

**TITLE OF PAPER:**

**Constitutions of the Australian Federation: A Complex, Evolving Centralizing System.**

Ken Coghill<sup>1</sup>

**ABSTRACT**

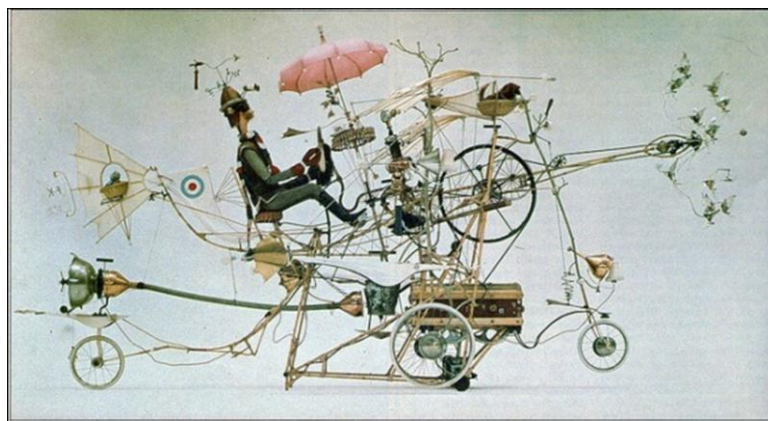
This paper explores the nature of the constitutional arrangements which regulate Australian governance from a complex evolving systems (CES) perspective. It argues that the federation operates according to both legal structures (e.g. Constitutions, constitutional conventions, local government acts) and dynamic inter-relationships between social sectors (public; civil society and market) which operate at both organisational and personal levels. The legal structures provide an overarching framework and sub-frames which both enable and limit the capacity of relationships between local, State & Territory and national interests to generate policy decisions, allocate resources and manage society's peace, order and good government. CES theory provides an explanation for the association of the superior outcomes with particular features of democratic political systems and helps us to predict elements of constitutional design and practice that are more likely to lead to governance able to adapt and evolve as the economic, social and physical environments changes.

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<sup>1</sup> Department of Management  
Monash University  
ken.coghill@monash.edu

## Introduction

This conference invites us to address the question: Should the Northern Territory (NT) be innovative and bold in its form of self-government? In other words, what should inform the State 7 Constitution? This paper aims to respond from a theoretical perspective and to treat it as a systems question. In other words, it starts from the premise that how the Australian Federation, with particular reference to the NT, functions is more than the product of the mechanistic operation of black letter constitutional law with its formal structures and statutory powers – the mere whirring of some sort of massive Heath-Robinson machine (Figure 1).



Source: [http://farm7.staticflickr.com/6144/6202830241\\_f16833fbaf\\_z.jpg](http://farm7.staticflickr.com/6144/6202830241_f16833fbaf_z.jpg)

Figure 1. A Heath Robinson machine.

Rather, governance of the NT is the outcome of complex, dynamic and evolving relationships and interactions, both within and across its political borders. Such systems are conceptualised as complex evolving systems (CESs) (Coghill, 2003; Mitleton-Kelly, 2003). Whilst the CES model is a useful analytical tool, it is well to keep in mind that “models are not really real but representations of the way people think” (Williams, 2012).

## CES explained

As the name suggests, CESs are a family of systems that are complex and which change and evolve over time in response to changes in their internal or external environments or both. Mitleton-Kelly (a scholar at the London School of Economics) has found that CESs have the following characteristics: self-organisation; emergence; connectivity; interdependence; feedback; far from equilibrium; space of possibilities; co-evolution; historicity and time; path dependence; and creation of new order (Mitleton-Kelly, 2003). We will return to discuss these in detail.

CESs include socio-political systems - that is, systems involving human communities and their political systems. Contemporary modern socio-political systems are conventionally described as including three identifiable sectors each with distinguishable functions: state (public); civil society and market. The sectors are embedded within their communities. In their simplest form, these are illustrated by Figure 2.

