

# General Overview

- **Commonwealth Law/ Act**
  - Head of power/ characterisation
    - > S.51(29) External Affairs (includes treaties, extra territoriality, relations with other countries, international concern)
    - > s.51(20) Corporations
    - > s.96 Grants to the States
  - Implied Limits/ Prohibitions
    - > Separation of powers
    - > Limits on Commonwealth's ability to bind States (intergovernmental immunities)
    - > Implied Freedom of Political Communication
    - > Implied freedom to vote
  - Express Limits
    - > S.81 spending power
    - > S.92
- **Commonwealth executive action, no legislation: Executive power or spending power s 81**
- **State Law**
  - How State Law Made: Restrictive Procedures (manner and form provisions)
  - Implied limits of States' ability to bind the Commonwealth executive (intergovernmental immunities)
  - Implied Freedom of Political Communication
  - S.92
  - Separation of powers (Kable etc)
- **Both State & Commonwealth laws**
  - All of the above
  - S.109 Inconsistency

# Topic 1: Fundamental Concepts

## Constitutional Law

- The main body of law which regulates the three arms of Government:
  - The Executive – which administers and enforces the law (i.e. Government)
  - The Legislature – which drafts the law (i.e. Parliament)
  - The Judiciary – which interprets the law
- The Constitution regulates the relationship between each arm and provides authority for the exercise of public power as well as any limits to that power

## Parliamentary Sovereignty

- Parliament has the power to make or repeal any law provided that it adheres to the limitations imposed by the Commonwealth Constitution
  - Thus, due to the presence of the Constitution, the Parliament is only partially sovereign
- It exists because Parliament is the only body elected by the people and is therefore a Representative Government

## Rule of Law

- The Rule of Law suggests that we live in a society governed by declared laws rather than arbitrary exercises of power (AV Dicey)
- There are three main aspects:
  1. There is to be absolute supremacy of laws and laws alone
  2. All are equal before the law
  3. The Constitution is to be formed with an emphasis on the right of individuals

## Separation of Powers

- This doctrine prescribes that the functions of the three arms of Government are to be clearly separated to safeguard the integrity of the system

- How separate are the executive and legislature?
  - Parliament also controls the executive, as members of parliament form the executive – ie. not very separate
  - Have checks and balances on the power of executives because of this:
    - States – federal parliament doesn't have complete control of how the country runs
    - Two houses of parliaments and strong senate often controlled by other parties
    - Very strong separation of power when it comes to separating the judiciary and the other 2 branches

## Federalism

- Federalism is the sharing of power between the Commonwealth and the States
- Australia is a Federation, meaning power is shared between the two levels

## Types of Power

- Exclusive Powers
  - Where only the Commonwealth has power over legislative area (e.g. coining money)
- Concurrent Powers
  - Where both the States and the Commonwealth have power over legislative area
  - Most of them are set out in s.51 of the Constitution (e.g. marriage, copyright)
- Residual Powers:
  - Where legislative area is left exclusively to the States
  - Sometimes the Constitution specifies these, sometimes silent on the power
  - Silence is taken as being a Residual Power (e.g. hospitals and education)

## Referenda

- The Constitution cannot be changed unless via the process outlined in s.128 of the Constitution

# Topic 2: State Legislative Power

## The nature of State constitutions

- State constitutions are an ordinary act of parliament
  - That means parliament can change them without referendum
- Certain manner and reform requirements exist if wanting to change them
- State constitutions are 'controlled', and if being changed, the parliament merely has to express clearly that they are referring to the constitution (McCawley v R 1920)

## Plenary power

- Ss.15 and 16 of the Victorian Constitution grant the Victorian Parliament plenary law making power (Union Steamship)
  - This is residual power over any subject matter
- The States also have extra-territorial powers – s.2(1) Australia Act
  - Ie. Can make laws for matters external to their State or national borders
  - All that is required is a remote or general nexus between the subject matter and the State (Union Steamship – injury outside NSW, ship registered in NSW, NSW law applies)
- The States may pass laws which are immoral or unjust (Durham Holdings)

## Restrictions on state power

### 1) Constitutional restrictions

- The Commonwealth has exclusive legislative power over:
  - S.52: Seat of government, places acquired for public purpose and department of public services
  - S.90: Customs, excise and bounties
  - S.114: Raising forces and imposing tax of property of Commonwealth or State
  - S.115: Coining money
- S.109 – Commonwealth law will trump state law on concurrent powers (s.51) if they are inconsistent, to the extent of the inconsistency

- Manner and form restrictions placed by previous Parliament will also apply

## **2) Victorian Charter of Human Rights and Responsibilities**

- S.32 – Victorian courts and tribunals must interpret statute in a way compatible with human rights
  - However, the court cannot attribute a meaning to a provision which is inconsistent with both the grammatical meaning and apparent purpose of the enactment (Slaveski)
- Note that the Charter is an ordinary Act of Parliament so it may easily be amended
- Basically, all the courts can do is issue a declaration of incompatibility to be reviewed by Parliament (ss.36 and 37)
  - S.31(1) – Parliament may declare that an Act/provision is valid despite incompatibility