Separation of Powers (Week 2)

Charles-Louis de Secondat stated – 'Nor is there liberty if the power of judging is not separate from legislative power and from executive power. If it were joined to legislative power, the power over the life and liberty of the citizens would be arbitrary, for the judge would be the legislator. If it were joined to executive power, the judge could have the force of an oppressor.'

The Doctrine of the Separation of Powers: We adopted this from the American Federation. But it was modified slightly to remove the complete separation of the Legislature and Executive. In England however, parliament is supreme (no constitution or separation).

The Legislature – Chapter 1 and s1 of the Constitution: According to Stanley de Smith, legislative power is 'the creation and promulgation of a general rule of conduct without reference to particular cases.'
Const s 1 vests the legislative power of the Commonwealth in a Federal Parliament, consisting of the Queen, a Senate, and a House of Representatives. For the Commonwealth, and all states besides Queensland it is Bicameral.
Section 51 and 52 lists the powers of the Parliament in regard to making laws. Thirty nine topics are listed in s51.

The Executive – Chapter 2 and s61 of the Constitution: Section 61 vests Commonwealth executive power in the Queen, exercisable by the GG as the Queen's representative. It extends to 'the execution and maintenance of this Constitution, and of the laws of the Commonwealth.'
Section 62 dictates 'There shall be a Federal Executive Council to advise the GG. Further, section 63 states the GG will act on the 'advice of the Federal Executive Council'. The Conventions of Cabinet that allow this are: cabinet solidarity and cabinet confidentiality.

Victorian Stevedoring and General Contracting Co Pty Ltd v Dignan is authority that the Parliament can refer law-making power to the Executive through Enabling Acts, allowing the Executive to make regulations, or by-laws, to facilitate the efficient application of legislation.

Sources of executive power:
Constitutional: Express: ss 5, 32, 68 or 72 (e.g to appoint/remove judges).
Implied: *Nationhood power* – Defined in the *AAP case* as 'a capacity to engage in enterprises and activities peculiarly adapted to the government of a nation and which cannot otherwise be carried on for the benefit of the nation'. But *Davis v Commonwealth* is authority that it must be 'reasonably and appropriately adapted to achieve the ends that lie within the limits of constitutional power'. *For example, economic stimulus packages during economic crisis (Pape v Commissioner of Taxation), CSIRO, Bicentennial celebrations (Davis).*
Reserve powers: Held by convention, allows the G-G to exercise power not on the advice of the PM or Cabinet. E.g. choice of parliament if hung parliament, dismissal of parliament or refusal to dissolve parliament. E.g. 1975 Constitutional Crisis.
Legislation: Largest and most influential! E.g. Issuing visas under the Migration Act 1958 (Cth). Also constrains the executive the most as it clearly defines their power!
Common Law (Prerogative): Sir Frederick Pollock states 'Prerogative is nothing more mysterious than the residue of the King's undefined powers after striking out those which have been taken

away by legislation or fallen into destitute'. E.g. signing treaties, war and control of armed forces, Ex-officio indictment, mercy, prevent entry into Australia (Tampa Case).

The Judiciary – Chapter 3 and s71 of the Constitution:

Process for an exam answer:

1. Is it judicial power? – Quote definition and go through the indicia using an authority for each
2. Apply to Boilermakers'. Is it limb 1, or limb 2 that is breached?
3. Apply the relevant exception, likely to be persona designata! Go through Hilton, then Grollo, then Wilson.

1. Section 71 vests the judicial power of the Commonwealth in the High Court of Australia, and such other federal courts as the Parliament creates, and those it vests with federal jurisdiction. *The criteria for the justices appointment is s72.*

1b *(if time):* Griffith CJ in *Alexander's Case* found 'any attempt to vest any part of the judicial power of the Commonwealth in any body other than a court is entirely ineffective.' *Re Judiciary and Navigation Powers* found an 'advisory opinion' was not part of the judicial power.

2. The ***Boilermakers Case*** consolidated all past judgements and held: - *when discussing this case, be specific about which limb:*
Limb 1: The judicial power of the Commonwealth can only be vested in a Chpt III Court (including State courts vested with Federal Judicial power s 77(ii)). *At 270 'it is beyond the competence of the Parliament to invest… judicial power [onto] any body except a court created pursuant to s71.'*
Limb 2: A federal Chpt III court cannot be invested with anything other than federal judicial power. *At 286 'a court established under Chap. III cannot exercise dual functions…'*

3. ***Is the power vested in a judicial or executive body?*** Then determine if judicial power with *indicia.*

The reasoning for this, and the separation of powers, was: (at 275)

1. 'the history of the separation of powers' (From England)
2. We copied it from 'the American instrument of government'
3. 'the logical inferences from Chaps. I, II and III'
4. 'the form and contents of ss. 1, 61 and 71'
5. (at 276) Federalism 'upon the judicature rest[s] the ultimate responsibility for the maintenance and enforcement of the boundaries within which government power might be exercised…' consistent with 'the institution of federalism'.

‘Judicial Power’ (Week 3)

Latin: *Inter partes: a trial between both parties. Ex parte: a trial in absence of one of the interested parties. De novo: An appeal whereby a whole new trial is conducted. It shows the original hearing was not judicial power. Strict appeal: implies judicial power, it is an appeal on existing evidence and on already established facts and law. Therefore, it implies the original decision was binding.*

Definitions **1a *(if time):*** *Ex parte Tasmanian Breweries Pty Ltd* identified that a definition of judicial power ‘has not been possible to frame’.

1b. Griffith CJ identified the basic elements in *Huddart Parker and Co v Moorehead ;* that ‘Judicial power is the power’ from a ‘sovereign authority’ to ‘decide controversies’, ‘whether the rights relate to life, liberty or property.’ The power can only be exercised when ‘some tribunal which has power to give a binding and authoritative decision (whether subject to appeal or not) is called upon to take action’.

***Indicia* of Judicial Power:** *- Use an authority that has most analogous facts!*
Essential: Power derived from a sovereign authority
Huddart Parker and Co v Moorehead (above).
OR *A-G (Cth) v Breckler*
OR: R v Trade Practices Tribunal; ex parte Tasmanian Breweries Pty Ltd

Essential: Binding and authoritative decision
Huddart Parker and Co v Moorehead (above).
OR *Brandy v Human Rights and Equal Opportunities Commission*
OR *Federal Commissioner of Taxation v Munro*
OR *A-G (Cth) v Breckler*

A controversy about existing legal rights and duties: ‘a matter’
A matter is stated in the Constitution (ss 75 and 76), thus, only a court can rule on a matter. In *re Judiciary and Navigation Acts* ‘there can be no matter… unless there is some immediate right, duty or liability to be established and determined by the court’
OR *Huddart Parker and Co v Moorehead* (above)

Inter partes
Gaudron J in *Nicholas v Queen* in stating a party has the right to know case against them.
Huddart Parker v Moorehead.

Ascertainment of the law as it is
R v Trade Practices Tribunal; ex parte Tasmanian Breweries Pty Ltd

Determination of the facts as the truly are
R v Trade Practices Tribunal; ex parte Tasmanian Breweries Pty Ltd
Huddart Parker and Co v Moorehead

Performed in a judicial manner
Under judicial manner, must also have an appropriate level of judicial discretion

Per *R v Commonwealth Court of Conciliation and Arbitration; Ex Parte Battett:* 'where a discretionary authority is conferred upon a court… to be exercised according to legal principle… [it]constitutes an exercise of judicial power'.
Blackstone stated judicial power is a controlled power, as such standards applied must be from existing law.
Then use: *Thomas v Mowbray (Below)*

Under Judicial manner, must also be in accordance with judicial process:
Per Gaudron J in *Nicholas v The Queen*: 'ensure equality before the law, impartiality and the appearance of impartiality'.
Kitto J in *R v Trade Practices Tribunal; ex parte Tasmanian Breweries Pty Ltd* stated the judicial process is 'an inquiry concerning the law as it is and the facts as they are', followed by applying the law to the facts; and the result must be an act that entitles 'observance of the rights and obligations that the application of law to facts has shown to exist.'
OR use *Thomas v Mowbray* (below)

*****Are the members of the body appointed per s 72?***

Decisions regarding judicial powers

Thomas v Mowbray
The Criminal Code Act 1995 (Cth) s 104.4: 'The issuing court may make an order … if … the court is satisfied on the balance of probabilities that each of the obligations, prohibitions and restrictions to be imposed … is reasonably necessary, and reasonably appropriate and adapted, for the purpose of protecting the public from a terrorist act'.

The interim control order: required Jack Thomas to remain at his residence between midnight and 5 am each day unless he notified the Australian Federal Police. It also required him to report to the police three times each week. It required him to submit to having his fingerprints taken. He was prohibited from leaving Australia without the permission of the police. He was prohibited from acquiring or manufacturing explosives, from communicating with certain named individuals, and from using certain communications technology.

Was this judicial power with an appropriate level of discretion? (Are courts a rubber stamp for E?)
'reasonably necessary, and reasonably appropriate and adapted' also appears in *Crimes Act 1914* (Cth) s 3ZQO(2)(b), *Quarantine Act 1908* (Cth) s 4, *Family Law Act 1975* (Cth) s 90AE(3). Gummow and Crennan JJ held 'Reasonable' is 'the great workhorse of the common law'. Hence, Gleeson CJ stated it is a common standard, NOT 'inherently too vague for use in judicial decision-making'.
Was it required to be exercised in a manner contrary to the judicial process?
(Kirby J) (dissenting) 'to determine what is reasonably necessary for the protection of the public … is not a court's normal function'. Conversely, Callinan J held 'Risks to democracy and to the freedoms of citizens are matters of which courts are likely to have a higher consciousness'.
Gummow and Crennan JJ held satisfaction on the 'balance of probabilities' is a 'judicial activity'.
This is judicial per Callinan J as 's 104.4 … makes and implies the usual indicia of the exercise of judicial power: evidence, the right to legal representation, cross-examination, a generally open hearing … addresses, evaluation of the evidence, the ascertainment and application of the law to the found facts… which may be the subject of an appeal on either or both fact and law.

Federal Commissioner of Taxation v Munro: Board of Review (Executive) made determinations about tax liability. The High Court could review decision in original jurisdiction. **Held:** to be an administrative power because NOT binding and conclusive. Thus, the exercise of power was consistent with limb 1 of *Boilermakers*.

