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16. Cession
 - a. One state loses control of its territory and agrees to be taken over.
 - b. Existing law remains in place for local inhabitants unless overridden by law of new sovereign
17. Conquest
 - a. Existing law remains in place for local inhabitants unless overridden by law of new sovereign
18. Occupation (international law term) / settlement (common law term)
 - a. Terra nullius
 - i. Original: desert, uninhabited and uncultivated land
 - ii. Enlarged → barbarian theory in a 1889 UK case: socially primitive land with no law or sovereignty → condemned in *Western Sahara* advisory opinion (1957)
 - b. Exercise a certain degree of governmental authority sufficient to maintain order
 - c. Display intention to acquire sovereignty
 - d. Consequence: ‘all the English laws then in being, which are the birth right of every subject, are immediately there in force’: Blackstone, quoted in *Mabo*.
19. Prescription

***Mabo v Queensland (No 2)* (1992) 175 CLR 1, 31-52 (Brennan CJ)**
20. Mabo and others from the Meriam people commenced proceedings in 1982 in response to the *Queensland Amendment Act 1982*. Islands had been annexed to Queensland in 1879 ‘by an exercise of the prerogative’.
21. Justiciability:
 - a. An annexation of territory by exercise of the prerogative is an act of State.
 - b. The acquisition of territory by a sovereign State for the first time is an act of state which cannot be challenged, controlled or interfered with by the courts of that State: *Seas and Submerged Lands Case*.
 - c. Recognition by our common law of the rights and interests in land of the indigenous inhabitants of a settled colony would be precluded if the recognition were to fracture a skeletal principle of our legal system.
 - d. Although the question whether a territory has been acquired by the Crown is not justiciable before municipal courts, those courts have jurisdiction to determine the consequences of an acquisition under municipal law.
22. The common law became the common law of all subjects within the colony who were equally entitled to the law’s protection as subjects of the Crown.
23. The common law does not necessarily conform with international law, but 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.
24. Native title:
 - a. The source of native title is the traditional connection to or occupation of the land, determined by the character of traditional laws and customs.
 - b. Differences between radical and absolute titles:
 - i. The acquisition of territory is chiefly the province of international law; the

- acquisition of property is chiefly the province of the common law.
- ii. Radical title can extinguish lingering rights of native title, if expressed clearly and unambiguously → Native title can be extinguished by grant of fee simple.
- iii. Radical title could co-exist with native title.
- c. Upon acquisition of sovereignty, the Crown acquired a radical title (territory) rather than absolute beneficiary title (ownership).
- d. Recognition of the radical title of the Crown is quite consistent with recognition of native title to land, for the radical title, without more, is merely a logical postulate required to support the doctrine of tenure, and to support the plenary title of the Crown.
→ Doctrine of tenure: in English legal theory, every parcel of land in England is held either mediately or immediately by the King who is the Lord Paramount; the term 'tenure' is used to signify the relationship between tenant and land. Both lord and tenant have an interest in the land: the King had 'dominion directum', the subject 'dominium utile'.

Territoriality

- 25. State boundaries are capable of alteration only by CP, but subject to state approval via CP and referendum.
- 26. Between Cth and the Australian states and territories
 - a. A state or territory can exercise power over territory within its boundaries.
 - b. Technological advances do not bring along boundary changes: *SA v Vic* (PC, 1914).
 - c. Cth grants legislative power to states regarding adjacent territorial sea of 3 nm: *Coastal Waters (State Powers) Act 1980* s 5(a).
 - d. Federal supremacy clause: *CC* s 109.

Extraterritoriality: Australian states and territories

- 27. Presumption against extraterritorial effect.
 - a. Displace by express words or necessary implication.
 - b. State can make laws for the peace, order and good government of that state that have extraterritorial operation: *Australian Act 1986* (Cth) s 2(1).

***Port MacDonnell Professional Fishermen's Association Inc v SA* (1989) 168 CLR 340, 374**

- 28. Cth and SA made an arrangement about a fishery which extended from SA coast but fell within Vic territory. The Association challenged the arrangement and the law on grounds that it was an invalid exercise of state's extraterritorial legislation.
- 29. Test for validity when the state legislates extraterritorially:
 - a. There must be sufficient connection or nexus between the state and the subject matter of the legislation: *Pearce v Florenca* (HCA, 1976)
 - i. Even remote or general connection would suffice: [518] per Gibbs J.
 - b. Strictness of the test depends on the context.
- 30. *CC* contains no express paramountcy provision similar to s 109 by reference to which conflicts between competing laws of different states are to be resolved.
- 31. Where there is no suggestion of the direct operation of the law of one state in the territory

of another, the problem of conflicting state laws arises only if there be laws of two or more states which, by their terms or operation, affect the same persons, transactions, or relationships.