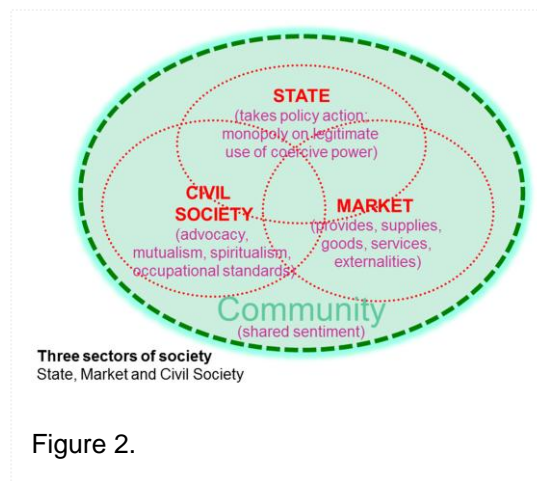


Figure 2.

The relative “size” or “strength” of each sector varies between societies. Thus in the small traditional hunter-gatherer society featured in “Ten Canoes” (Heer & Djigirr, 2006), the three sectors and their functions were not easily distinguished – they appeared to be conflated.

In larger, developed societies, the sectors are generally more specialised and distinct but also more varied in size and function. The social sectors may be specialised to the extent that functions are generally limited to one sector, so that the public sector may have a small, limited role in market or civil society activities.

However, in some societies, the state (or public) sector is active in the tradable goods and services market e.g. China. The state sector in Australia and New Zealand is small by OECD standards; for example it is much smaller than in the highly successful northern European states (OECD, 2011).

The relative “size” or “strength” of each also varies over time. For example, Australia’s public sector participated much more heavily in market activities in the early post World War 2 period (e.g. petrol refining) than in recent decades. The system is not static but dynamic.

CESs are multi-layered, with sub--systems nested within systems. Each system is a nested sub-system within a large system.

Thus we see Australia nested as a sub-system within an international community of nations and the Northern Territory as a sub-system nested within the federation. The NT example demonstrates that nested sub-systems may vary one from another within the same over-arching CES. As a territory of the Commonwealth, the NT does not have the same degree of autonomy in the exercise of some constitutional powers as do the States.

In the same way, local communities are sub-systems of the NT CES. The diversity among those local communities is greater than that within most if not all Australian states.

The dynamic changes which CESs exhibit are responses to external changes in the environment in which they are nested but also responses to internal dynamics, including changes to their own sub-systems. Such changes are adaptive - they reflect the socio-political system’s adaptive responses to change. For example, in the recent NT general elections, certain actions by the former government are said to have led members of remote Aboriginal communities to change their aggregate voting behaviour. That resulted in a change of government and can be expected to lead to changed actions by government i.e. changes in the behaviour of the system.

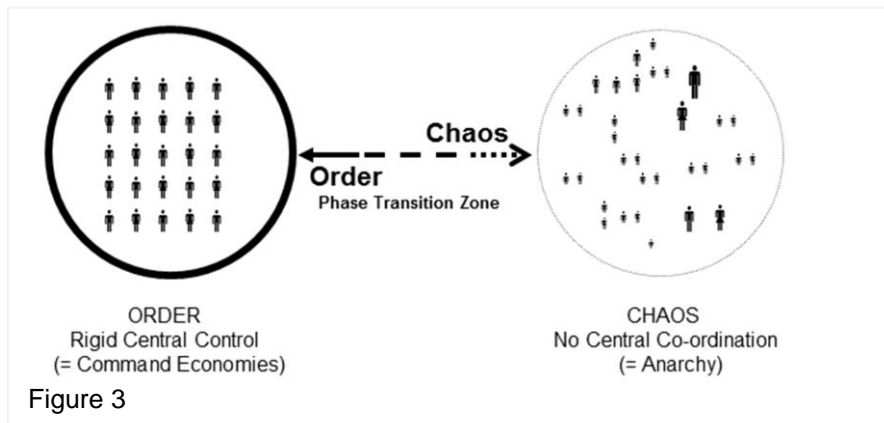
Mitleton-Kelly points to ten characteristics of CESs (Mitleton-Kelly, 2003), which we can examine for their relevance to the functioning of the NT within the Australian Federation and a little more broadly, Australasia. We now review each characteristic briefly.

