

# LAW2111 // CONSTITUTIONAL LAW NOTES // 2016

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### TOPIC 1 → FUNDAMENTAL CONCEPTS, INSTITUTIONS AND INSTRUMENTS

#### A. Fundamental Concepts and Institutions

Constitutional Law is the branch of law that regulates the three arms of government (legislature, executive and judiciary) and regulates the relationship between these branches.

1. The *Executive* → Government – the body that administers, enforces and implements the law
2. The *Legislature* → Parliament – the body that enacts, drafts and passes the law
3. The *Judiciary* → Courts – the body that interprets and applies the law.

The Constitution provides an authority for the exercise of public power as well as any limits to that power. The Constitution also regulates the relationship between each arm of the Government.

#### – *Parliamentary Sovereignty* –

Parliamentary Sovereignty is the principle, which states that the legislature is the prime law making body in a Westminster system.

- *AV Dicey* → “Parliament’s power to ‘make or unmake any law whatever; and further, that no person or body is recognised by the law of England as having a right to override or set aside the legislation of Parliament.’
- No Australian Parliament is absolutely sovereign, unlike the UK. The powers of all Australian legislatures are constrained by the Commonwealth Constitution – our parliament is only sovereign so long as it complies with the Constitution.

#### CRITICISMS OF PARLIAMENTARY SOVEREIGNTY

Tyranny of the majority – the idea that the majority is allowed to rule in a

## TOPIC 2 → STATE LEGISLATIVE POWER

Plenary power = power to legislate on any subject matter

Enumerated power = power to legislate on subject matter *enumerated* in a body (such as the Commonwealth Constitution), that grants such power(s).

### A. Plenary Legislative Power

**Sections 15 and 16** of the Victorian Constitution Act 1975 grants the Vic Parliament residual plenary legislative power re: any subject matter - ***Union Steamship***.

#### Relevant Legislative Provisions:

*Australia Act 1986 s 2(1)* → confirms plenary grant in Vic Constitution Act, below

- “The legislative powers of the Parliament of each State include full powers to make laws for the **peace, order and good government** of that State”

*Victoria, s 16 of the Constitution Act 1975*

- “The Parliament shall have power to make laws in and for Victoria in all cases whatsoever.”

#### – **Limitations on State Legislative Power(s)** –

##### (A) CONSTITUTIONAL LIMITATIONS – POWERS EXCLUSIVE TO THE COMMONWEALTH

- *S 52 Cth Constitution: Exclusive powers of the Parliament*
  - a. The Commonwealth has exclusive legislative power over the seat of Government and places acquired for public purpose, as well as matters relating to any department of public services
- *S 90 Cth Constitution: Exclusive power over customs, excise, and bounties*
  - b. Commonwealth has exclusive power over customs and excise duties, and granting bounties on the production or export of goods
- *S 114 Cth Constitution: Raising forces and imposition of tax*
  - c. A State shall not, without the consent of the Parliament of the Commonwealth, raise or maintain any naval or military force, or impose any tax on property of any kind belonging to the Commonwealth...

## TOPIC 6: THE EXTERNAL AFFAIRS POWERS

### Section 51(xxix)

There are three definite and one possible limb under the external affairs power via which the Commonwealth may validly pass a law.

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#### A. Extraterritorial Power

The exercise of extraterritorial power arises when a Parliament legislates with respect to matters beyond its own borders.

- The Commonwealth has plenary extraterritorial power: **s 3 Westminster Act**.
- Whilst the Commonwealth can pass extraterritorial laws such as outlawing whaling in Japan, outlawing guns in the US etc., their *validity* does not equate to *enforceability*.
- No nexus requirement – merely being external to AUS ('geographic externality') is sufficient to invoke the external affairs power (**XYZ**)
  - See Callinan & Heydon dissent
- The words 'external affairs' in **s 51** of the constitution refers to "places, persons, matters or things situated" outside of the geographical limits of Aus: **ILO; Polyukhovich**
  - E.g. war crimes in Europe – Australia's participation triggered the nexus: **Polyukhovich**
  - Prohibiting Australian citizens/residents from sexual acts with minors outside of Australia: **XYZ** majority

#### B. Relations with Other Countries

A law will be valid under the external affairs power if its subject is relations between Australia & other countries; **Sharkey**

- This doctrine includes Australia's relationship with international organisations/'persons' (such as the UN, WHO, World Bank etc.); **Koowarta** – See *Brennan J*
- There is unsettled debate as to whether this limb requires improvement of relations, or whether relations must merely be affected; **XYZ**
  - Callinan & Heydon in **XYZ** say yes: the law must enhance relations

## TOPIC 7: THE CORPORATIONS POWER

### Section 51(xx)

“The Parliament shall, subject to this constitution, have power to make laws with respect to...foreign Corporations, and trading or financial Corporations, formed within the limits of the Commonwealth.”

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### A. Which Corporations are subject to the power?

First limb of 51(xx): *Is this a law with respect to a foreign, trading or financial corporation?*

1. **Foreign corporations** → A corporation that has been incorporated into another country
  - a. Any entity formed under foreign law and that has a corporate personality under foreign law or Australian law (***Incorporations case***)
  - b. Therefore, a corporation can be regulated under the Corporations power even if it is not a trading or financial corporation (just needs to be foreign under this definition)
2. **Trading corporations** → Current activities test
  - a. If trading is a ‘substantial’ or ‘sufficiently significant proportion’ of the activities of that corporations: ***Adamson***
  - b. Trading activities include those which produce revenue, but is not limited to buy and selling for profit: per *Mason J* in ***Adamson***
    - i. *Mason J* noted that not all corporations that engage in trading activities will be trading corporations – “the trading activity of a corporation may be so slight and incidental to some other principal activity, viz religion or education in the case of a church or school, that it could not be described as a trading corporation”
    - ii. Therefore churches, fetes, second-hand book sales, school canteens etc. may not be trading corporations: *Mason J*
  - c. Examples of trading corporations:
    - i. Football league selling TV rights, tickets, catering, renting premises, selling programs etc: ***Adamson***