

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); and
- The Judiciary – which interprets the law

The Constitution regulates the relationship between each arm.

It also 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:
 - There is to be absolute supremacy of laws and laws alone;
 - All are equal before the law; and
 - 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.

← 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 Cth constitution (e.g. marriage, copyright)
- Residual Powers: where legislative area left exclusively to the States
 - Sometimes Cth constitution specifies these, sometimes silent on the power
 - Silence is taken as being a Residual Power (e.g. hospitals and education)

STATE LEGISLATIVE POWERS

← Plenary Law Making Power →

- Cf. with the Enumerated power of the Cth
- This is the power of the States stemming from the State Constitutions

S 15 and 16 (Victorian Constitution) T

- **The parliament of Victoria shall have power to make laws in and for Victoria in all cases whatsoever** → Grants **plenary** (Unqualified/ Absolute) law making power →
 - **NOTE:** For Residual Power

Union Steamship Co v The King (1988)

“Peace order and good government” is **not words of limitation** on power

- Case involved s 5 of NSW Constitution

Includes Extra-Territorial powers → as confirmed by s 2(1) Australia Act

Facts: A man injured outside of Australia – in international seas and wanted workers compensation

Question: Was whether NSW workers compensation legislation could comply to an injury that happened beyond the territorial borders of NSW?

Held: Yes because that law will be valid so long as there is a nexus between the legislation and the state

- *States can pass legislation that applies beyond borders so long as there is a link between the topic being legislated over and the state* → needs to be brought back to the state
- **The Nexus Requirement:** just needs to be remote – a low threshold – The boat being registered in NSW was viewed as a sufficient nexus
 - Cf. **CTH** power is broader than the states in that there is no nexus requirement

- Each STATE has this power → The state may pass laws which are immoral or unjust

Durham Holdings v NSW (2001)

Facts = involved the **Coal Acquisition Act 1981** → certain coal mines were the property of the state of NSW and not the people that owned the mines on which they were located (**NSW acquiring property that was privately owned**)

- **Capped the compensation** -- therefore not justly compensated -- unjustly acquiring property

Held = *No such limits have ever been applied to the states plenary law-making power and no limit was to be applied now* → the state may pass laws that may allow it to acquire property on unjust terms

- Brings back the notion of **Parliamentary Sovereignty** → “A morally fallible legislature could have unlimited legal authority” (**Goldsworthy**)

- So the State constitutions are Constitutions are inherently **flexible and may be amended** by passing ordinary legislation (**McCawley - UK**)
 - Generally, the argument is in favour for a flexible constitution -- shouldn't be hard because we want them to change with the times and be dynamic
 - Cf. CTH is inflexible - s 128 provision → specific process in order to amend, the referendum (requires a double majority, majority of population, majority of states)

Taylor v AG of QLD (1917)

The end of the senate in QLD

Facts = Parliament of QLD passing the ‘parliamentary bills referendum act 1908’ – **wanted to avoid a situation where the upper house could block laws from passing** →

- The act was **an alternative procedure to passing a law** (standard = simple majority in both houses,
- The alternative = if government tried to pass legislation and passed twice by lower house and rejected twice by upper house then it could go to referendum and **if the law passed the referendum then it would become law**
- Then they used this to abolish the upper house

Held = Two main issues for the HC

Did the QLD parliament had power to create an alternative procedure?

- HC said yes -- Parliament's plenary law-making power means they can create an alternative legislative procedure

Based on the idea of Parliamentary Sovereignty - *Parliament can make any law that it likes including a different law-making process*

- If this is valid then can this procedure be used to abolish the upper house
- Yes and also when the Question went to referendum the people said no so HC didn't pay much attention to it
 - BUT A few years later the people said yes
 - **QLD changed the constitution simply by passing a bill**