## Self-organisation

A fundamental property of CESs, the first of Mitleton-Kelly’s characteristics is their capacity for self-organisation within the limits imposed by the system within which they are nested. Thus, the NT community clearly has capacity to organise its internal affairs as it sees fit, subject to the Northern Territory (Self-Government) Act 1978 (Australia). The Act establishes the structure within which self-organisation is possible e.g. a parliamentary system.

The internal controls or rules affecting the operation of a CES are of fundamental importance to its capacity for self-organisation and its outcomes. The manner in which the behaviour of a CES changes is governed by formal and informal controls or rules. CESs operate much more successfully where there is a moderate level of control –at the “transition between order and chaos ... excellent solutions are found rapidly”. Conversely in “a chaotic regime ... no solution is ever agreed on”. High levels of control inhibit the emergence of responses and suppress adaptation to change (Kauffman, 1995, p.247). This is illustrated in Figure 3

Where there is very little self-regulation of the system as a whole, the law of increasing returns (Arrow, 1994) asserts itself. In other words, those with relatively more power within society tend to increase their own power at the expense of those with less power. Power tends to aggregate and accumulate. We observe a tendency of those exercising power to use it in their own personal, peer-group or class interests rather than necessarily the overall benefit of the polity. The historic trend toward the regulation and democratisation of power in which there is a long-term trend of diminution of reliance by the state on coercive power is a response to this.



Conversely, where leaders seek to impose extensive regulatory control over society, that introduces a rigidity into society that has the effect of suppressing creativity and innovative adaptation to changes affecting its internal or external environment.

This becomes important in the design of democratic systems. Where the constitutional structure makes it unlikely that a leader or political party has unchallenged power over Executive actions, then it is less likely that Executive will act in the interests of particular classes of people rather than exercise a public trust and recognise a fiduciary duty to the public in general.

Where the constitutional structure or electoral system enables the Executive to act with disregard to the public interest there is a risk that some leaders will exploit the opportunity if not constrained by strong normative features of the polity.

The law of increasing returns suggests that an Executive will seek to majority support in a parliament, with the effect, if not the overt intent, of diminishing its accountability to the parliament.

What does that mean for the State 7 Constitution? It may mean that a unicameral chamber elected solely from single member electorates (constituencies) would be at greater risk than with either a mixed member proportional electoral system (MMP) or a bicameral parliament, designed to reduce the likelihood of government control.

In the same way, the manner in which NT self-organisation is implemented can affect or limit the capacity of communities within NT to self-organise. Local government is sub-ordinate to the NT Government and operates within the provisions of the Local Government Act 2008. To take one example, some communities within the NT lacked policing services that could have provided the secure environment necessary to develop or maintain effective self-organisation (FaHCSIA, 2010). The NT Intervention included severe restrictions over some communities' conduct of their own affairs which inevitably limited their capacity for self-organisation (FaHCSIA, 2008).

Looking more broadly at Australasia, we see that Australia and New Zealand are independent sovereign states which choose to self-organise into a complex, evolving collaborate relationship which operates at national government level, in economic relations and in certain other areas such as sport.

## Emergence

Emergence refers to the potential for new ideas or properties to develop spontaneously from within the system or through interaction with actors (individual or institutional) outside the system. As noted above, emergence is affected by the level of control governing the system and its interactions. Teisman and Edelenbo have shown that the nature and extent of interactions between actors, including informal interactions, is a key factor affecting the emergence of solutions to policy problems. Where there is a high level of interaction between agencies (through their personnel), solutions are more likely to emerge. Where interactions are more restricted or limited to formal exchanges, better solutions are less likely to emerge (Teisman & Edelenbo, 2011).

In the emergence of a State 7 Constitution, we should be looking for constitutional features that facilitate the emergence of creative ideas and innovative solutions to unanticipated issues that will arise in years, decades and centuries to come. Teisman and Edelenbo's findings confirm that these features are as much normative as structural.

The constitution must enable interaction within the NT polity and indeed with neighbouring national and international polities. The new Queensland departmental committee system, a model already familiar to New Zealanders, is one example of structural and normative reform.

Another worthy of consideration is the Outback Commission recently proposed by the remote FOCUS Desert Knowledge Australia report "Fixing the Hole in Australia's Heartland: How Government needs to work in remote Australia" (Walker, Porter, & Marsh, 2012). That report yet again highlighted the value of interactive relationships between local communities and levels of government, and their actors.