Extraterritoriality: Cth

32. The starting point is the presumption that jurisdiction (in all forms) is territorial, and may not be exercised extraterritorially without some specific basis in international law: Crawford.
33. Basis for extraterritorial criminal jurisdiction: genuine connection between the subject matter of the jurisdiction and the territorial base or reasonable interests of the state in question: Crawford.
 - a. Territorial
 - b. Nationality
 - c. Passive nationality → protective principle
 - d. Universal
34. Cth's power to legislate extraterritorially is constitutionally restricted: Cth to make laws with respect to the external affairs: CC 51(xxix)

XYZ v Cth (2006) 227 CLR 532, 535-544 (Gleeson CJ)

35. [1] Issue: constitutional validity of legislation enacted by CP which makes it a criminal offence, punishable by the law of Australia, for an Australian citizen or resident, while outside Australia, to engage in certain forms of sexual activity involving children.
36. [6] Extraterritorial acts can only lawfully be the object of jurisdiction if (Brownlie, *Principle of Public International Law*, 6th ed (2003) 30):
 - a. There is a substantial and bona fide connection between the subject-matter and the source of the jurisdiction;
 - b. The principle of non-intervention in the domestic or territorial jurisdiction of other states is observed;
 - c. A principle based on elements of accommodation, mutuality and proportionality is applied.
37. [10] External affairs power includes 'power to make laws with respect to places, persons, matters of things outside the geographical limits of Australia: *Polyukhovich v Cth* (1991) 172 CLR 501.
 - a. [12] Developed statehood;
 - b. [12] Attained international status;
 - c. 'Foreign power' redefined: *Sue v Hill*;
 - d. [15] No Australian state has legislative power to enact laws aimed at the conduct of foreigners or threatening Australian state and citizens.
38. [14] State legislation requires a relevant territorial connection, but the test of relevant is to be applied liberally, and even a remote or general connection will suffice.

3. State and People

Citizenship

81. Questions of legal right and liability should be resolved by application of the law and not the exercise of discretion.
 - a. Discretion should ordinarily be narrowly defined and its exercise capable of reasonable justification.
 - b. Rules and principles of statutory interpretation determine how law is applied: French CJ.
82. The laws of the land should apply equally to all, save as to the extent that objective differences justify differentiation.
83. The law must accord adequate protection for fundamental human rights.
 - a. Principle of legality.
 - b. Parliamentary supremacy, subject to *CC*.
 - c. *Jus cogens*.
84. Means must be provided for resolving, without prohibitive costs or inordinate delay, bona fide civil disputes which the parties themselves are unable to resolve.
 - a. Access to DR \neq access to justice
85. Ministers and public officers at all levels must exercise the powers conferred on them reasonably, in good faith, for the purpose of which the powers were conferred and without exceeding the limits of such powers.
 - a. *CC* s 75(v) allows HCA to issue writs of prohibition and mandamus against officers of Cth, and the power to grant ancillary relief in the form of certiorari.
 ➔ *Plaintiff S157* [5]: Parliament may create, and define, the duty, or the power, or the jurisdiction, and determine the content of the law to be obeyed. But it cannot deprive the court of its constitutional jurisdiction to enforce the law so enacted.
 - b. If a law imposes a duty, mandamus may issue to compel performance of that duty.
 - c. If the law confers power or jurisdiction, prohibition may issue to prevent excess of power or jurisdiction.
86. Adjudicative procedures provided by the state should be fair.
 - a. Judicial independence and impartiality.
 - b. Institutional protections: security of tenure, remuneration cannot be decreased while in office.
87. The existing principle of the rule of law requires compliance by the state with its obligations in international law and on constitutional interpretation.
 - a. Dualist system ➔ Enforceability?
 - b. ⇔ Common law and statute will be interpreted compatibly with international law in certain circumstances ➔ Conflicts of law?

IV. INSTITUTIONS OF GOVERNMENT

11-12. Legislature

Repository of legislative power

1. *CC* s 1: The legislative power of the Cth shall be vested in a Federal Parliament, which shall consist of the Queen, a Senate, and a House of Representatives.
 - a. Power limited by subject matter: *CC* ss 51 (heads of powers), 53 (money bills).

