

## AUSTRALIAN PUBLIC LAW STUDY NOTES

### FOUNDATIONS

#### State, Power and Accountability

- In legal terms, the state refers to the structure under which a community is politically unified. This includes public institutions, officials, governments, laws, etc. It requires a permanent population, defined territory and sovereign government.
- Officials and institutions must <sup>1</sup>maintain social order, <sup>2</sup>create and regulate legal roles and relationships, and <sup>3</sup>coordinate collective action to realise social needs.
- Public law <sup>1</sup>confers power upon officials and institutions, <sup>2</sup>imposes limits on that power, and <sup>3</sup>regulates the exercise of power. It comprises Constitutional Law and Administrative Law.
- In order to avoid corruption and tyranny, state officials must comply with the law.
- In Australia, public law is relevant at Commonwealth, State and Territory level, and across the legislative, administrative and judicial branches.
- The Commonwealth was established under s3 Commonwealth of Australia Constitution Act (UK). The legislative branch was established in s51, and military and naval command was bestowed upon the Governor-General in s68. Executive power was created by s61.
- States were given formal equality in s99, and citizens were given the right to reasonable use of water and rivers in s100.
- The regulatory measure of a Speaker of the House was outlined in s35, and the right to trial by jury was established in s80.
- The election of Senators for a period of six years by vote was established in s7. The role of the Ombudsman was outlined in s4, the function of the Ombudsman was established in s5, and the Reports by the Ombudsman were discussed in s15. The House of Representatives was established by s24.
- Public law can be <sup>1</sup>constitutional (s16 Constitution Act 1975 (Vic)), <sup>2</sup>statutory (s5 Judicial Officers Act 1986 (NSW)), <sup>3</sup>regulatory (Air Navigation Regulations 1947 (Cth)), <sup>4</sup>common law (Lee v NSW Crime Commission (2013)), <sup>5</sup>conventions (that the Governor-General exercises their power only upon the advice of the Ministers), and <sup>6</sup>doctrines, principles and values (no one is above the law).
- The Constitution is <sup>1</sup>a structural foundation of our legal system, <sup>2</sup>of the utmost importance, and <sup>3</sup>relatively stable over time.
- The Federal Parliament was established in s1, and s71 established the High Court of Australia.
- The Australian state is characterised by its <sup>1</sup>historical origins as a collection of colonies, <sup>2</sup>politico-moral identity as a liberal democracy, <sup>3</sup>federal structure of Commonwealth, State and Territory government, and <sup>4</sup>lack of constitutional or statutory human rights provisions.

#### History of the Australian State

- Pre-settlement, Australia was governed by Indigenous Law, which involved Indigenous communities, people, laws, constitutions and sovereignty.
- Britain at the time was experiencing declining monarchical power, developing Parliamentary power, the beginnings of a representative democracy, a developing responsible government, the development of the Rule of Law, the rise of judicial power, and the development of civil and political rights.
- For settled colonies, as Australia was, indigenous law was not recognised by Britain, which saw British Law as applicable to the situation and condition of the colony. Thus, the only applicable laws to NSW were those expressly or impliedly intended to apply to NSW or the colonies.
- NSW was considered a penal colony until 1823, and the Governor created laws consistent to British Law under British supervision. The 1823 NSW Act established a legislative council which could override the Governor, could determine revenue spending and remained subject to British veto.
- The 1828 Australian Courts Act confirmed the colonies as civil settled colonies, and ensured English law would apply. The Legislative Council's role was further confirmed, and the role of the Supreme Court was strengthened.