The normative features need not wait for a State 7 Constitution. They can and should be in operation now.

## Connectivity

Whilst it is trite to note that everything is connected to everything else, it is important to be aware of the significance and consequences of connections between actors. These connections may be as basic as shared language or extend to shared belief systems. "Connectivity may also be formal or informal, designed or undesigned, implicit with tacit connections or explicit" (Mittleton-Kelly, 2003, p.6).

Take something as basic as the very purpose of governance. Many may say that its purpose is progress – the improvement of social and economic conditions. However, Davis reports:

In the Aboriginal universe .... There is no notion of linear progression, no goal of improvement, no idealisation of the possibility of change. To the contrary, the entire logos of the Dreaming is stasis, constancy, balance, and consistency. The entire purpose of humanity is not to improve anything. It is to engage in the ritual and ceremonial activities deemed to be essential for the maintenance of the world precisely as it was at the moment of creation. ((Davis, 2009)p.158)

It is immediately apparent that someone holding that fundamental belief is going to have difficulty connecting with the miner who thinks he has a God-given right to relocate the minerals that constitute that part of the Aboriginal world. Nonetheless, both are capable of modifying their beliefs and how they interpret and express them. As Ostrom observed, awareness of connections linking actors facilitates learning the norms that affect the relationship. This connectivity through understanding 'the other' potentially leads to appreciating beneficial outcomes of value to others (Ostrom, 2005).

Here, it is the normative "constitution" which is the most important aspect of State 7 Constitution. It must provide leadership, forums and other means to build understanding between people, communities and businesses within NT and who deal with NT.

## Interdependence

The actors in a CES are each to a greater or lesser extent dependent on each other. For some the relationship is remote and weak; for others it is asymmetric, as between a disempowered woman in a remote community and the Executive Government responsible for public services on which she relies. The asymmetry is reversed when she exercises her vote! As Mittleton-Kelly explains,

the greater the interdependence between related systems or entities the wider the 'ripples' of perturbation or disturbance of a move or action by any one entity on all the other related entities. Such high degree of dependence may not always have beneficial effects throughout the ecosystem. When one entity tries to improve its fitness or position, this may result in a worsening condition for others. Each 'improvement' in one entity therefore may impose associated 'costs' on other entities, either within the same system or on other related systems (Mittleton-Kelly, 2003, p.5).

A State 7 Constitution could strengthen positive interdependence by providing for the rights of all sections of the community, including local governments, to be entrenched, secure and treated with respect and dignity. Whilst this is partly normative, it is only partly so. The State 7 Constitution could guarantee local government independence from NT Government direction and include a charter of rights and responsibilities developed from the Victorian model ("Charter of Human Rights and Responsibilities," 2006) .

## Feedback

In systems thinking, feedback has a meaning similar to its colloquial use but is used in a special way. As Mittleton-Kelly expresses it, "positive (reinforcing) feedback drives change, and negative (balancing, moderating, or dampening) feedback maintains stability in a system" (Mittleton-Kelly, 2003, p.16). We see it in political discourse. Negative feedback is likely to discourage a political initiative whereas positive feedback is likely to encourage the political action which it endorses.

Research tells us that people are more satisfied with their lives and with decisions affecting them where they have had opportunities to influence those decisions – not necessarily personally but they or their peers having had the chance to do so (Arvai, 2003; Frey & Stutzer, 2000).

Responsibility to foster participation and rights of participation should be entrenched in State 7 Constitution, and participation accepted as the default normative practice.

## Far from equilibrium

A political system which is subject to some change that seriously destabilises its normal operation can become far from equilibrium, in which case a relatively minor disturbance can precipitate a dramatic change to the structure and functioning of the system (Mittleton-Kelly, 2003). It may make a relatively orderly transition to a different system as occurred after the collapse of the Soviet Union, or it may dissolve into a disorderly, unstable system from which a new order eventually emerges, as may be happening at last in Somalia.

The constitutional features discussed above would increase the resilience of the political system and its capacity to re-organise in the event of a crisis.