Brandy v Human Rights and Equal Opportunities Commission: Issue concerned the enforcement of determinations of the Human Rights and Equal Opportunities Commission. Had other *indicia* but the clincher was parliament attempted to make their decisions binding by registering them in the Federal Court. It invalid consistent with Limb 1 of Boilermakers. *Deane, Dawson, Gaudron and McHugh JJ held 'there is one aspect of judicial power which may serve to characterize a function as judicial when it is otherwise equivocal. That is the enforceability of decisions given in the exercise of judicial power'.****Contrast with Luton!:***

Luton v Lessels**:** facts: Cwth created the Child Support Scheme. Death with future financial obligations of what child support to pay. Has same indicia as Brandy but not binding! Not Judicial power as per Gleeson CJ: 'It involves the creation of new rights and obligations for the future', 'the enforceability of such rights and obligations depends upon the intervention of a court' (*de novo* appeal), and the power was given to the executive. ***Contrast with Brandy!***

A-G (Cth) v Breckler**:** Superannuation Complaints Tribunal to review decisions of the trustees of Regulated Superannuation Funds to determine if 'unfair or unreasonable'. Provisions in *Breckler* NOT judicial power (and therefore valid) because per Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ;
1. not 'sovereign power' as using 'procedures' from the ' constituent trust instrument'
2. 'availability of an election … in the context of the present legislative scheme'
3. The Tribunal's determinations required 'an independent exercise of judicial power' to be enforced
4. The Tribunal's determinations are open to challenge by appeal on law and judicial review

Chameleon Powers

Kitto J is held *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd* that some powers that may be administrative when conferred on an administrative body may just as appropriately be seen as judicial and be validly conferred on a federal court.

Accordingly, *Precision Data Holdings Limited v Wills* is authority of some of the types of powers that are chameleon: Determining disputes, findings of fact, determinations of law, applications of law to the facts and making decisions.

The difference is, is the decision binding and conclusive?! In *Brandy* it was binging and conclusive through an strict appeal, but in *Luton* it was not binding due to *de novo* appeals.

Applications and Exceptions to *Boilermakers* (Week 4)

Applications of *Boilermakers*

Legislative Usurpation *(Breach of limb 1)*

It occurs when the legislature itself is trying to exercise judicial power. For example: declarations of guilt (Bills of Attainder (punishment of death) and Bills of Pain (punishment of imprisonment)).

Lim v Minister for Immigration: is authority that 'it is a necessary implication of the… separation of powers' that the Parliament cannot enact Bills that would infringe the separation of judicial and legislative power 'by substituting a legislative judgment of guilt for the judgment of the courts.'

Polyukhovich v The Queen: ***(Breach of Limb 1)***

War Crimes legislation retrospectively criminalised actions in Europe during WWII. The majority of Mason CJ, Dawson J, McHugh J held the legislation *valid*: as the law left it to the courts to determine guilt, hence 'there is no interference with the exercise of judicial power'.

However, Deane J in dissent held 'the Parliament cannot, consistently with Ch III of the Constitution, usurp the judicial power in the form of legislation'. She stated, although in dissent, that the adjudgement of guilt has historically been exclusively judicial. This was reaffirmed in Lim.

Detention *(Breach of limb 1)*

Lim v Minister for Immigration is authority that 'the involuntary detention of a citizen in custody by the State is penal or punitive in character and… exists only as an incident of the exclusively judicial function of adjudging and punishing criminal guilt.' ← reaffirms Deane J's dissent in *Polyukhovich*.

Exceptions to *Boilermakers* *(In times of peace).*

Limb 1:

- Delegation of judicial functions to administrative officers of the courts (must be to limited extent and remain subject to review by the court: *Harris v Caladine*).
- Parliament's power to punish for contempt: *Australian Constitution*, s 49.
- 'Traditional powers of the Parliament to punish for contempt and of military tribunals to punish for breach of military discipline' – *Re Tracy; ex parte Ryan:* Not Ch III Courts, established under the s51defence power!
- *Lim, Kruger, Al-kateb, Wooley:* Detention for non-punitive purposes
- *Lim:* 'Arrest and detention… to ensure that [a person] is available to be dealt with by the courts…' I.e. Remand.
- *Lim:* To detain an alien to investigate and determine an application to admit or deport 'is neither punitive in nature nor part of the judicial power of the Commonwealth.'
- *Lim:* 'Involuntary detention in cases of mental illness or infectious disease.'

Limb 2:

- Non-judicial power 'incidental' to the exercise of judicial power (e.g. Rules of Court)
- Non judicial functions conferred on judges in their personal capacity: *Persona Designata*.

Persona designata **Process:**

1a *(if time):* *Drake v Minister* is authority that 'nothing in the Constitution' precludes a Ch III judge 'from, in his personal capacity', being appointed to an executive office. To determine validity…

1b. *Hilton v Wells* is authority the starting point is to examine the statutory construction. The power must be conferred on the individual not the Court. *If conferred on the 'court' this creates the strong presumption it is conferred on the court. But if conferred on the judge, must determine intentional. [apply to the facts].*

2. *Grollo v Palmer* is authority that the next step is to determine if the judge consented to the conferral of power, not an 'unavoidable obligation'. *[apply to facts].* Hence, the conferral of power may be valid *(if did, if not: invalid)*

3. *Grollo* is also authority that the power must not be incompatible with the exercise of judicial power. To determine this, the court established 3 sources of compatibility:

1. **Breadth of commitment:** cannot be such a burden so 'that the further performance of substantial judicial functions by that Judge is not practicable'. *[Apply to facts].*
2. **The Integrity of the judge cannot be compromised:** determine if 'the capacity of the Judge to perform his or her judicial functions with integrity is compromised or impaired'. *[Facts].*
3. **The Public confidence:** 'in the integrity of the judiciary as an institution or in the capacity of the individual Judge to perform his or her judicial functions with integrity' cannot be diminished. *[Apply to facts].*

3b. Brennan CJ, Dawson, Toohey, McHugh and Gummow JJ in *Wilson v Minister* established 3 criteria to assess the 3rd test of *Grollo v Palmer:[Don't restate the test, answer them on facts in a sentence].*

a) 'whether the function is an integral part of, or is closely connected with, the functions of the Legislature, or the Executive government'?
   If yes: go to questions (b) and (c). If no: no question of incompatibility arises: valid
b) 'whether the function is required to be performed independently of any instruction, advice or wish of the Legislature or the Executive government'?
   If no: incompatible. If yes: go to question (c)
c) 'Is any discretion … to be exercised on political grounds … not confined by factors expressly or impliedly prescribed by law?' → Go to *Thomas v Mowbray* to determine if permissible discretion. *If yes: incompatible. If no: compatible*

Drake v Minister for Immigration and Ethnic Affairs: Davies J appointed as Deputy President of the AAT. The qualification for appointment: 'judge of the Federal Court' for public confidence.

Hilton v Wells: The Telecommunications (Interception) Act 1979 (Cth) empowered a ' federal judge' to issue warrants to AFP to tap telephones.
Held: Non-judicial power as *Ex parte,* hearings not open and not disclosed. Then decided above test. *But in dissent Mason and Deane JJ: The referral 'has the potential, if it is not kept within precise limits, to undermine the doctrine in the Boilermakers' Case.'*

Grollo v Palmer: Facts: The Court found the conferral of power onto a federal court judge to issue warrants did not compromise the integrity of the judiciary.

Wilson v Minister for Aboriginal and Torres Strait Islander Affairs: Facts: Minister appointed a judge to investigate and report upon claims of the Aboriginal community that an area was 'significant

Aboriginal Area' before making a declaration. In doing so, the judge was required to make determinations based on policy and not law.

***Arbitrary detention*: Kruger v Commonwealth**- *Not punitive!*
Gummow J held 'A power of detention which is punitive in character and not consequent upon adjudgment of criminal guilt by a court cannot be conferred upon the Executive'. He also emphasised the importance of intention in stating to determine if punitive, 'depends upon whether [the detention] necessary for a legitimate non-punitive purpose.' Similarly, in **Re Wooley:** *McHugh J found that the purpose of detention is determinative.*

***Al-Kateb v Godwin**: Facts: 'Stateless refugee' and potentially indefinite detention.*
***Held**: it was not punitive to detain and exclude from the Australian community 'by segregation.' As the purpose of the detention was the eventual removal of unlawful non-citizens the detention was not punitive nor prohibited by the constitution.*

Examples of non-punitive detention:

(a) the terrible consequences of the Stolen Generations as no purpose irrespective of practical consequences (Kruger)
(b) harsh conditions i.e. conditions of detention irrelevant in determining if punitive (Behrooz v Secretary of the Department of Immigration and Multicultural and Indigenous Affairs (2004) 219 CLR 486)
(c) breach of international legal obligations (Woolley)
(d) potentially indefinite nature (Al Kateb)

The Impact of the Federal Separation of Judicial Power on State Courts (Week 6)

The Separation of Powers under the State Constitutions:

Gilbertson v South Australia and *Kable v Director of Public Prosecutions* are authority that there is no separation of powers in the SA constitution. But in *Kable,* Dixon J stated there is concern 'with the preservation of judicial independence.' However, Toohey J held that 'judicial independence does not of itself protect the judicial process from legislative interference.' As a result, the *Boilermakers'* principles are not applicable, other arms of government can exercise judicial power and the courts can exercise non-judicial powers.

In Kable it was also held that: there is no equivalent to the Federal constitutional structure, the State constitutions are not an 'exhaustive statement' of how judicial power may be exercised and there is a 'long history of the exercise of non-judicial power by the courts and the exercise of judicial power by bodies exercising non-judicial functions'.

Limitations on State legislative power – *When examining facts, create analogies to these cases!*
Preventative Detention: The court considered and accepted the issue of preventative detention in *Veen v The Queen.*

***Kable v DPP* – legislation was invalid:** *Facts: the issues arose on the legislation. Kable was convicted of manslaughter and while he was imprisoned he wrote threatening letters to his sister-in-law outside. The NSW government faced legitimate concern of Kable and the threat he posed and of an upcoming election. Hence, they attempted to continue his imprisonment through the courts after his imprisonment expired.*

The poorly-drafted legislation was an issue because:

- *The powers looked non-judicial: was punitive, but were going to detain without a conviction*
- *The Act, though in some places expressed generally, applied ad hominem*
- *It prescribed an unusual procedure for the court in criminal matter*
- *The Supreme Court was implicated in the E/L plan to keep Kable in prison*
- *Contained the civil law standard of proof on the balance of probabilities (s 15) but the action was instigated criminally by the AG (s 8).*
- *The court was bound by the rules of evidence (s 17(1)(a)) but they could take into account normally inadmissible material like medical records, prison reports. Thus, procedural fairness was in jeopardy.*
- *The Judges were given no discretion regarding a future assessment of rights (more likely than not to commit an offence). The courts were not able to decide to apply the rules of evidence, or to apply the criminal standard of proof.*

Held: The legislation was invalid! Not judicial power as there was punishment for criminal guilt without a trial. It was making the judiciary a rubber stamp for the executive such that it was clothing the use of executive power in a judicial cloak.

Also, that the State courts are part of an integrated court system. Two Limbs:
1. State Supreme Courts cannot be abolished because of the reference to them in s77(iii). *McHugh J held: 'the Constitution has withdrawn from each State the power to abolish its Supreme Courts'.*

2. The bodies must be capable of exercising federal judicial power. They cannot be changed to make this impossible. Per Haudron J State Supreme Courts thus cannot exercise functions *incompatible* with their exercise of federal judicial power. Incompatibility test is similar to *persona designata* – see *Grollo* and *Wilson. Gaudron J stated 'there is nothing anywhere in the Constitution to suggest that it permits of different grades or qualities of justice, depending on whether judicial power is exercised by State courts or federal courts created by the Parliament'.*

The Court stated **Judicial independence** is important as it prevents the judiciary from becoming a rubber stamp of the executive. The courts must 'be and be perceived to be, independent of the legislature and executive government... [otherwise] public confidence in the impartial exercise of federal judicial power would soon be lost'.

