

## Australian Constitution

- ✓ Commonwealth of Australia was formed on 1st January 1901 by the [Commonwealth of Australia Constitution Act \(Imp\)](#)
- ✓ Our system is a hybrid model between:
  - United Kingdom – representation and responsible government
  - United State – Federation, separation of powers & judicial review
- ✓ Australian Constitution have both a written and unwritten part
  - The written document known as “the Australian Constitution” is set out in s9 of the [Commonwealth of Australia Constitution Act 1900](#). It is complemented by the [Statute of Westminster 1931 \(Imp\)](#) and the [Australia Act 1986 \(Cth\)](#) and is supplemented by the common law and unwritten conventions.
  - Each of the Australian States also has a written constitution supplemented by conventions and the common law.
- ✓ Flexible and rigid Constitution
  - Under the “rigid” Australian Constitution, amendments are initiated by the Commonwealth Parliament but can only be effected by a referendum satisfying the requirements of s 128.
  - The Constitutions of the Australian States are for the most part flexible.

## Federalism

- ✓ Legislative powers
  - Commonwealth has specific legislative powers: ss 51, 52
  - The State retain general legislative power, subject to the Constitution: ss 107, 108.
  - Commonwealth power prevails over inconsistent State legislation: s 109
- ✓ Maintenance of the State
  - The Constitution of the State are ‘continued’: s 106;
  - High Court doctrine protects the State by limiting what the Commonwealth can do to a State, for example, it cannot destroy a State, or essential governmental institution of a State, etc.
- ✓ Privileged status of the people of the State
  - They choose senators, and counted in both majorities for s 128 referendum.
  - Protected by s 117 of the Constitution for discrimination.
    - However, people of territories are not guaranteed to vote.
- ✓ Operation of federalism in the structure of both Houses of Parliament
  - House of Representatives
    - Members are chosen by people of the Commonwealth, but number of members in each State dependant on the respective numbers of the people in each State;
    - Each original State to receive minimum 5 members regardless of population.
  - Senate – The States House?
    - Senators chose by the people of the States;
    - Original States must have minimum 6 senators.
    - Original States to have equal number of senators, regardless of population.
- ✓ Powers of each House come from federalism concerns
  - A compromise between majority rule (House of Representatives) and representation of the States (Senate).
  - However, in reality, Commonwealth has financial advantage and legislative advantage due to history and High Court interpretation of Commonwealth powers.

## Separation of Powers

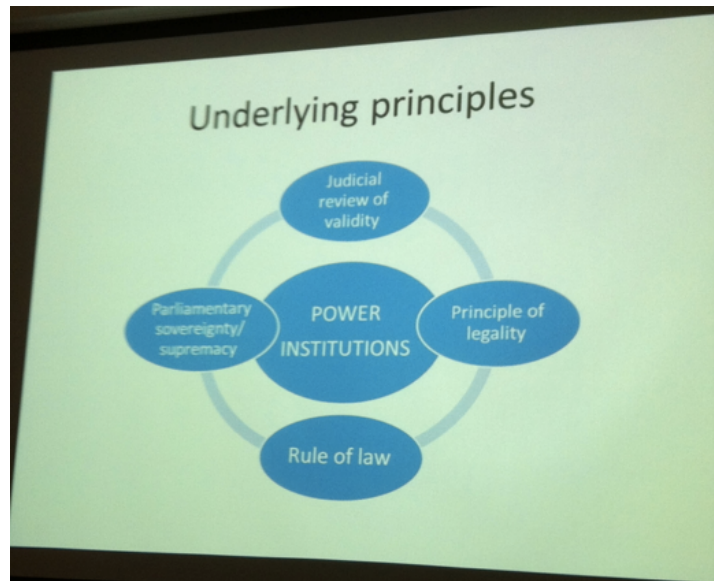
### **What is the Separation of Powers?**

- ✓ Divides power into 3 arms
  - The legislative function is the making of new laws and alteration or repeal of existing laws.
  - The executive/administrative function is the general and detailed carrying on of government according to law i.e. implementation of government.
  - The judicial function consists of the interpretation of law and application by rule or discretion to facts of case.