## Space of possibilities

When a CES is confronting challenges to its established order, the range or extent of options for change open to it is referred to as the space of possibilities i.e. how much room for manoeuvre is available without precipitating a collapse of that order and the transition to another order. The greater the space of possibilities, the greater the capacity of the CES to evolve and adapt to changes in its environment. Accordingly, a CES will be more resilient and better able to adapt to unanticipated change if it can expand and sustain a bigger space of possibilities. Thus Syria's regime has a small space of possibilities and is too rigid and inflexible to cope with the reaction to its repression.

Again, the constitutional features discussed above would increase the space of possibilities for the political system to evolve and adapt in response to a crisis.

## Co-evolution

As one CES changes, that has flow-on effects to other CESs with which it interacts. Evolutionary changes in each neighbouring CES as it evolves and adapts to changes in its environment, of themselves change the environment of each other neighbouring CES. Each CES evolves and adapts in sympathy with each other CES according to the levels on connectivity and interdependence between them.

The demand for specialised labour skills in the NT has some effect on the availability of those skills elsewhere in Australia and perhaps internationally.

The implications of the co-evolutionary nature of the NT system for constitutional design are largely normative. For example, there must be opportunities created for substantial interactions between the NT Parliamentarians and their counterparts in other jurisdictions. The State 7 Constitution must not be so rigid that it cannot be interpreted or amended to evolve and adapt to evolutionary changes in the Australian federation.

## Historicity and time

Evolutionary change in a CES is affected by the historical background embedded in its structure and norms. The NT political system has developed in a Westminster parliamentary system environment in which there has been no serious challenge to continuing with it and, despite Darwin's cosmopolitan population, little knowledge of other models. The parliamentary model is well entrenched. Similarly, the NT local government model has become more like rather than less like its interstate contemporaries.

Any change which is contemplated takes time to implement and circumstances change during implementation potentially affecting implementation. The length of time taken may relate to anything from the time taken for cultural change to occur so as to enable a policy to have effect, to the time taken to train and educate a population to a certain level or in special skills.

The major implication of historicity is that the State 7 Constitution should not incorporate provisions that are redundant or reflect out-dated constitutional practices.

Rather, it should provide for and entrench trends toward improved accountability of the Executive to the Parliament. This is especially important in relation to the Independent Officers of the Parliament, such as the Auditor-General and the Ombudsman. The 2006 report by the Victorian Public Accounts and Estimates Committee set out the arguments for the independence of these offices from the Executive and provided a model for implementation (Victoria, 2006). The Victorian Constitution now entrenches that independence.

In the same way the State 7 Constitution should embrace the trend for greater autonomy of the parliament by separating the parliament's appropriation from the Executive's budget and placing it under the control of an all-party committee chaired by the Speaker (Atkinson, 2012; Coghill, 2012).

## Path dependence

Path dependence refers to features of a CES which determine how it operates and which features, despite any imperfections, are so widely accepted or deeply embedded that the transaction costs of change outweigh the expected benefits. To take the example from parliamentary procedure of the conduct of Question Time, Speakers' rulings are built on standing orders and long chains of precedent akin to common law. However, the behaviour of MPs in most chambers is so enculturated that it has proven difficult for Speakers to achieve reform in Australian chambers.

In other countries, there are different standing orders, different cultures and different behaviour.

The State 7 Constitution should, for example, provide for the accountability of the Executive to the Parliament.

## Creation of new order

The creation of new order is a "key feature" of CESs ((Mitleton-Kelly, 2003, p.20). As discussed above in relation to far from equilibrium, this is the capacity of a CES to undergo major change through evolution and adaptation and to emerge reformed, with changed structure and/or norms governing its functioning and outcomes.

The constitutional features discussed above would increase the resilience of the political system and its capacity to create new order in the event of crisis.

## Structure and behaviour

As discussed above, the Australian CES operates according to both statutory provisions and the behaviour of the actors – what can be described as the hard and soft infrastructure.

## Hard infrastructure - legal structures

In this analysis, the hard infrastructure includes the Commonwealth and State constitutions and the NT Self-Government Act, the state and NT local government acts and the large number of statutory provisions affecting intergovernmental governance and financial arrangements e.g. the Murray Darling Basin Authority operating under the Water Act 2007.

The reach of these provisions have greatly expanded as the Council of Australian Governments (COAG) has provided a mechanism for negotiating cooperative schemes affecting the functioning of the Federation, often facilitated by the use of the Commonwealth's superior financial resources.