Reasons that the State courts are part of an Integrated Court System:

- *Federal judicial power is vested in State Courts, who are the 'autochthonous expedient' (use what's there).*
- *S 71 states: 'The judicial power of the Commonwealth shall be vested in ... such other courts as [the Parliament] invests with federal jurisdiction' ie, State courts.*
- *S 73 dictates: High Court hears appeals from State Supreme Courts*
- *S 77(iii) shows: 'the Parliament may make laws … investing any court of a State with federal jurisdiction'*

Per Gaudron J: These chapt III provisions led to 'one of the clearest features of our Constitution … an integrated Australian judicial system for the exercise of the judicial power of the Commonwealth'

NAALAS v Bradley restated this through '[I]t is implicit in the terms of Ch III of the Constitution, and necessary for the preservation of that structure, that a court capable of exercising the judicial power of the Commonwealth be and appear to be an independent and impartial tribunal.'

Kirk v Industrial Relations Commission implies jurisdiction to state Supreme Courts to review executive decisions, as a minimum characteristic of a court. Thus, at both Cth and State level we have the ability to review executive decisions.

H A Bachrach Pty Ltd v Queensland is authority that no occasion for the application of *Kable* will arise if the law 'had been a law of the Commonwealth and it would not have offended those principles.'

***Baker v The Queen* – legislation was valid:** Legislature created legislation to keep prisoners with life imprisonment in jail. Legislation allowed prisoners, to apply for a parole period to be set for special reasons. It was argued that this was analogous to *Kable*, but court rejected this for two reasons:

1. Application to only 10 named individuals – didn't just apply to Baker (not *ad hominem*). *Valid:* as no legislative usurpation (unlike *Liyanage* whereby the legislation was altered to ensure a conviction of 11 individuals and thus held invalid as it removed the ability of the

judiciary to determine criminal guilt)

2. Criteria of 'special reasons': There was still a discretion in the court to find "special reasons', thus not a rubber stamp. The court was also bound by the rules of evidence.

It was consistent with Boilermakers' (i.e. power could also have been vested in a federal court) so no Kable question could arise.

***Fardon v A-G* – legislation was valid:**

Legislation required continuing orders of detention or supervision against (already locked up) prisoners. If the court was satisfied 'to a high degree of probability' that the prisoner was a serious danger (i.e. the standard of proof was higher than in *Kable*). Valid as it was:

- Not *ad hominem* (applied generally and lots of applications).
- Related to 'prisoners' (connection to previous conviction).
- Court had significant discretion to decide if a person was danger to the community, and this was a common assessment for a court to make. *Assess judicial discretion similar to Thomas v Mowbray: but can't be too broad so judges are just making policy, but it must be constrained by legal principle to make a decision.*
- Different process: ordinary rules of evidence, onus of proof on the A-G, right of appeal and periodic review, prosecutor's duty of disclosure.

Secret Evidence

***Gypsy Jokers Motor Cycle Club v Commissioner of Police* – legislation was valid:**

Facts: The commissioner of the police was given power to identify any information provided to the court as confidential if its disclosure might prejudice the operations of the commissioner. That evidence could not be disclosed to any other person.

Gypsy Jokers Argued: The court's use of confidential information is a denial of procedural fairness as the not proceeding in a judicial manner as the party doesn't know case against them, no opportunity to respond to the case and not acting judicially.

Nonetheless, the legislation was upheld: as it was up to the Supreme Court to decide upon if the disclosure of the evidence could be inappropriate as (discretion), the non-disclosure of the information did not affect the independence or impartiality of the Supreme court.

***K Generation Pty Ltd v Liquor Licencing Court* – legislation was valid:**

Similar legislation to *Gypsy* regarding non-disclosure of criminal intelligence. Applied same analysis as in *Gypsy Jokers*: Per French CJ the section allowed 'the courts to determine whether information classified as criminal intelligence.' It also allowed the courts to decide what steps may be necessary to preserve the confidentiality of such material.

***Pompano* – legislation was valid:**

Similar legislation to *K Generation*. Argued the assessment of secret evidence was a policy assessment without a legal standard (too much discretion that the court was acting as an administrative inquiry). This was unanimously rejected as the court was able to determine what was reasonable (common judicial tool – *Thomas v Mowbray*). *French CJ accordingly held 'Procedural fairness … is defined by practical judgments… . Both the open court principle and the hearing rule may be qualified by public interest considerations…'*

Criminal and Unlawful Asset Confiscation:

***Re Criminal Proceeds Confiscation Act 2002* – Invalid:** A State could apply for an order restraining property 'without notice' in an *ex parte* hearing. Williams JA at [158] stated this is an interference with the judicial process that is incompatible with the exercise of judicial power.

***International Finance Trust Co Ltd v New South Wales Crime Commission* – Invalid:**
The NSW Crime Commission could chose to proceed with a trial *ex parte.* The court did not have discretion to allow or deny it.
French CJ stated: To direct the court as to how it will conduct the hearing is to deprive it of an essential feature of judicial power, to ensure procedural fairness.

Control of Criminal Organisations

***South Australia v Totani* – Invalid**
Magistrates Court was required to impose a control order on a member of a declared organisation (declared by the A-G). Unlike what was hoped The Magistrates Court was not outside Chapter III. However, it was held invalid as the magistrate could not exercise discretion and acted as a rubber stamp for the executive.

***Wainohu v New South Wales* – Invalid**
Similar to *Totani* except the power to declare an organisation was exercise by a Supreme Court Judge acting *Persona Designata*. The judge would not give a reason for their decision hence, this was seen to be acting in a non-judicial manner and incompatible with chapter III. It threatened public confidence and integrity.

Judicial Review of Executive Action

Kirk v Industrial Relations Commission (NSW)
Applied *Kable* principles to conclude that Chapter III of the Commonwealth Constitution prevents State legislatures from legislating to stop State Supreme Courts from engaging in certain forms of judicial review of executive action.

Declarations of Incompatability with Human Rights

Momcilovic v The Queen
Supreme Court of Victoria was given power under s 36 of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) to issue a 'declaration of incompatibility' if a statute cannot be interpreted consistently with *Charter* rights.
High Court (French CJ, Crennan and Kiefel JJ, Bell J) held that this declaration was non-judicial (because it had no binding effect). But it did not breach *Kable* as it was not incompatible with the institutional integrity of the Supreme Court and thus valid

The State Constitution (week 7)

***Reception of English Law*: (relates to indigenous legal rights)** *It is only relatively recently that the High Court has declared the legislative, judicial and executive branches of the Australian government independent from Britian per Sue v Hill.*
Blackstone stated that '[I]f an uninhabited country' was discovered by the British, 'all the British laws' would be immediately in force but 'colonists carry with them only so much of the British law, as is applicable to their own situation and the condition of an infant colony'.

This position was accepted for nearly 2 centuries until Mabo v Queensland [No 2]. Brennan J stated that our Contemporary law will accept the applicable laws of England. However, it will not accept the theory of terra nullius which advanced the introduction of the English law. However, Brennan J did not question the past sovereignty of the British as this would underpin our Constitutional Monarchy legal system.

***Development of South Australian Governance* – representative and responsible government**
SA adopted the English law on the 28th December 1836. The 1856/7 Constitution Act 1856 (SA) established the SA parliament. It allowed for self-government, responsible government (as Executive was chosen from the legislature) and representative government (as both the House of Assembly and Legislative Council were elected, and each vote had one value).

Legislative Powers – State Parliaments

ALWAYS STEP ONE: *Constitution Act 1934* (SA) s 5: Gives plenary power formally exercised by the Legislative Council under the *Australian Constitutions Act 1850,* to make laws for the 'peace, welfare and good government'. This is now reconfirmed in *Australia Act 1986 (Cth)* s 2(1).
'The Legislative Council and House of Assembly shall have and exercise all the powers and functions formerly exercised by the Legislative Council constituted pursuant to section 7 of the Act of the Imperial Parliament.'

1b (*if time)* *Hodge v The Queen* (1883) is authority that the words 'peace, welfare and good government' are not limitations. Thus, the States were given 'plenary' powers.

Kirby P and Mahoney JA in *BLF* and the unanimous High Court in *Union Steamship Co of Australia Pty Ltd v King* supports this. So does White J in *Grace Bible Church v Reedman* in saying: 'If the court could substitute its own opinion for the Parliament's opinion as to what is a law for the peace, welfare and good government of the State … we would not be living under the rule of law but in a state of chaos.' This is because of the nature of our democratic system. Parliament is the democratically elected representatives and the courts are appointed, hence it would be contrary to the rule of law.

However, Street CJ and Priestley JA in *BLF* state it should not be 'treated as a jingle' and that it is a protection against 'tyrannous excesses'.

Given plenary legislative power, subject to restrictions arising from:
The Australian Constitution

- Sections 106-108 of the Commonwealth Constitution: save State Laws, but State Parliaments and Constitutions are *subject to* the Commonwealth Constitution.
- Inconsistency: s 109 of the Constitution
- Exclusive Commonwealth legislative powers: ss 52 (exclusive powers) and 90 (can't excise taxes) of the Constitution
- Express prohibitions: ss 114 (can't raise military) and 115 of the Constitution
- Express freedoms: ss 92 and 117 of the Constitution
- Implied freedoms from representative government: implied freedom of political communication, **implied right to vote
- **Implied restrictions from Chapter III: *Kable*
- Implied restrictions from federal compact: Intergovernmental immunities

(Limit of plenary power after outlining it) Principle of Territoriality – e.g. Sex Tourism Act
FIRST STEP – *Jumbunna Coal Mine NL v Victorian Coal Miners' Association* (1908) is authority that there is a statutory interpretation presumption that legislation does not intend to apply extra-territorially. However this can be rebutted with express words or necessary implication. **[On the facts, rebut it with words in question legislation.]**

SECOND STEP – The *Australia Act 1986* (Cth) s 2(1), gives the State parliaments have power to 'make laws for the peace, order and good government of that State that have extra-territorial operation.'

THIRD STEP – However, there is likely a requirement of a 'sufficient nexus':
Pearce v Florenca is authority that a law applying extraterritorially 'is valid if it is connected, not too remotely, with the State which enacted it… legislation should be held valid if… even a remote or general connexion.' This was reaffirmed in *Union Steamship Co of Australia Pty Ltd v King*.
Pearce Facts: Lobster fisherman caught fishing illegally outside of WA and a connection was found as his boat was registered in WA.

Dixon J in *Broken Hill South Ltd v Commissioner of Taxation* states a sufficient nexus is 'presence within the territory, residence, domicile, carrying on business there, or even remoter connections.'
Facts: Broken Hill operated in Vic but was registered in NSW and this was a sufficient connection to WA.
Example: No person ordinarily residing in SA may litter in SA, Vic, WA, NSW, ACT etc.

Manner and form requirements
The British principle of 'parliamentary supremacy' has been modified in Australia by s 6 of the *Australia Act 1986* (Cth) (Previously in *Colonial Laws Validity Act 1865* (Imp) s 5) that allows manner and form provision if 'respecting the constitution, powers or procedure' of the state Parliament'.