2. *VC* s 15: The legislative power of the State of Victoria shall be vested in a Parliament, which shall consist of Her Majesty, the Council, and the Assembly.
 - a. Power not limited by subject matter: *VC* s 16 (have power to make laws in and for Victoria in all cases whatsoever).
 - b. Federal laws prevail to the extent of inconsistency with the state laws: *CC* s 109.
3. GG:
 - a. Appointed by the Queen as Her Majesty's representative in the Cth: *CC* s 2.
 - b. Appoint times for parliamentary sessions, dissolve HoR: *CC* s 5.
 - c. Declare royal assents subject to *CC*, or withhold assent or reserve the law: *CC* s 58.
 - d. Issue writs for general elections of members of HoR: *CC* s 32.
 - i. Governor of the state issue writs for election of the state senators: *CC* s 12.
4. Comparison with the UN General Assembly:
 - a. UNGA cannot make binding laws, but only pass non-binding resolutions.
 - b. No system of responsible government through UNGA.
 - i. Secretary General appointed by the Security Council, not UNGA.
 - c. Decision made by two-thirds majority of the members present and voting: *General Assembly Rules of Procedure* rr 83, 85.

Parliamentary functions

5. Constitute the executive government through HoR → responsible government.
6. Scrutinise the government:
 - a. Remains one of the critical means, by which the Parliament retains an ultimate control over the public purse strings: *Brown v West*.
 - b. Scrutinise spending through the annual appropriations by way of *Supply* and *Appropriation Acts*.
7. Legislate:
 - a. *CC* s 51 (Cth heads of powers) CP to makes for the peace, order and good government of Cth with respect to ...;
 - b. *CC* s 52 (legislative powers exclusive to CP);
 - c. *CC* s 53: Senate has equal power with HoR in respect of all proposed laws, except for money and tax bills.
8. Control public finance — 'appropriate revenue or moneys, or impose taxes': *CC* ss 53-5
 - a. Money bills must originate in HoR: *CC* s 53.
 - b. Senate cannot amend money bills: *CC* s 53.
 - i. Senate cannot amend any bills to 'increase any proposed charge or burden on the people'.
 - ii. BUT Senate can return money bills to HoR with a message requiring certain amendments.
 - c. Tax bills can only deal with tax: *CC* s 55.
 - i. A tax bill shall deal with one subject of taxation only.
 - ii. 'Any provision therein dealing with any other matter shall be of no effect'.
 - d. Appropriation bills can only deal with appropriation: *CC* s 54.
 - e. No money shall be drawn from the Consolidated Revenue Fund except under

appropriation made by law: CC ss 81, 82 → Parliamentary scrutiny.

***Brown v West* (1990) 169 CLR 195, 199-213**

9. Under the *Remuneration Tribunal Act 1973* (Cth), the Tribunal had the power ‘to determine’ allowances of public money for members of CP, which either House can disallow. The executive purports to increase the postage allowance. Brown MP challenged the minister’s decision to increase entitlements set by the Tribunal under the *Act*.
10. Whether the executive power of Cth extends to the provision of a postage allowance supplementary to the postage allowance determined by the Tribunal?
 - a. 201: The executive power of Cth extends to the provision of what is necessary or convenient for the functioning of the Parliament provided that funds for that purpose are appropriated by the Parliament.
⇔ Where the executive power extends to the discretionary provision of benefits having a pecuniary value to the individual members of the Parliament who may draw upon the benefit as they will.
 - b. 205: There is no prerogative power as exists outside the executive power which validates the appropriation: It is a necessary implication of a statutory fixing of the amount of total expenditure that there is no residual executive power to increase it. The alleged prerogative power is curtailed by the operation of relevant statutes in conjunction with the determination of the Tribunal.
 - c. Legislative conferral of power?
 - i. An *Appropriation Act* has a negative as well as positive effect: not only does it authorise the Crown to withdraw moneys from the Treasury, it ‘restricts the expenditure to the particular purpose’.
 - ii. The court found the provision for CP’s ‘running costs’ was too vague or nebulous to confer express or legitimate authority on the executive.
 - iii. No as there was no distinct and express authorisation.
11. Whether the *Supply Act (No 1) 1989-1990* contains an appropriation for the purpose of supplementing the postal allowance determined by the Tribunal?
 - a. Differences between *Supply* and *Appropriation Act*:
 - i. 205: An appropriation made by a valid law is the necessary authority for the executive government to take moneys out of the Consolidated Revenue Fund: CC ss 81, 83.
 - ii. 205-6: CP exercises its power of appropriation either by Acts containing standing appropriation or by annual appropriation Acts.
 - iii. 206: A supply Act is an Act which appropriates the Consolidated Revenue Fund for use in a particular financial year pending the passing of an Appropriation Act.
 - b. 208: There cannot be appropriation in blank, appropriations for no designated purpose, merely authorising expenditure with no reference to purpose: *A-G (Vic) v Cth* (1945) 71 CLR 253.
209: ⇔ The *Supply Act (No 1) 1989-1990* merely expresses the purposes for which the money may be expended in very broad terms and the question is whether those purposes include the supplementing of the entitlement to a postage allowance

- determined by the Tribunal.
- c. 212: The *Supply Act (No 1) 1989-1990*, on its true construction, does not
 - i. Confer additional power on the executive government;
 - ii. Override any restriction on the executive power imposed by the *Remuneration Tribunal Act* and the *Parliamentary Allowances Act*;
 - iii. Appropriate funds to supplement the postal allowance determined by the Tribunal.
 12. Relationship with *Buddock v Vadarlis*: in *Brown*, the executive tried to unilaterally increase a discretionary benefit to Parliamentarians; in *Ruddock*, the executive authorised actions, pecuniary or otherwise, that were necessary and convenient to, or even incidental to, the effective running of the government.