### **Can we really separate powers?**

- ✓ It is impossible to adopt a complete separation of powers but checks and balances in power has developed between three arms.
  - Additional factors need to be considered in Australian context
    - Responsible government, that is, executive is responsible to the people through the legislature.
      - As a consequence, s 64 of the Constitution provides all Ministers (members of the executive) MUST be members of Parliament (the legislature).
      - ➡ Therefore, there is a blurring of line between executives and legislatures as required by the Australian Constitution.
    - But, the judiciary is more strictly separated from the other arms.
      - S 76 of Australia constitution confers that the High court will have jurisdiction in all matters arising under the constitution or involving its interpretation.
- ✓ Argues that in a sense administration subverts the tripartite system
  - This raises the question of is administration properly party of executive or legislative function? Or is it a 4th arm of government?

➡ This is because there is a growth in independent commissions, given tasks and specific powers to act like a court e.g. tribunals.



### **Principle of Legality**

☑ In the absence of express provisions, legislation must be interpreted on the basis that it is not intended to deprive people of rights which had accrued under the old law.

- The principle of legality is the legal ideal that requires all law to be clear, ascertainable and non-retrospective. It requires decision makers to resolve disputes by applying legal rules that have been declared beforehand, and not to alter the legal situation retrospectively by discretionary departures from established law. It is closely related to legal formalism and the rule of law.

### **Rule of Law**

☑ The rule of law generally refers to the influence and authority of law within society, especially as a constraint upon behaviour, including behaviour of government officials. This phrase is also sometimes used in other senses. Three aspects:

- “the supremacy of law or predominance of the regular law over the influence of arbitrary power”
- “equal subjection of all classes to the ordinary law of the land administered by the ordinary law courts. It excludes the idea of exemption of anyone from the duty of obedience to the law”
- “A formula for expressing that the law of the constitution is a consequence of the rights of individuals, as defined and enforced by the courts.

### **Judicial review of validity**

☑ The validity or applicability of a rule may be determined in an action for declaratory judgment in a court of competent jurisdiction. The board shall be made a party to the action. The court shall declare the rule invalid or inapplicable if it finds that it violates constitutional provisions or exceeds the statutory authority of the board or was adopted without substantial compliance with required rule-making procedures.

### **Parliamentary sovereignty**

Parliamentary sovereignty (also called parliamentary supremacy or legislative supremacy) is a concept in the constitutional law of some parliamentary democracies. It holds that the legislative body has absolute sovereignty, and is supreme over all other government institutions, including executive or judicial bodies. The concept also holds that the legislative body may change or repeal any previous legislation, and so that it is not bound by written law (in some cases, even a constitution) or by precedent.

## General

### ✓ Written or unwritten

- A written constitution is a document which founds a political community and defines its chief political institutions, confers powers and circumscribes permissible limits. Example include the Constitution of the United States
- Whereas UK never adopted a single document so it sometimes said that the constitution of UK is “unwritten”.

### ✓ Rigid or flexible (Dicey):

- A **flexible** constitution is one under which every law of every description can legally be changed with ease by one and the same body.
- Whereas a **rigid** constitution is one under which certain laws generally known as constitutional or fundamental laws cannot be changed like ordinary laws. In order to effect a constitutional change, the legislative body may have to follow a special and more difficult procedure.

### ✓ Enactment of a law

- The power to enact a law includes the power to repeal or amend the law: [A-G \(WA\) v Marquet \(2003\)](#)

## Commonwealth Constitution Amendment

A proposed law for the alteration of the Commonwealth Constitution must be (under [s 128](#)):

### ✓ Involves a number of institutions / groups: **both Houses of Parliament, the Governor-General, the electors**

### ✓ Double majority reflects federal concerns

- Passed by an **absolute majority** of both Houses of the Federal Parliament, or by one House twice; and
- At a referendum, passed by **a majority of the people as a whole**, and by **a majority of the people in a majority of the states** (i.e. in at least 4/6 states).

Note: there is compulsory voting (s 45 [Referendum \(Machinery Provisions\) Act 1984 \(Cth\)](#)).