However, effective 'manner and form' provisions must be 'double-entrenched' so can't just change manner and form provision. This stops a parliament potentially establishing a dictatorship or tyranny. As we are in a democratic system, parliament can bind future parliaments.

Per *West Lakes Ltd v South Australia* 'Manner and form' are limited if provision 'relates to the substance of the lawmaking power, not to the manner and form of its exercise'

Most of the Constitution Act 1934 (SA) is 'flexible', except:

- *No abolition of either House or change in powers of Legislative Council (s 10A), no change to 'deadlock' provision (s 41).*
- *'A system of local government in this State under which elected local governing bodies are constituted': s 64A(1).*
- *Electoral Districts Boundaries Commission: Part 5.*

'Manner and form' requirements in SA:

- *A referendum (ss 10A(2), 88) or*
- *Absolute majority of both Houses (s 64A(3))*

Fundamental common law principles (??): As in *Union Steamship Co of Australia Pty Ltd v King* this issue is yet to be considered by the Court. Hence, it may be a limitation. However, it has no known strong basis and may not be effective.

Restrictions not applicable

1. NO separation of powers (limited incompatibility principle relating to State Courts – *Kable*)
2. NO MORE repugnancy: *Statute of Westminster 1931* (UK) (adopted from 1939 by *Statute of Westminster Adoption Act 1942* (Cth)); *Australia Act 1986* (Cth) s 3 and *Acts Interpretation Act 1915* (SA) s 22B.

Can parliament abolish upper house? In Taylor v Attorney-General (QLD) the High Court stated the Parliament could create an alternative legislative procedure by abolishing the upper house. However, each of the judges noted this likely did not extend to the complete abolition of the legislature itself.

Executive Accountability (week 7 and 8)

Accountability of the Executive is crucial to the rule of law in Australia, per *Re Minister for Immigration and Multicultural Affairs; Ex Parte Lam.*

Accountability and integrity

Empowerment v Constraint issue: Empowerment: The Executive is an extremely large and powerful arm of government due to the rise of the modern administrative state. They have responsibilities and expectations to protect the community from external and internal threats, to erect public institutions, to offer public services, regulate and monitor. Further, this method of law making is required due to its flexibility. But the law-making process raises the possibility of abuse.
Constraint: As the arm is becoming bigger and more complex and the need for flexibility is growing, the arm must be constrained within legal limits. Further, the immense power must be exercised in accordance with public purpose of powers and public values.

The majority of executive powers are statutory powers. These are very useful for setting prescribed limits. However, for other sources, like prerogative powers, judicial records need to be searched for interpretations of the powers limits. This is consistent with McHugh and Gummow JJ in *Re Minister for Immigration and Multicultural Affairs; Ex parte Lam* which held In Australia, constraining the executive 'by the Constitution and by statutes and subsidiary laws validly made is an aspect of the rule of law under the Constitution.'

Complications *arise as the oversight mechanisms are designed for 'public' power. For example when: public bodies exercise commercial functions and compete with the private sector like, Medibank. And, when private bodies are contracted to perform public functions, e.g. SERCO.*

Parliamentary Accountability

Responsible Government: In the Australian Constitutional system, unlike the US, there is not a complete separation of powers. The legislature and the Executive are linked under s 64 to facilitate Responsible Government.
Gaudron, Gummow and Hayne JJ in *Egan v Willis* held a system of responsible government traditionally has been considered to encompass "the means by which Parliament brings the Executive to account" so that "the Executive's primary responsibility in its prosecution of government is owed to Parliament". Essentially, it is to deter or prevent Executive abusing power by ensuring they are accountable to the elected parliament who are representatives of the people.

Ministerial responsibility (*Australian Constitution* s 64, *Constitution Act 1934* (SA) s 66): Under the traditional view of ministerial responsibility the Minister bears responsibility for all actions of their department. However, per the *Guide on Key Elements of Ministerial Responsibility:* Ministers do not bear individual responsibility for all actions of their departments. Where they neither knew, nor should have known about matters of departmental administration which come under scrutiny it is not unreasonable to expect that the secretary or some other senior officer will take responsibility.

Ministerial responsibility ensures a neutral public service while maintaining accountability. Although in Rau saga public servants did face repercussions. This could involve the public sector in politics and remove their neutrality.

Authorisation and auditing of expenditure: No taxation without statute (parliamentary authorisation) (*Magna Carta 1215; Bill of Rights 1689*). Also, No expenditure without appropriation per ss 81 and 83 and often requires additional statutory authority per *Williams v Commonwealth.* An Audit of expenditure also occurs by the Auditor-General (Parliamentary Officer).

Parliamentary processes to bring government to account:

****Question time and requesting information:**

Requesting information: A strong power not often used. Power of Parliament to request disclosure of documents, and hold Ministers in contempt for failing to provide documents. Subject to Public interest immunity and Cabinet confidentiality.

Questions: *Questions without Notice* are oral questions made publically available through Question Time. Although this is limited by Partisan politics and Dorothy Dixers. But the time limits mean answers must be directly relevant to the question. The ministers still show up and answer questions, and go through the process of responsible government. It is also publicised on television so the ministers expose themselves.

Questions on Notice are written questions relating to Factual information. They still operate how intended. But are limited as they can take long time or may not be answered.

Parliamentary committee systems, include budget committees: *e.g. Senate Select Committee into the Children Overboard incident:*

Committees Inquire, receive submissions, hold public inquiries (compel witnesses), and report to the main chamber. The government has 3 months to respond to reports. Parliamentary privilege applies to proceedings (Commonwealth Constitution s 49; common law). Senate committees are often more effective at oversight (when not controlled by Government). Effectiveness is also improved through the Punishments (by the chamber) for contempt. But, Committees have no power to compel members of other chambers. Limited as ministers are rarely jailed for contempt and as such they can refuse to speak or withhold documents (as in the Children overboard inquiry). Also, to charge with contempt would result in a long and expensive legal issue. *Further, the asylum seekers would not be given parliamentary privilege.*

Standing Committees are for the ongoing for life of Parliament. Select Committees investigate into specific instances.

Senate Budget Estimates scrutinises the annual appropriation Bills. They can Question public servants. There is also the House of Assembly Budget Estimates (SA).

Reporting to Parliament: Government agencies are required to report to parliament, usually in annual reports. These are tabled in parliament and are published in the parliamentary papers that are available to the public. This increases transparency and informs the votes for election time.

Scrutiny of Delegated Legislation: Parliament retains the control of delegated legislative power through statutory powers and procedures for parliamentary scrutiny and disallowance Regulations by either House of Parliament under the *Legislative Instruments Act Cth s 42 and the Subordinate Legislation Act) s 10(5a).*

The Auditor General: Is an independent officer of the parliament (under the *Auditor General Act* s8(1)) who assists parliament in holding the executive to account in terms of government finances. It focuses predominately on financial accountability and reports annually to parliament.

Executive Oversight Institutions:

****Merits Review:** Is an executive oversight mechanism not only reviews legality but also whether the decision was correct in the circumstances. It is dissimilar in this fashion to judicial review. The presiding officer stands in the 'shoes of the original decision maker' and can make a fresh decision (unless prohibited by the statute). Hence, in the immediate sense the executive decisions are held accountable as the decision can be overturned. ***See judicial comparison table for more:***

Advantages:	**Disadvantages:**
New evidence, not bound by original arguments (s33(1)(c))	The body is part of the executive arm of government and hence, it could be seen as not independent.
Allows for a fresh, more informed decision as the specialist knowledge of the reviewer as opposed to a court.	The members did not have fixed tenure, unlike judges, and hence they could be vulnerable to political issues and changes of government.
Cheaper than a court and more accessible. It is also much less formal (s33(1)(b).	They are often under resourced. Also Non-binding determination per *Indicia* (rely on Executive respect)
Consider the merits of decision – 'legality' and 'integrity	The knowledge of the people of the tribunals is limited and hence, they rely on the policies of the government body to notify them if the decision can be reviewed.
	Only have standing for a right to review where specifically granted by statute

****Ombudsman:**

Investigation of administrative acts only: Not legislative, political or judicial actions!
Booth v Dillon: is authority it is *beyond jurisdiction of Ombudsman* about whether prisoners should sleep in dormitories or individual cells and funding allocation of funding as policy issue!
Salisbury City Council v Biganovsky: is authority government's policy in relation to the use of its land, property is *beyond jurisdiction of Ombudsman* as it is a policy decision.

NB: 'Administrative Act' includes an act done in the performance of functions conferred under a contract for services with the Crown or an agency

Cth Act: Section 15(1): After investigation, **Ombudsman reports** (including reasons and recommendations) if the action or decision: appears contrary to law; unjust, or improperly discriminatory; was in accordance with the law but the law is or may be unreasonable; was based either wholly or partly on a mistake of law or of fact; was done in pursuance of an improper purpose; took into account irrelevant considerations, or failed to take into account relevant considerations; or was one for which reasons should have been furnished, but were not.

Report to Department or prescribed authority, or escalate if their response inadequate/inappropriate, to the Prime Minister and Parliament (ss 16 and 17) or to Annual and special reports to Parliament (s 19)
See s 25, 29 of the SA Act for SA equivalent

Strengths:	Weaknesses:
Cost efficient – no cost to the complainant	The tenure in the Act can be changed
Flexible investigative process & substantial powers to conduct investigation	Issues with independence arise as they are funded by the executive
Creative remedies – may not be available as a court order (although can't make an order): Of An apology, financial compensation and a reconsideration of government action or policy	It can only investigate into areas of mal-administration. They are only concerned with issues of process, not the outcome.
May be a precursor to other redress (parliamentary, court action) as Ombudsman can escalate it	There is no reviewer of the ombudsman
Redress for systemic issues not just individual complaint	Further, they have no formal power to change administrative decision. Therefore, merits review is more appropriate f you would like the decision changed.
Has extensive investigatory powers to investigate a wide range of issues	May be known as a 'toothless tiger' as the orders are not binding. But, predominately most agencies adhere to their decisions. Perhaps they cooperate so the decision does not become public.

Public Service Commissioners (Solely about public service and can impose sanctions): Purpose – to promote and evaluate compliance with the Australian Public Service Values and the *Code of Conduct*. Sanctions may be imposed on members who breach this Code.

Independent Commissions (like an independent tribunal to hear complaints) for example**:** Australian Human Rights Commission (receives complaints under the equal opportunity act), Anti-Corruption Commissions.

****Royal Commissions and Inquiries:** They research into conduct of the executive.
Establishment: (Using prerogative power (Dixon J) or common law capacity (Griffith CJ) through letters Patent issued by Governor or Governor-General. Terms of Reference set in Letters Patent.
Powers: Extensive powers from statute to compel witnesses and documents, and inspect premises: *Royal Commissions Act 1917* (SA) ss 10, 11, *Royal Commissions Act 1902* (Cth) ss 2-5.
Examples: Fitzgerald Inquiry (Royal Commission into Police Corruption – Qld), Inquiry into certain Australian companies in relation to the UN Oil-for-Food Programme (investigation of *private* companies, terms of reference did not allow investigation into Commonwealth government's role)
Limits: The terms of limit are set by government whose actions are those that need investigating, also questions independence and impartiality. A problem of political control of scope of inquiry.