Parliamentary privilege

13. CC s 49 protects the same powers, privileges, and immunities of the Senate and of HoR as enjoyed by the UK House of Commons at federation.
 - a. *Bill of Rights 1688* (UK) s 9: freedom of speech within Parliament
 - b. *Parliamentary Privileges Act 1987* (Cth)

***Egan v Willis* (1998) 195 CLR 424 (Gaudron, Gummow, Hayne JJ)**

14. A standing order of NSW Legislative Council provided that any papers may be ordered to be laid before the House. Egan MP refused to table papers called for by resolution of the House. The House passed a resolution judging him guilty of contempt of the House, and suspending him from the service for the remainder of the day's sitting.
15. Justiciability:
 - a. [5] Questions respecting the existence of the powers and privileges of a legislative may present justiciable issues when the elements in a controversy arising in the courts under the general law but they should not be entertained in the abstract and apart from justiciable controversy.
 - b. [22] Art 9 of the *Bill of Rights* define the relationship between the courts and the Westminster Parliament: That the freedom of speech, and debates or proceedings in Parliament, ought not to be impeached or questioned in any court or place out of Parliament.
 - c. [27] A court may judge the existence of a privilege in a House of Parliament but may not examine the occasion and manner of its exercise: *R v Richards; Ex parte Fitzpatrick and Browne* (1955) 92 CLR 157, 162 (Dixon CJ) [setting: CP].
16. Responsible government:
 - a. [42] 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'.
 - b. [42] It has been said of the contemporary position in Australia that, whilst 'the primary role of Parliament is to pass laws, it also has important functions to question and criticise government on behalf of the people' and that 'to secure accountability of government activity is the very essence of responsible government'.

- c. [42] The conduct of the executive branch is not confined to Ministers and the public service. It includes the affairs of statutory authorities and public utilities which are obliged to report to the legislature or to a Minister who is responsible to the legislature: *Lange v ABC* (1997) 189 CLR 520, 561.
In Australia, s 75(v) of CC and judicial review of administrative action under federal and state law, together with freedom of information legislation, supplement the operation of responsible government.
 - d. [42] The system of responsible government necessarily implies 'a limitation on legislative and executive power to deny the electors and their representatives information concerning the conduct of the executive branch of the government throughout the life of a federal Parliament': *Lange v ABC* (1997) 189 CLR 520, 561.
 - e. [43] Accountability of individual Ministers: Ministers are accountable to Parliament, in the sense that they have a duty to explain in Parliament the exercise of their powers and duties and to give an account to Parliament of what is done by them in their capacity as Ministers or by their Departments [setting: UK].
 - f. [45] Two aspects of responsible government:
 - i. Ministers may be members of either House of a bicameral legislature and liable to the scrutiny of that chamber in respect of the conduct of the executive branch of the government.
 - ii. The ministry must command the support of the lower House of a bicameral legislature upon confidence motions.
17. [32] The legislature has such powers, privileges and immunities as are reasonably necessary for the proper exercise of its functions: *Barton v Taylor* (1886) 11 App Cas 197 (Privy Council):
- a. ➔ [25] The Speaker had authority to cause a member, who had been disorderly in the chamber and who had left it in a disorderly manner, to be arrested outside the chamber and brought back into it: *Willis and Christie v Perry* (1912) 12 CLR 592 [Setting: NSW Legislative Assembly].
 - b. ➔ [32] The power of suspending a member guilty of obstruction or disorderly conduct during the continuance of a current sitting was reasonably necessary for the proper exercise of the functions of the House: *Barton v Taylor* (1886) 11 App Cas 197, 203 (Setting: NSW Legislative Assembly).
 - c. [49] The primary function of the Legislative Council is, subject to the provisions of CC, to make laws for the peace, welfare and good government of NSW: *NSW Constitution Act* s 5.
 - d. [50] What is 'reasonably necessary' at any time for the 'proper exercise' of the 'functions' of the Legislative Council is to be understood by reference to what, at the time in question, have come to be conventional practices established and maintained by the Legislative Council.
 - i. [51] Conventional practices might be varied or abrogated by legislation.
 - ii. But there has been no relevant legislation relevant to the present case.
 - e. [52] The broad reach of the legislative power conferred by s 5 indicates an imperative need for each chamber to have access to material which may be of help to it in