### ✓ The “frozen continent”

- Since 1901, 44 proposals have been put to referendum – only 8 have succeeded
- Since 1977, 8 proposals all unsuccessful

## State Constitution Amendment

### ✓ States in empire

- States were colonies, within the British Empire
- States owe their existence and juridical basis to ss 106 and 107 of the Constitution
  - ▶ The Constitution of each State of the Commonwealth shall, subject to this constitution, continue as at the establishment of the Commonwealth ... until altered in accordance with the Constitution of the State: s 106
  - ▶ Saving power of State Parliament: s 107
- However, Imperial laws affected the powers of the colonies / States.

### ✓ Parliamentary sovereignty

- In general, one Parliament cannot limit the powers of future Parliament.
- Unless, a higher authority gives a Parliament the power to do so.
  - ▶ In terms of a State, before 1986, a higher authority came from Imperial legislation, i.e., the [Colonial Laws Validity Act 1865 \('CLVA'\)](#)
  - ▶ In 1986, the [Colonial Laws Validity Act 1865 \('CLVA'\)](#) ceased to be effective upon the commencement the [Australia Acts 1986 \(Cth\)](#) and by virtue of ss 2 & 3 of the Act, the State Parliaments were given full legislative power.

### ✓ Flexible State constitution.

- State has power to change its Constitution: [Taylor v A-G of Queensland \(1917\)](#), and the State Constitution can be amended impliedly: [McCawley v The King \[1920\]](#)

### s 6, Australia Acts 1986

Notwithstanding sections 2 and 3(2) above, a law made (THE AMENDING LAW) after the commencement of this Act **by the Parliament of a State respecting the constitution, powers or procedure of the Parliament** of the State shall be of no force or effect unless it is made in such **manner and form** as may from time to time be **required by a law** (ENTRENCHING PROVISION) made by that Parliament, whether made before or after the commencement of this Act.

## Manner and Form Requirement

### ✓ **Nature** of the amending law should be with respect to the **‘constitution, powers or procedure’** of the Parliament

- The constitution of a State Parliament includes its own **‘nature and composition’**: [A-G \(NSW\) v Trethowan](#)
  - ▶ For measures affecting the constitution, powers and procedure of the State Parliament, the requirement of **submission to a referendum** can be ‘a manner and form’ requirement: [A-G \(NSW\) v Trethowan](#)
    - Rationale: it is confined to obtaining the direct approval of the people whom the ‘representative legislature’ represents.

- ▶ The constitution of the Parliament extends to features which got to give it and its Houses a representative character: [AG \(WA\) v Marquet \(2003\)](#)
  - ✓ Therefore, **legislation establishing a scheme for electoral distribution** and the bureaucratic machinery for its implementation is 'a law respecting constitution, powers and procedure' of the Parliament.
- A mere requirement of a special declaratory form of words is not a 'manner and form' requirement: [South-Eastern Drainage Board \(SA\) v Saving Bank of SA \(1939\)](#)
  - ▶ In the present case, the requirement to include the words 'notwithstanding the provisions of "The Real Property Act 1886"' is not a 'manner and form' requirement.
- ☑ **Double entrenchment** of the 'entrenching provision'.
  - If a 'manner and form' provision is not doubly entrenched, a Parliament is free to make the amendment, either to the entrenched provision directly, or to the 'manner and form' provision: [A-G \(NSW\) v Trethowan](#)
- ☑ **No** purported **abdication** of legislative power – Principle of Parliamentary sovereignty.
  - A provision requiring the consent to legislation of an entity **not forming part of the legislative structure** amounts to a renunciation of the lawmaking power: [West Lakes Ltd v SA \(1980\)](#)
- ☑ **Consequence**
  - Under the CLVA there was no power to enact the entire amending law.
  - Under the Australia Acts the entire amending law is of 'no force or effect'.

## Issue of Justiciability

- ☑ Should the court intervene before the Governor gives assent to the amending Bill, or wait for it to be challenged once it has become a law?
- ➡ In general, courts prefer to deal with the issue of the validity of a law after it is enacted ([Cormack v Cope](#)).
  - However, **exceptions** are sometimes made if the law expressly prohibits a Bill being presented to the Governor unless it complies with a manner and form procedure ([A-G \(NSW\) v Trethowan](#)) and
  - Where there would be no remedy or it would not be in the public interest to wait until the Bill received assent ([AG \(WA\) v Marquet \(2003\)](#))
    - In this case, s 13 of the Electoral Distribution Act 1947 (WA) (entrenching provision) required an absolute majority in both Houses of the State Parliament for 'any Bill to amend this Act' → The amendment affects representative character.