Public Accountability – *not within executive branch*: In a democracy, final accountability lies with the people at the ballot box. Under **Representative Government** elections are therefore the ultimate form of political accountability. This is facilitated through the Electoral system: Compulsory voting. In the House of Reps: Preferential voting is used in electorates of comparable population, whereas in the Senate: Proportional representation is used in whole-State electorates.

Voting is a constitutionally entrenched right per ss 7, 24. Furthermore, we have a Freedom of Political Communication (*Lange v ABC*). And any restriction on political participation must be for a 'substantial reason': (*Roach v Electoral Commissioner*). *Or, Rowe v Electoral Commissioner (2010): closing the rolls at 8pm on the day writs are issued invalid (but seven days after is valid)*

Roach: Facts: a law preventing all prisoners from voting was invalidated (those serving sentences of more than three years' imprisonment could be disenfranchised).

Weaknesses:

- Party discipline
- Senate not a *States' House* (they act on party lines so the upper house no longer represents the interests of the smaller states).
- Most representatives loyal to party not electors
- Once every 3 or 4 years (could be too long as people forget issues or too short as government can't implement long-term policy)
- Elections are fought between packages of policies – not on specific issues
- Liable to distortion by media, lobby groups
- Senate voting system (1/2 senate every 3 years and allows for smaller parties and minorities to hold the balance of power)

Facilitating Accountability

FOI: Purpose (Per s3 of the SA and Cth Acts), is to balance the objectives of openness against effective governance and cabinet confidentiality. *It also creates the right to amend personal information and an obligation on government to publish the information.*

Commonwealth FOI application (*Freedom of Information Act* 1982 (Cth):
1. Right of Access - *make a request under s 15(2)(a) in writing and 15(2)(aa) state it is for purpose of FOI act and other s15 requirements.* a. No need for special interest as 'every person has a legally enforceable right to obtain access' of information per s11 of the FOI Act. Thus, the motives for applying are irrelevant per s 11(2). b. Must show it is a document the FOI applies to per s 4 is any record of information (**relate to facts:** Written on paper, a plan or map, any material which can be reproduced, any copy of these etc.) excludes publically available material and Cabinet notebooks and it must be in the possession of the agency that created/received it. c. No application fee in Cth Act but processing charges apply.
2. Exemptions a. Could be an except agency per s7(2) and Sch 2 like intelligence agencies, the auditor general, or legal advisors. b. Unconditionally exempt: Eg, documents damaging to security, defence or international relations (s 33), Cabinet documents (s34), documents subject to legal professional privilege, disclosure of personal information -> Cabinet documents s34. If document, like in Fissee, the executive summary is likely to be all they get. But, if disclose the rest of the report, you will see what the Cabinet considered in the executive summary, so likely withhold it all. This is authority that public interest in cabinet confidentiality supports non-disclosure. c. Conditionally exempt (If disclosure would be contrary to public interest)– Use the ss 11A and B public interest test. documents which could prejudice Commonwealth-State relations, documents

which would disclose matters relating to the deliberative processes of government, documents that unreasonably affect business, commercial or financial affairs

Note: Exempt agencies can still voluntarily disclose, and exempt documents can still be voluntarily disclosed. Can receive part of the document, if not the whole.

3. If unsatisfied with the decision. Review? – must mention each has time limits.

a. Internal review (Pt VI),
b. Review by the Information Commissioner (Pt VII) directly or from an internal review decision
c. AAT review (Pt VIIA) but must be of a Review by the Information Commissioner
d. Federal Court review (*AD(JR) Act*).

Even though review is available, if likely to be unsuccessful, then tell the client that!

State FOI application (*Freedom of Information Act* 1991 (SA)):

1. Right of Access – *Make request under s 13a in writing, specifying under FOI act, with fee and must identify document.*

a. S 12 gives a person a legally enforceable right to an agencies document.
b. FOI applies to 'Anything in which information is stored or from which information may be reproduced' (s 4 (1)). But, Agency must 'hold' the document (s 23(1)(b)) or have an 'immediate right of access' per s4(4) (like through a contractor).
c. $31.50 application fee in SA Act plus processing charges

2. Exemptions

a. Could be an except agency per Sch 1 like intelligence agencies, the auditor general, or legal advisors.
b. Unconditionally exempt: Eg, documents damaging to security, defence or international relations, Cabinet documents, documents subject to legal professional privilege, disclosure of personal information
-> Cabinet document? If in Cth cabinet there is a presumption that the clause applies to SA cabinet. As cabinet confidentiality was given upmost importance in Fissee, it will likely trump all.
c. Conditionally exempt (If disclosure would be contrary to public interest)– documents which could prejudice Commonwealth-State relations, documents which would disclose matters relating to the deliberative processes of government, documents that unreasonably affect business, commercial or financial affairs

Note: Exempt agencies can still voluntarily disclose, and exempt documents can still be voluntarily disclosed. Can receive part of the document, if not the whole.

3. Review? – must be aware as each has time limits.

a. Internal review – s 29
b. Merits review by the Ombudsman – s 39 (free!)
c. Appeal to District Court – s 40

Even though review is available, if likely to be unsuccessful, then tell the client that!

***Fisse v Department of Treasury* [2008] AATA 288:** Claim for a report whose executive summary was considered by cabinet. Thus, the executive summary was unconditionally exempt per s 34. Then the whole report was conditionally exempt as under s47C, as part of the deliberative process. Public interest test: Disclosure favoured by: purpose of legislation; democratic participation; transparent and accountable decision-making. But, Non-disclosure favoured by: public interest in Cabinet confidentiality.

Media:
They provide an extra-governmental role as the 'fourth State' by providing government information and commentary on that information to the public to encourage reforms or at least inquiries. For example the Moonlight State documentary.

They use FOI, Parliament question time and whistleblowers to gain access to government information. It is facilitated through the shield laws, so journalists do not need to reveal their sources. But, Media has an increasingly commercial focus, on giving the reader what they want and not what they need to be an informed voter. Further, as it is extra-governmental it has almost no accountability.

Whistleblowing:
Legislative protection is given to government employees (and possibly contractors) where they have seen illegality in government administration. The protection extends to reprisals in the workplace (demotions) and civil/criminal liability. However, the protection is limited and serious consequences arise if you do not have that protection. Cth has general legislation (*Public Interest disclosure Act 2013)* and the SA (*Whistleblowers Protection Act 1993).* It could be bad as it could jeopardise the neutrality of public servants and horrible if not covered by protection.

Wikileaks facilitates public access of information from government, by providing a source of information and a way to disclose information anonymously. It facilitates the distribution of information from whistleblowers (and others). It is designed to increase transparency, but this may not have occurred as the Govt have cracked down on their security and do not disclose information as freely.

Merits review and Judicial review

Courts can't engage in Merits Review as, consistent with limb 2 of *Boilermakers'*, they can only exercise judicial power. To make a fresh decision, exercising the same power as the decision maker, would be using executive power: *Re Drake v Minister for Immigration.*
Tribunals can't engage in Judicial Review as, consistent with limb 1 of *Boilermakers',* they cannot exercise judicial power. If a tribunal were to make a binding decision, it would be using judicial power.

At SA level: Can get Merits Review from the District Court under s43E(3) of the District Court Act. All they need show 'cogent (persuasive) reasons to depart from the original decision'. Can do this per Kable as no separation of powers at the State level.

First advise client to talk to the minister directly, then internal review mechanisms and then the Ombudsman if possible as it is free. But it does not apply to ministerial decisions. And, always advise Merits review first as legal representation is often not necessary (AAT Act s 32), it has relaxed procedures with little formality and technicality (AAT Act s33(1)(b)) and they are not bound by the rules of evidence, and can be more inquisitorial AAT Act s 33(1)(c)) and you can still get the decision reviewed judicially afterwards.

Commonwealth Merits Review: *Administrative Appeals Tribunal Act 1975 (Cth)*

1. Jurisdiction

If there is no statutory right to review, there can be no merits review!
Accordingly, *AAT Act* s 25(1)(a) states 'An enactment may provide that applications may be made to the Tribunal for review of decisions made in the exercise of powers conferred by that enactment'.
(Must be a decision under an Act, not a policy or contractual decision).

2. Grounds

Legal Errors:
Any misinterpretation of words in the statute. *Haneef* for 'association'. It is authority it must be interpreted by its context and by the purpose of the Act. Is it interpreted too narrow, or widely?
The purpose of the provision seems to be ____. Hence, the term(s) _____ (and _____) should be interpreted _____.

Merits review:
New evidence can be submitted (s33(1)(c)) to show that the decision is not the best in the circumstances. Not necessary to show original decision was legally wrong or erroneous
S 41(1) AAT Act

3. Outcome

Merits Review Tribunals are part of the Executive and can therefore exercise power of original decision maker (executive power). *AAT Act* s 43(1) states 'the Tribunal may exercise all the powers and discretions that are conferred by any relevant enactment on the person who made the decision'. Hence, this review mechanism offers a 'fresh' decision. But, it will be not be binding pursuant to the principle in Brandy. But, the executive will likely comply as they have established the AAT.
Further, Re Drake v Minister for Immigration is authority that a decision of a Tribunal should, take 'into account the possible application of an administrative policy.'

4. Review?

Can seek judicial review.

Commonwealth Judicial Review: *Administrative Decisions (Judicial Review) Act 1977 (Cth)*

'Judicial review is neither more nor less than the enforcement of the rule of law over executive action': *Church of Scientology Inc v Woodward*

1. Jurisdiction – *Cth Act Thus, ADJR Act applies!*

a. Likely to be a single judge of the Federal Court reviewing the decision. *Plaintiff S157/2002* is authority that judicial review over executive or administrative decisions, at the Commonwealth level, is guaranteed, as a minimum, under s 75(v) of the *Australian Constitution*. Further, there is not equivalent constitutional guarantee in the state constitutions. However, *Kirk v Industrial Relations Commission* implies jurisdiction to state Supreme Courts to review executive decisions, as a minimum characteristic of a court, endorsing the *Kable* principle.

b. Jurisdiction is given by the *AD(JR) Act*, as it is a 'decision of an administrative character made… under an enactment' (s 3(1)). (If not, use a Writ).

b2. State 'assuming the Act is not except under Schedule 1 of the AD(JR) Act (If it is use a writ).

c. Show standing to sue as 'A person who is aggrieved by a decision: *AD(JR) Act* s 5(1). This is further defined in s 3(4) as 'a person whose interest are adversely affected'

d. **OR** jurisdiction based on the common law writs pursuant to s39B of the Judiciary Act 1903 (Cth)

Statutory and common law powers of judicial review CAN be taken away by statute (called a 'privative' or 'ouster' clause).

2. Grounds

Concerned with legality, not merits of original decision. Look for legal or procedural errors in the original decision.

