

MLL323 – Constitutional Law

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Introduction

The constitution is the rules that set up government and what governments can and cannot do.

FC = Federal Constitution (often not used)

SC = State Constitution (Victoria unless otherwise specified)

The Federal Constitution

Called the *Commonwealth of Australia Constitution Act*. It is called an Act because it is an Act of parliament passed by Britain.

Begins with 'Covering Clauses' which act as a preamble, followed by the body of the constitution itself.

Separates the Parliament (Chapter 1), Judiciary (Chapter 2) and Executive (Chapter 3) branches.

Constitutional Design

Written Constitutions

Need to decide, should rules be written or unwritten? What should be law and what should be convention?

Convention v Law e.g: Royal Assent to Bills by the Queen when a bill passed by both Houses is presented to the Governor-General at the GG's discretion. GG may withhold assent or leave for pleasure of the Queen. – written law (s 58). However, convention is that GG assents all laws passed by Parliament.

Law is enforceable in Court, but convention is not.

Constitution is a 'higher law'.

Representative Government

Need to decide how we choose who can make the rules. E.g. People electing officials to represent the senators for each state in the senate (upper house) (s 7) as well as the members of the House of Representatives (lower house) (s 24).

Responsible government is that government is accountable to the people in parliament.

Separation of Powers

Separation of state and federal powers. Each is a system of responsible government.

3 arms of government:

1. Judiciary
 - a. Judges and people who decide if laws have been broken
2. Parliament
3. Executive
 - a. Prime minister and cabinet and people who perform the day to day running of the country (by convention)
 - b. Queen and GG are executive (by law) (s 61)

Other points to consider:

- Separation between Parliament and executive quite soft (*s 64*)
 - You cannot be in the executive for more than 3 months unless elected into the parliament
 - Governor General can appoint officers to administer departments of State
- There is a collective responsibility of the executive as a group to the legislature (parliament) and individual responsibility of the ministers within the executive to the legislature (parliament)
- Money raised by the executive must be used for the purpose of the commonwealth in a manner sanctioned by the constitution (*s 81*)
- This money must be appropriated by law before it can be drawn from the treasury (*s 83*). Parliament determines the budgets that appropriate this expenditure
- If Senate does not pass the budget (like in 1975 with Whitlam):
 - Generally, this is unconventional as typically the Senate will pass the budget when it passes the lower house
 - Usually, Prime Minister will resign, otherwise;
 - Governor General makes determination as head of state (as per *s 64* above) and in Whitlam's case, Whitlam was sacked

Drawbacks of this system:

- Australia has a 'whip' system when it comes to individuals voting in parliament
 - Individuals must vote in line with their parties views or their careers could be over (convention)
- This means that the leader of the party in power directs the votes of their party
- If this party also is majority in the house, the parliament cannot keep a check on the executive as the parliament is controlled by the executive

Federalism

Federal and State level there is an Executive, Legislature and Judiciary.

Power is divided between all the levels of the federal and state.

Bicameralism

The 2 levels of legislature:

Federal: House of Representatives and Senate

Victoria: Legislative Assembly and Legislative Council

Parliamentary Sovereignty

Parliament can enact any law it wants. In the UK, this is unconditional, except for parliamentary sovereignty itself. In Australia, parliament is also bound by the constitution (*s 51 FC*)

Rule of Law

General idea is that it is a system governed by laws, not the whims of those in power. Must have Dicey's three criteria:

Non-arbitrariness: No person can be punished or made to suffer except for a distinct breach of law

Equality: All persons are subject to the ordinary laws, even the Crown.

Judge made: Constitutional rights are the result of a judicial decision, not general constitutional principles.

'The Australian Constitution is framed upon the assumption of the rule of law' – Gleeson CJ (*Plaintiff S 157/2002*)

The High Court has Original Jurisdiction in just about all matters (*s 75 FC*)

Rule of law provides a consistent framework in which to behave. Provides an objective standard in which decisions about conduct can be made.

Generally speaking, citizens have the right to act unless the law says they cannot – not the other way around where laws provide right to act.

From Fuller:

1. Laws must be general
2. Accessible
3. Forward looking
4. Intelligible
5. Consistent
6. Stable

Judicial Review

Judges review matters against the constitution from both the legislative and administrative perspective. Allowing for a judicial review is a given as per *Australian Communist Party v Commonwealth* Fullagar J who said: 'in our system the principle of *Marbury v Madison* [i.e. allowing for judicial review] is axiomatic'.

Invalidity is considered *ab initio* (conditions returned to as if actions committed invalidly never occurred).

Allows any law or regulation to be tested against the constitution to see if it is permitted.

Strong form review: Can strike down legislation and decision are binding on other arms of government.

Weak form review: Court can only issue an advisory opinion. This cannot strike down legislation

Constitutional History

British Settlement

British Colonialization works with a conquest, a cessation or *terra nullius* – land that no one owns.

British law was incorporated into Australia in the *Australian Courts Act 1828*.

Colonial and State Constitutions

In 1850, the *Australian Constitutions Act (No. 2) 1850* was passed and Colonies could make their own constitutions. This power was made absolute in the *Colonial Laws Validity Act*, subject to a Repugnancy Constraint where Colonies cannot legislate against British laws that extended to the colonies (*s 2-3 Colonial Laws Validity Act*)

Towards Federation

Many reasons for it, but some include:

- Getting uniform customs between the colonies
- Defence
- Common infrastructure such as telegraph lines and systems

We have states/territories within a federation as we started that way as colonies which formed a federation and did not want to remove their own power.

National Australian Convention was held in 1891 to discuss federation and draft original constitution, written by Andrew Inglis Clark and passed to Samuel Griffiths who completed it.

1897-1898 had 3 further conventions in Sydney, Adelaide and Melbourne to debate the drafts and refine them.

Queen then passed Constitution Act and federation was formed in 1901.

Towards Independence

Balfour Declaration

Occurred in 1926.

Canadian Prime Minister was upset with the level of British interference with Canada and called for meeting with various heads of state including Australia to discuss UK dominance.

From this, the Balfour declaration was written. A declaration is more like a statement, not law. It declared that governments of these countries were at the same level as the UK crown.

A committee was formed and this decided to investigate legal relationship with dominions and empire. This prompted that Statute of Westminster.