The legal infrastructure does much more than define and regulate the public sector. Businesses (other than criminal enterprises) require a legally defined market structure in order to have enforceable contracts, secure property titles and access to reliable financial services. In the same way, most civil society activities rely on a stable and secure legal environment.

## Soft infrastructure

The actual operation of a political CES is a product of much more than the legal structures. These include many aspects of personal and institutional conduct ranging from constitutional conventions to the personal style of office-holders.

Prior to COAG, Ministerial Councils (MinCos) operated as forums for the coordination and harmonisation of policy and administration within portfolio areas. These continue and complement COAG. Many MinCos include the relevant New Zealand minister.

COAG itself was established without legislation, relying on the prerogative powers of the executive governments of the Commonwealth, States and Territories. It exists and operates within constitutional powers but, despite its importance as a forum for intergovernmental relations, without specific statutory provision.

We see that the operation of the federation, and the NT within the Federation, enable and limit the capacity of relationships between local, State & Territory and national interests to generate policy decisions, allocate resources and manage society's peace, order and good government.

Most significantly, the soft infrastructure includes extensive interaction between the state (the public sector) and the other two sectors – the market, dominated in Australia by business, and civil society.

## Factors affecting the strengths and weaknesses of these relationships in Australasia

This overview of CESs and applying the model with particular reference to the NT and the proposed State 7 Constitution leads us to reflect on the nature of governance in Australasia.

Let us begin at the level which most affects most people. Most go about their daily lives living in a local community and, if employed, working in that community or within convenient commuting distance. There is little sign that most people are dissatisfied with the operations of their local government, but it would be unwise to think that that is universal. Certainly the report on the Intervention finds strong evidence of some people in communities feeling disempowered and bitter. Historicity and path dependence were also factors. Some communities seemed far from equilibrium but had not been able to create new order. There was also evidence of inadequate education, training and physical security to enable those subsystems to achieve effective self-organisation. That indicates a severe risk of such subsystems failing to fulfil their potential. Although these examples are mostly from one part of Australia, the principles are generalisable.

Local communities are sub-systems of larger systems. The "Fixing the Hole in Australia's Heartland" report suggest that more use could be made of subsystems intermediate between the local and State/Territory levels. Some such self-organisation has occurred in South West Queensland with the formation of RAPAD by seven local governments. Some similar initiatives have ebbed and flowed in more densely populated areas e.g. in western suburbs of Melbourne and Sydney.

Australian state and territory sub-systems vary over time in respect of each of these features of CESs according to "soft" factors such as ideology and personal leadership styles. Poor engagement with local communities and citizens generally or a perceived breach of faith has been a factor in the electoral defeat of some government .e.g. Kennett in Victoria and Bligh in Queensland. The Queensland Parliament's new departmental committee system may develop as a good model for improving self-organisation. State and Territory sub-systems have demonstrated considerable resilience in dealing with natural disasters such that the creation of new order has not been necessary. All have increased their levels of interaction with the Federal government but that has also been affected by Federal Government leadership styles.

MinCos and COAG have led to considerable co-evolution, especially since the creation of COAG.

However, relations between the state and territory subsystems and the Federal system have been characterised by creeping centralisation of policy-making, which the former have found difficult to resist due to their financial dependence. Interdependence is becoming highly asymmetric. As the fiscal imbalance becomes ever more severe, it threatens to disturb the operation of the federation, rendering it less adaptive. States and Territories are becoming less able to self-organise due to financial resource constraints. A certain path dependence seems to afflict revenue policies in all jurisdictions, based on an apparent belief that although improved services are desirable, tax increases are politically unacceptable. The result is that revenue stalls and services decline.

Australia's engagement with international systems, most closely with the Australia-New Zealand system, are generally well-regarded in each of the above respects.

## Conclusion

Complex evolving systems theory is distant from most discussions of parliamentary affairs. Nonetheless, the characteristics of CESs can assist in the analysis of the strengths and weaknesses of the operation of political systems. The theory provides an explanation for the association of the superior outcomes with particular features of democratic political systems and helps us to predict elements of constitutional design and practice that are more likely to lead to governance able to adapt and evolve as the economic, social and physical environments changes.

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