The court cannot consider new evidence unless granted leave by the judge, which is very unlikely. Hence, this is unlike merits review.

a. Legal error: All executive action must be within the executive's legal powers. *Ultra vires* = beyond powers. I.e. if minister makes a judicial decision, use *Boilermakers'* (or *Lim* if imprisonment).

b. Error of law (Like in Merits review, say as above).

c. Procedural error under *AD(JR) Act* s 5(1) (if didn't follow correct process, or breach of procedural fairness): It may be possible, but on the facts it is not clear, hence I will assume it is not an issue.

3. Outcome

The decision will be binding and enforceable. But, it will not be a new decision. The judge may reaffirm the decision or quash it and remit it back to the original decision maker to be attempted again. The court cannot make a new decision as this would be exercising executive power (*Boilermakers'* limb 2). Although this is costly and time consuming, it retains the impartiality of the judiciary.

A federal Court could not make a fresh decision (because of the 2nd limb of *Boilermakers*) so would be limited to remitting a decision to the Executive.

Cannot exercise executive power, so must remit a decision to the executive if it was made in error

4. Review?

If still unsatisfied, could appeal to the Full Federal Court, and then the High Court if given leave. This would be a part of the courts' appeal process.

*Common law prerogative writs: Common law prerogative writs: Writ of Certiorari to **quash** a decision, Writ of Prohibition to **prohibit** an unlawful action from being taken or, Writ of Mandamus to **mandate** that a certain action be taken.

***Haneef v Minister for Immigration and Citizenship*:** Visa was cancelled by the Minister for Immigration on the grounds that he failed a character test because of his 'association' with his second cousin. The Act stated 'a person does not pass the character test if: ... the person has or has

had an association with someone else, or with a group or organisation, whom the Minister reasonably suspects has been or is involved in criminal conduct.' Federal Court HELD The Minister had misconstrued the legislation by interpreting the term 'association' too broadly.

Judicial Review	**Merits Review**
Expensive, slower, more formal *(Negative)*	Cheaper, faster, less formal (S33(1)(b) *(Positive)*
Review only to establish legal or procedural error in original decision (limited to 'legality') *(Negative)*	Consider the merits of decision – 'legality' and 'integrity'*(Positive)*
If successful, decision remitted to the original decision maker *(Negative)*	If successful, new decision made. A 'Fresh decision' *(Positive)*
No new evidence, bound by original arguments *(Negative)*	New evidence, not bound by original arguments (s33(1)(c))*(Positive)*
Binding determination of the limits of power *(Positive)*	Non-binding determination per *Indicia* (rely on Executive respect) *(Negative)*
Always available unless excluded in Schedule 1 to *AD(JR) Act.* Constitutionally guaranteed for 'jurisdictional error'(s75(v)). *(Positive)* For standing under ADJR s5(1) must be a person 'aggrieved' (s 3(4)) by 'decision to which this act relates' (s3(1)).	Only have standing for a right to review where specifically granted by statute *(Negative)*
Independent of Executive *(Positive)*	An Executive body (not independent) *(Negative)*

Right to Reasons

To challenge a decision, need the reasons for the decision! At common law there no duty for executive decision makers to provide reasons: *Public Service Board of NSW v Osmond.* However, the *Administrative Decisions (Judicial Review) Act 1977* (Cth) s 13 and *Administrative Appeals Tribunal Act 1975* (Cth) s 28 give a statutory right to hear the reasons for a decision. However, there is no equivalent at State level

Indigenous Legal Issues

Why indigenous legal rights are a public law issue:

As it involves a relationship between the Government and the people. Indigenous policy is government driven as they have a 'special place' in the Australian nation. It also originates back to the foundation of our State and the introduced British legal system adopted through the concept of terra nullius.

The settlement of Australia, by the British, was conducted through the exertion of their sovereignty over seemingly uninhabited lands. This is evidenced by Cook's journal that reads "The natives do not appear to be numberous(sic) neither do they seem to live in large bodies but dispers'd in small parties along by the water side." This also illustrates the perhaps inaccurate perception at the time of the Indigenous societies, as Cook's party did not travel too far from the waterside themselves and could not know of the other Indigenous societies elsewhere.

Confirmation of UK sovereignty:

Occurred in 4 main cases:

Cooper v Stuart: The Privy Council held that the British law is the law of the land.

Milirrpum v Nabalco: Nabalco was a mining company with a lease on indigenous land. Blackburn J held that there is no ability to make claims under Indigenous law, only British law. But, he also said the British common law could recognise interests in land.

Coe v Commonwealth: Revisited sovereignty in the HC. Held: even if the British settlement was illegal under International Law, the British asserted their sovereignty and hence their laws apply.

Mabo v Queensland (No 2): Confirmed that there is only one law of the land that determined rights. But, this British common law could recognise pre-existing rights to land. The indigenous right to land was based on traditional laws and customs. The common law Native Title decision led to the Native Title Act to define it and specify how it could be claimed.

Responsibility for Indigenous Policy

The plenary power of the colonial parliaments under their constitutions was used to implement legislation regarding Indigenous Policy prior to federation. After federation, until 1967 the States continued to use this power to legislate over indigenous affairs, s51(xxvi) prohibited the parliament from legislating in this area. This was included as the colonial parliaments believed that the Indigenous people would just die out, and because of this it was not going to be an issue that the Commonwealth parliament was going to need power for. Also, the Indigenous Affairs were traditionally a power of the States and at federation the States attempted to retain as must residual power as possible. Furthermore, s127 prohibited Aboriginals from being counted in a national Census. This was included as the Aboriginal people were not believed to be a part of society, rather part of the flora and fauna. It also attempted to stop states with larger aboriginal populations receiving more of the government revenue. Lastly, s 25 excluded states with large aboriginal populations, which were denied the vote, from receiving extra seats in parliament. These provisions isolated the Aboriginal communities.

Over 90% of voters, voted yes on the 1967 referendum, which changed the State of law regarding Aboriginal people in Australia. It altered s51(xxvi), to give the parliament power to legislate over indigenous affairs and to remove s 127 so aboriginals were counted in the census. This did not give

them the vote, this was achieved a few years prior with the Electoral Act. Relying on this race power (s 51(xxvi)) the Commonwealth has passed several pieces of important legislation aimed at protecting their rights, including legislation to protect their cultural heritage (the *Aboriginal and Torres Strait Islander Heritage Protection Act* 1984 (Cth)); legislation to establish an elected Indigenous body to offer advice to government (*Aboriginal and Torres Strait Islander Commission Act* 1989 (Cth)); and legislation to recognise Aboriginal native title land interests (*Native Title Act* 1993 (Cth)), even the *Racial Discrimination Act* 1975 (Cth)(not for everyone!) could be passed under the race power.
See Kartinyeri if must be used for benefit.

The UNGA, through the *UN Declaration on the Rights of Indigenous People,* affirms that Indigenous people are equal, and thus have full protection of rights contained in the UN *charter* and the *UN Declaration of Human Rights. A*lthough the use of the race power seems to undermine this, the *RDA 1975 (Cth)* s 8 permits this to provide equality of access to basic human rights.

Basis of claims against the State:

(Fundamental) Descendants from the original occupants of the land

Because of this the Aboriginal people have a continuing connection to a different legal system, a different set of rights and a different understanding of the connection to land. Thus, they claim that as descendants of the original occupants there is a continuation of rights from the time of first settlement to the present, and these rights have not been removed by the introduced legal system.

Separate and continuing laws and customs recognisable by the law

They claim that their relationships of land and people are different from the introduced law and this should be recognised and protected. For example, Native Title or sacred practices. Indigenous people also argue against the state that they should have the freedom to make their own decisions about their lives, and also the freedom to negotiate the intersection of their own laws and the state laws.

Distinct culture with different legal systems

This is as above. However, it could not only be claimed by Aboriginals. However, for non-Indigenous cultures, it is a weaker right as when a culture enters into a legal system it accepts that systems culture and rights.

Historical injustice

The need to remedy past discriminatory and unjust treatment. For example, past generations have attempted to erase the Aboriginal culture from our national story.

Contemporary socio-economic disadvantage

Indigenous people are vulnerable to this, however, it could be claimed by many aspects of society.

Responses to Indigenous Claims

Recognition of past injustices

Firstly, reconciliation was attempted through the establishment of the Australian Council for reconciliation to resolve past injustices.
Secondly, a call for a treaty in the 1980's between the Indigenous and the government resulted in Indigenous land use agreements. Over legislation, they are a flexible instrument, communities are able to negotiate the treaties, thus having a direct influence and as such they will be more likely to honour it. It allows the indigenous to implement their perspective in a different way. However, due to the state's large resources, the outcomes may not be desired. Further, considerable political hurdles exist before the government will accept the treaty process.

Thirdly, building a national consciousness was attempted to further the education of the Australian community. Aboriginal and Australian history is now compulsorily taught in schools. Also, public recognition has occurred through the Australian National Museum indigenous displays and the recognition of the Aboriginal people as the custodians of the land before any public proceeding. Lastly, an apology occurred in 2008 to the Stolen Generation after the 'Bringing them home' inquiry, which revealed the forcible removal of Indigenous children from their families. Compensation was then suggested, but the Government refused and said this must occur through the courts. Although, Tasmania has a compensation scheme. It may be useful if only token compensation as still gives them recognition and a remedy for the harm done upon their culture.

Political Rights

Voting rights were extended to indigenous people in 1918 with the *Electoral Act* 1918 (Cth). The claims for Indigenous political rights have resulted in regional framework agreements, whereby government bodies provide services to Aboriginal people within certain regions. Recognition in the State Constitutions through sections or in the preamble has occurred, and this has been suggested in the Commonwealth Constitution. Although, it could pose the issue of giving rise to extra claims of invalid laws.

ATSIC was also establish as an Indigenous representative body, although it failed due to the lack of impartiality (no radical agenda) as received funding from parliament and its controversial president. *The National Congress of Australia's First Peoples* was established in May 2010 to replace it. It seems more independent as it does not receive government funding. Hence, it may be more effective in scrutinising government and formulating policy to promote Aboriginal rights. The need for an economic base was provided for as the property rights could be used to negotiate and receive compensation for allowing a use of land contrary to Native Title. Lastly, representation in parliament has been an issue. Having designated seats for Indigenous representatives has been suggested, similar to NZ (whereby 7 of the 122 seats are dedicated for the Maori representatives). In Australia it has never practically occurred and as such Indigenous people have been proportionally underrepresented. It would allow an Indigenous voice to influence across the policy spectrum. However, it poses the issue of this appointment being undemocratic and these representative becoming a token for the government as they may not have the power to oppose government policy. Further, Indigenous culture is diverse, a few representative may not adequately represent this diverse population. Some also argue it may undermine the claims of self-determination.

Property Rights

The response to *Milirrpum* resulted in a commission being established that recommended an Aboriginal Land Rights Act for the NT. Subsequently 40% of the NT was claimed under this Act. As Stated above, the issue of British and Aboriginal sovereignty was resolved in Mabo, which resulted in the Native Title Act 1993 (Cth). This established a claims process, codified the definition, confirmed how it could be extinguished and established the rules of engagement for future land use. Native Title was defined as a right to land that is a continuing relationship to land based on traditional laws and customs that existed at times of first settlement.