## Express Right

### **Trial by jury: s 80**

☑ **Section 80** of the Constitution appears to guarantee a right to trial by jury for offences arising under Commonwealth laws.

- ☑ Section 80 applies if there is a trial on indictment, but **leaves it to the Parliament to determine whether any particular offence shall be tried on indictment or summarily**: [Kingswell v The Queen \(1985\)](#)
  - Does not apply to summary offence: [R v Archdall & Roskrug; Ex parte Carrigan and Brown \(1928\)](#)
- ☑ Consequence of the **s 80**
  - Defendant can't elect to waive the right to jury: [Brown v The Queen \(1986\)](#)
  - Jury unanimity is an essential element of the "trial by jury" guaranteed by s 80: [Cheatle v The Queen \(1993\)](#)

### **Freedom of religions: s 116**

- ☑ s 116 contains four separate guarantees: the Commonwealth shall not make any law
  - "for establishing any religion",
  - "for imposing any religious observance", or
  - "for prohibiting the free exercise of any religion", and
  - "no religious test shall be required as a qualification for any office or public trust under the Commonwealth".
- ☑ What is a religion? [Church of the New Faith v Commissioner of Pay-Roll Tax \(Vic\) \(1983\)](#). (not a rigid test)
  - Belief in the supernatural (what extends beyond the senses)
  - Ideas relating to man's nature and place in the universe and his relation to things supernatural.
  - Requirements that adherents engage in particular conduct
  - Ability to recognise adherents as a identifiable group
  - Recognition by adherents themselves of their beliefs & practices as constituting a particular religion.

#### ☑ **Establishment clause**

- In the interpretation and application of s 116, **the establishment of religion must be found to be the object of the making of the law**. Further, because the whole expression is "for establishing any religion", the law... must have that objective as its express and single purpose: [DOGS case \(1981\)](#)
  - Therefore, government funding of church schools does not amount to an "establishment" of religion in this case.

#### ☑ **Free exercise clause**

- Cannot legislate to stop someone from doing a religious act, but can compel someone to do something they're required not to: [Krygger v Williams \(1912\)](#)
- **Freedom guaranteed by s 116 is not absolute**: It is subject to limitations necessary for the protection of the community & in the interests of the social order: [Jehovah's Witnesses Case \(1943\)](#)
  - Query whether the interference with religious freedom, if any, is appropriate and proportionate to the protection and preservation of the community (or those people): [Stolen Generations case \(1997\)](#)

#### ☑ **Application scope**

- s 116 applies to all Commonwealth laws: [Jehovah's Witnesses Case \(1943\)](#)
- s 116 does not apply to State laws: [DOGS case \(1981\)](#)
- s 116 is likely to apply to laws made under s 122 (legislative power for territories): [Stolen Generations case \(1997\)](#)

### **Right of out-of-state residents: s 117**

- ☑ Section 117 is designed to prevent a State from imposing any "disability or discrimination" on residents of another State by reason of their interstate residence.
- ☑ This Section was "designed to enhance national unity and a real sense of national identity" per Mason in [Street v Queensland Bar Association \(1989\)](#)

- ☑ Section 117 only applies to resident, therefore it does not necessarily preclude discrimination on the basis of domicile: [Davies and Jones v WA \(1904\)](#)
  - The mode of residence is interpreted widely to include all kinds of residence: [Street v Queensland Bar Association \(1989\)](#)
- ☑ Not every kind of differential treatment by a State of a resident of another State amounts to the imposition of a disability or to discrimination within the meaning of s 117: [Street v Queensland Bar Association \(1989\)](#)
  - Query whether the plaintiff has been subjected to **a greater burden or disadvantage than that imposed on a resident** of the legislating State: [Street v Queensland Bar Association \(1989\)](#)
- ☑ Where s 117 applies, its effect is to leave the law valid but its operation in the individual case inapplicable: [Street v Queensland Bar Association \(1989\)](#)