Cultural Rights

Firstly, States have attempted to recognise customary laws and practice, like punishments to stop the Indigenous population being overrepresented in prison. Many law reform inquiries suggest that the mainstream legal system should recognise customary law, by for example, allowing the indigenous people to determine to what extent they should be governed by their customary law. This may be limited as their customary law, like the punishments, may be contrary to basic human

rights, like against torture. Further, Heritage protection has been attempted to protect the Aboriginal sacred sites. Under the *Aboriginal and Torres Strait Islander Heritage Protection Act* 1984 (Cth) the Minister for Indigenous Affairs has the power to declare an area of Indigenous cultural significance and prevent activity that would damage the area. Although unsuccessful, this action and process was evidenced by the Hindmarsh Island Bridge Case.

Rights to equality

Legislative protection – Racial Discrimination Act 1975 (Cth). Constitutional Protection suggested but it is yet to occur.

Kartinyeri v Commonwealth (1998): The Hindmarsh Island Bridge Act 1997 was passed by the Howard Government in order to kill off the Heritage claims regarding Hindmarsh Island. Kartinyeri challenged this and argued that since the 1967 referendum changed the Race power in s 51(xxvi) it should only be used to benefit the Aboriginal people. The majority of the court disagreed with her. Gummow and Hayne JJ held the power was a plenary power, due to the wording of the section, and could be used to pass any law regardless of its effects. They had 3 main reasons; firstly, If the court were to be tasked with determining if a law was beneficial it would be a political decision. Secondly, the wording specifies it must be 'special' laws, there is no mention of it being beneficial. Lastly, there was no ambiguity in s 51(xxvi) and thus, the intention of the people at the 1967 referendum can't be referred to due to the statutory interpretation methods. However, Kirby J in dissent it was limited by the context of the referendum. This question has not subsequently arisen in the High Court and as such, the scope of the race power remains uncertain.

Possible recommendations (for Cth and State Constitutions):

The Expert Panel has suggested changes to the Australian Constitution. They firstly suggest the removal of s 25. This would seem very beneficial as the section seems redundant in our current society. Further, if it were removed no aspect of the community would be disadvantaged; it would only secure our rights and remove the possibility of discrimination in the future. Lastly, it doesn't reflect the prevailing values of our current society of equality and fairness.

However, I do not believe the removal of s51(xxvi) would be appropriate as it would cause the parliament to lose a power, which much legislation used to benefit Aboriginals relies on (above). The inclusions of a section which specifies for the 'benefit' may be appropriate, but that would then require the court to make political decisions. It a replacement was to occur, it should not contain a preamble, like the Expert panel suggests in s 51A, as the HC can be unpredictable and may not use this in its interpretations if no ambiguity like in Kartinyeri.

I also do not endorse any provisions in the Constitution trying to implement a Bill of Rights through the back door. This could cause our Constitution to lose its flexibility and would not likely receive bipartisan support.

For the States, recognition sections have been implemented. In the SA Constitution Act it is s 2, drafted from the Vic and WA sections. Subsections 1 and 2 attempt to recognise Indigenous rights, culture and history and seems very effective. Although, subsection 3 attempts to stop compensation and challenges to the validity of laws, but it does undermine this and perhaps make it seem pointless. To remedy this the subsection 3 could be removed as it does not appear to have any practical uses.

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Codify the indigenous rights in the constitution, similar to a bill of rights. Included in this could be Native Title. It could also be undertaken as an act of parliament, although this could be changed by parliament. Could also include a preamble to our Commonwealth Constitution, recognising injustices, like the South African Constitution. Or, similar to NZ initiate an Act of parliament as an apology in the preamble, to increase land rights and settlement. In NZ it is called the Waikato Raupato Claims Settlement Act 1995 (NZ).
Also, treaties could be implemented to achieve common objectives.
They could also legislate, or allow, for a right to seek compensation for the past injustices. Although, this compensation may only be token compensation so the financial burden on the Cwth is not large, but still recognise that injustices occurred.

Referendum implementation:
For these changes to be implemented in the Constitution, the referendum bill must first make it through parliament and then receive a double majority, of people and states agreeing. This has posed very difficult and as such only 8/44 have been successful. To maximise success, the community should be educated so they have ownership of the change. To do this may require more than just pamphlets, perhaps social media interaction. The idea should have bipartisan support so a major party does not rally against the idea, and it should have State support so the States do not run a campaign against it. Lastly, it should be a sensible idea so the people can be persuaded to agree and constitutional scholars and experts would not be opposed to it.

Introduction: There is some protection of Indigenous rights in Australia, but much of this is not specific to Indigenous people and there is a great deal more that could be done.

Body: 1967 referendum: A referendum, supported by 90% of the Australian people, in 1967 began the movement towards the protection of Indigenous rights in Australia. This referendum altered s 51(xxvi) of the Constitution to allow the Commonwealth to legislate in indigenous affairs. Previously, it was part of the plenary power of the States, and the race power explicitly stated the Commonwealth could legislate for the people of any race, except for Indigenous affairs. The referendum also removes s 127 from the Constitution which allowed the indigenous population to be counted in a census. However, unlike the belief at the time it did not give them the right to vote, this occurred a few years earlier with the *Electoral Act*. The s51(xxvi) change protects rights somewhat as it allows the Commonwealth to legislate in Indigenous affairs, but it does not have to be for the benefit, but also for their detriment, per *Kartinyeri*.
Native Title
The Native Title Act 1993 (Cth), which is based on the judgement in Mabo v Qld (No 2) 1992, protects the indigenous property rights to some extent. It allows the Indigenous to claim Native Title over land, and prohibit some uses on the land, on a usufructuary basis. However, it does not extinguish the Government sovereignty over the land and it is extinguished if it is private land and per the Wik Case it can coexist with pastoral leases.

Human Rights in Australia

What are human rights? How did they emerge at the national and international level?

Brennan J in *Gerhardy* v *Brown* is authority that Human Rights are '…rights and freedoms which every legal system ought to recognize and observe… The State and other persons are bound morally, though not legally, to recognize and observe those rights and freedoms.'

National Level: The concept of rights is extremely old, possible originating from natural law theory. The Positivist Bentham challenged this in saying real rights are those legislated. The first movement towards the emergence of human rights was the 13th C English *Magna Carta* that limited the power of the monarchs for the first time, protecting their own rights. 1689 English *Bill of Rights* followed, protecting the rights of citizens in England via statute. English philosopher John Loche influenced the 1789 French *Declaration of the Rights of Man and the Citizen* as he believed that leaders should respect Human Rights in exchange for being allowed to rule. The creation of the 1791 US *Bill of Rights* (first ten amendments) influenced the rest of the constitutions around the world. Although our system was influenced by the *Magna Carta* and the US Bill of Rights, we do not have a bill of rights in the 1901 *Australian Constitution* as the framers had bigger issues during the creation (Defence, Immigration, Trade, Transport, Industrial unrest), as our independence did not arise from a revolution no need to protect human rights arose, the framers also didn't want to give any rights to the Chinese immigrants and they were very optimistic about how well functioning democracy can protect human rights. Our structure is the exception to the positivist assertion by Bentham.

International level: The *Charter of the UN* 1945 was the first movement towards international Human rights, after the atrocities that occurred in WWII, supported by the 1948 *Universal Declaration of Human Rights* (UDHR), although the UDHR was not legally binding originally, parts may be seen as customary international law. Although, the *Charter* has few references to HR (Art 1(3), 55 and 56) but does not explain what they are. *The International Covenant of Civil and Political Rights 1966* and *The International Covenant of Social, Economic and Cultural Rights 1966* followed that established the main first and second generation rights for humanity. Collectively, the UDHR, ICCPR and the ICESCR are seen as the international bill of rights. Many other Human Rights treaties have followed. The 7 core treaties ratified by Australia are:

1. ICCPR
2. ICESCR
3. *International Convention on the Elimination of Racial Discrimination* ← Led to 1975 RDA
4. *Convention on the Elimination of all forms of Discrimination Against Women*
5. *Convention on the Rights of the Child*
6. *Convention on the Rights of Persons with* Disabilities
7. *Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment*.

Some UN treaty bodies, like the UN Human Rights Committee (HRC) act as quasi-judicial bodies to make non-binding conclusions. They monitor state compliance through periodic reviews and publish 'report cards' and hear individual complaints (if the optional protocol has been ratified) e.g. *Toonen's case.*

Evaluation: Comprehensive protection for first and second gen rights, although, little their gen rights are protected. Further, international law rests on the good will of the States. Hence, difficulties arise with enforcement of the rights. It is hard for an individual to gain standing to have a complain heard in an international court, unless they do so under an ICCPR or an ICSECR established tribunal. Additionally, it is difficult to get States to comply with the HR. States do not need to comply with the HR committee rulings, and, there is no domestic enforcement of the rights.

As of May 2009 the key concerns of the UN's Human Rights Committee about Australia were: our Anti-Terrorism laws may be breaching the ICCPR , Australia's Mandatory Immigration Detention Policy breaches the ICCPR (arbitrary detention), Suspension of the Racial Discrimination Act in NT intervention breaches international obligation and that Indigenous Australians suffer statistically high levels of ill health, homelessness and poor education.

Further, they effectiveness of the international system is limited as some laws may be Constitutionally valid in Australia but contrary to our international obligations. For example, our law requiring mandatory detention of asylum seekers without individual periodic review was held constitutionally valid by the HCA in Chu Kheng Lim, but in A v Australia (1997) the HRC said it violated ***Article 9*** *ICCPR (against arbitrary detention).*

2009 National Human Rights Consultation Recommendations in response to the HRC report: *They took 35000 submissions from the public. The Joint parliamentary committee on human rights should be establishedto determine if some bills infringe our international HR obligations (due to concern that some legislation, such as ASIO legislation + NT Intervention legislation, was passed by parliament with insufficient consideration of HR), statements of HR compatibility should be attached to all bills when introduced into parliament to force ministers to consider HR and that Australia adopt a federal bill of rights on model of Victorian Charter and ACT Human Rights Act as this was supported by approximately 87% of the surveyed Australian public (Only 1st gen rights included).*

Further, they identified the need for better human rights education, suggested the audit of all federal laws to examine whether existing laws, policies and practices comply with our international human rights obligations, stated the amend AD(JR) Act should be amended so human Rights are a relevant consideration when the government makes decisions and that the Government departments should report annually on their compliance with human rights.

2010 government response: *They agreed that more HR education should be given and said they would introduce a scheme of 'pre-legislative scrutiny' to ensure that Parliament and Executive act compatibly with human rights when formulating policy and drafting legislation. However, they refused to introduce a federal bill of rights, or comprehensive protection of HR.*

The Human Rights (Parliamentary Scrutiny) Act 2011 (Cth) was introduced as a result to establish a new Parliamentary Joint Committee on Human Rights to scrutinize compliance with the seven core treaties Aus has ratified. It also requires a 'Statement of human rights compatibility' for new Bills, to ensure the Legislature and Executive consider HR obligations before implementing legislation. However, the court cannot review the adherence to HR obligations nor invalidate statutes on that bases as they are unelected and giving them the power to invalidate democratically made law would perhaps be excessive.

2011 Universal Periodic Review by the UN Human Rights Council: *145 recommendations were made including: Australia withdraw some of its reservations to core HR treaties and Australia implement recommendations of UN bodies (eg HRC, UNHCR).*

How are human rights protected in Australia? In many diverse ways! However, it is all patchy and inconsistent as a result and protected to different extents. However, despite the results to a 2006 survey, whereby 61% of Australians believed we had a Bill of rights, this is not the case.

Australian Constitution

The High Court has narrowly interpreted few express individual rights in the Constitution: Section 116 – freedom of religion, Section 117 – freedom from discrimination on the basis of state residence, Section 80 – trial by jury, Section 51 (xxxi) – acquisition of property on just terms. Further, they have found implied structural protections in the Constitution through Chapter III finding separation of federal judicial power (*Boilermakers')* and Principles of responsible and representative government (s 7 and s 24) and from this the implied right to political communication. These are seen as the major protections of liberties, illustrating how weak our constitutionally entrenched protections are. Further, the democratic institutions protect the majority. This can lead to the issue of tyranny of the majority, as the minority can be unprotected. The framers of the constitution likely knew about this, but chose to allow it as they were part of the majority. These both protect against potential tyranny of the State. However, some rights, like s 51(xxxi) can be avoided by the Cth, through secret agreements with state governments as the rights do not typically bind the states.

In the State Constitutions, there are no similar human rights provisions! Further, there is no separation of powers at the State level. Although there is democratic protections. Additionally, some of the Commonwealth Constitution protections may apply, like *Kable,* or s 117. Overall, the state is much more patchy!

Statute Law (legislative protections)

Mainly a loose collection of separate acts protect our HR, they do not have the symbolic importance of the US Bill of Rights. Firstly, through positive protection. For example, Federal Anti-Discrimination acts: *Racial Discrimination Act* 1975 (Cth) etc. and In SA, *Equal Opportunity Act*, *Human Rights (Sexual Conduct) Act 1992* (Cth) implemented Art 17(3) ICCPR following *Toonen's case,* or the *Torture Prohibition and Death Penalty Abolition Act 2010* (Cth). The strength of this is that it can be domestically enforced in courts, unlike international law. The weakness with this protection is that the legislation can be suspended or repealed like the RDA with the NT intervention. However, the Constitution can only be changed through a referendum. First generation rights seem to be adequately protected, but it is also far from comprehensive (gays do not have any federal protection against discrimination). The second way is through statutory interpretation (below in the presumptions).

However, the Legislation has also been used to limit our HR, such as the *Anti-Terrorism Act No 2 (2005)* (Cth) – allows control orders *eg* Jack Thomas – allows detention of terror suspects for extended periods of questioning *eg* Dr Haneef. 10% - 15% of legislation is used to protect HR, but the same % also burdens them.

Parliament protection: Joint Parliamentary Committee on HR began operation in March 2012. It has a 'preventive' role (to minimise risks of HR violations) and an 'educative role'. It aims to test legislation for its potential to be incompatible with human rights and it reports to Parliament. *It is*

not limited to new legislation. (Expanding on above) where a Bill limits rights, a Statement of Compatibility should ideally explain: whether and how the limitation is aimed at achieving a legitimate objective; whether and how there is a rational connection between the limitation and the objective; and whether and how the limitation is proportionate to that objective.
Hence, this protection is very patchy! The State even more so!

Common Law

Possibly weak as to invoke these rights they need to be infringed first due to the reactive nature of common law. Further, common law can be overruled or interfered with by parliament. Nonetheless, the interpretative presumptions act as some sort of protection. Murphy J explained in *Hammond v the Commonwealth* that a right '…is presumed to exist unless it is excluded by express words or necessary implication, that is by unmistakeable language.' *Coco v The Queen* expanded on this by stating 'General words will rarely be sufficient for that purpose if they do not specifically deal with the question'. The other two presumptions that assist this are: they parliament does not intend to legislate retrospectively and that they intend to legislate consistently with human rights… unless clearly rebutted as above.

Moreover, criminal process rights, for example the right to legal representation as established in *Dietrich v The Queen,* also assist in protecting our rights. The judge also has a very strong power to stay a trial if they believe the defendant is being denied justice. Some of the criminal process rights are protected by *Boilermakers'.* Tort law, and administrative law, also protect some rights, like the right to procedural fairness (Admin) or the right to life, liberty and security of person (torts). Accordingly, Brennan J in *Mabo v Queensland (No 2)* stated *'international law is a legitimate and important influence on the development of the common law, especially when international law declares the existence of universal human rights.'* Nonetheless, this is limited per McHugh J in *Al kateb v Godwin* that '*It is not for courts*, exercising federal jurisdiction, *to determine whether the course taken by Parliament is unjust or contrary to human rights*.'

Federal Oversight Institutions – Human Rights 'Watchdogs' *(Not binding!!)*

Federal Level: Australian Human Rights Commission, Commonwealth Ombudsman, Privacy Commissioner, National Security Legislation Monitor or the Australian Information Commissioner. At State level: Equal Opportunity Commission and the State Ombudsman.

The Australian Human Rights Commission is the broadest body. Before *Brandy's case* it heard complaints (now the Federal Magistrates Service + Fed Ct). It now conciliates complaints e.g. between individuals and Govt depts, promotes rights through education, reviews and monitors legislation and can intervene in cases if given leave by court (eg recent immigration detention case involving ASIO assessments of risk). John Uhr, Simon Evans and Caroline Evans all agree that these watchdog mechanisms provide a valuable scrutiny mechanism to protect HR.

Hence, we are better than countries like Afghanistan, but not as good as other common law countries as no Constitutional Bill of Rights (like US) or Statutory (like UK or NZ). And our current protections are not absolute. Entrenched rights are particularly good for minorities as they are less protected by the democratic system in Australia which allows the majority to rule.

Statutory Bill of Rights

Dissimilar to the UK or NZ, we do not have a Federal statutory Bill or Rights. However, at the state level we have the ACT *Human Rights Act 2004* and Victoria's *Charter of Rights and Responsibilities*

Act 2006. They are aimed at ensuring that primary responsibility for HR protection is given to the Legislature + Executive, and accordingly do not allow the judiciary to invalidate any laws. This follows the *dialogue model* based on parliamentary rights model (UK and NZ). Courts do not have the power to 'strike down' legislation to preserve parliamentary sovereignty. Nonetheless, per s7(2) of the Vic Charter, human rights are still not absolutely protected.

How does the *Victorian Charter of Rights and Responsibilities* operate?

Dialogue model! Role of legislature: Per s28 a statement of compatibility must accompany each Bill. The Scrutiny of these statements is performed by Scrutiny of Acts and Regulations Committee (SARC) – Section 30. This leads to parliamentary debate and hopefully more HR consistent legislation. *Parliament is given the final say!*

Role of the executive: Public authorities are given a direct duty, per s 38(1), to not act in a way incompatible with a human right and in decision making to give proper consideration to rights. Further, the executive supplies watchdogs! The Victorian *Equal Opportunity and Human Rights Commission* (VEOHRC) looks at compatibility of existing legislation and common law + declarations of incompatibility and override (section 41). And the *Ombudsman* investigates the compatibility of administrative action with the Vic Charter.

Role of the Judiciary: Courts are given a duty, under s 32(1), to interpret all statutory provisions in a way that is consistent with human rights. Per 32(2) International law and the judgments of domestic, foreign and international courts relevant may be considered. BUT per s32(3)(a) this does not affect the validity of an Act or provision that is incompatible with a human right.

Under s 36 if the Supreme Court believes a statutory provision is inconsistent with a human right, the Court may make a declaration to that effect. Under s 36(5)(a) a declaration does not affect the validity of an Act or (b) give rise to a cause of action, under s 37 the parliament has the final say! *It is solely to facilitate public debate!* Eg *Momcilovic's case.*

Operation (critique): It proactively guides the process of policy-making and legislative drafting, informs the electorate through publically available statements made in Parliament: e.g. when a bill is introduced or when it is debated in parliament. Also informs electorate through reports of the Human Rights Commission regarding the compatibility of existing laws and through annual reports of Govt departments. It arms the electorate with useful information when going to the ballot box. It also increases the transparency of government and constrains their power under s38(1).

I also agree with the fact that the courts do not have the power to override a bill if it is incompatible with HR. Although this would allow for HR to receive greater protections, particularly for minorities, it would also allow the unelected, and unaccountable judiciary to be supreme to the democratically elected and accountable legislature. The legislature is able to undertake the balancing act, and consider the policy reasons for possibly breaching HR as they hopefully have the best interests of the community to heart, however, the courts would unlikely be able to do this. Unlike the fear, there has been no flood of litigation experienced in the UK, the ACT or Victoria.

However, in ACT and Victoria, litigants arguing Bills of Rights do not directly benefit from such litigation. Eg Momcilovic's case in Victoria. Rather, non-litigants are benefiting from using these Bills of Rights as tools of advocacy. Further, if the legislature does breach HR, there is nothing to enforce the HR. Thus, breaches can still occur and our rights are not absolute! It is also a time consuming system. Comprehensive 1st gen rights, but no 2nd or 3rd gen. So not comprehensive protection. And can't enforce it against private authorities.

	Purpose:	**Appointment and removal:**	**Applies to:**	**Complaints:** *(but can go on own initiative!)*	**Investigatory powers:**
Commonwealth Ombudsman Act	s 5 –to investigate matters of administration, where complaint made, or on own motion.	Appointment: Cth Act s 21 – by Governor-General for a term under 7 years. Removal: s 28 – GG on address from both Houses of for misbehaviour or incapacity; or where bankrupt or absent without leave.	Departs or s 3 'Prescribed authority', including government service providers (s 3A), and private contractors under a contract govt (s 3BA). **NOT** ministerial actions and decisions, actions of judges, actions of intelligence bodies such as ASIO, and public service employment disputes. (s 5(2))	Complaints can be dismissed where the complainant does not have a sufficient interest in the subject of the complaint (s 6).	→ Private investigation (s 8) →Power to obtain documents (s 9) →Power to examine witnesses (s 13) →Power to enter premises (s 14) →Required to accord procedural fairness (s 8(5)) →Power to conciliate (s 17A)
State Ombudsman Act	s 13 – to investigate any administrative act on own initiative or on complaint. + s 14 – to investigate and report on matters referred by Parliament + s 15 – to conduct a review of the administrative practices and procedures of an agency	Appointment: s 6: by Governor on recommendation of both Houses of Parliament until age of 65 years. Removal: s 10 – Governor on address from both Houses of Parliament.	s 3: govt departs, disciplinary boards, councils, statutory authorities, universities, any company established for a public purpose by an Act or subject to control or direction by a member of the executive. **NOT** Ministers , Crown legal advisers, private citizens, businesses and companies, judicial bodies, complaints by employees about their employers, police, Commonwealth bodies.	Has to be by a person or body of persons 'directly affected by the administrative act to which the complaint relates' (s 15) or guardians, nominated representatives.	→Private investigation (s 18(3)) →Determines own procedure of investigation (s 18), but must provide affected agency right to comment →Powers of a Royal Commission (s 19) →Summons, take sworn evidence, privilege →Entry and inspection of premises (s 20)