

## Table of Contents

<b>Constitution .....</b>	<b>9</b>
<b>Overview .....</b>	<b>9</b>
Definition .....	9
Purpose.....	10
Overview of Australian Constitution .....	10
Features of Aus Cn.....	10
Nominal Constitution .....	10
Written/Unwritten .....	11
Flexible and Rigid Constitutions .....	11
Strengths and Weaknesses of Australia’s Constitution .....	11
History of Australian Constitution .....	12
<b>Constitutionalism .....</b>	<b>12</b>
Overview.....	12
<b>Political and Legal Constitutionalism .....</b>	<b>13</b>
Amalgamated Society of Engineers v Adelaide Steamship Co Ltd (1920) .....	14
Australian Capital Television Pty Ltd v Commonwealth .....	14
Plaintiff S157/2002 v Commonwealth.....	14
<b>Rule of Law .....</b>	<b>15</b>
<b>Overview .....</b>	<b>15</b>
Definitions .....	15
Brian Z Tamanha, ‘On the rule of law: History, Politics, Theory’ (2004).....	15
AV Dicey ‘Introduction to the Study of the Law of the Constitution’ (1959).....	15
W.I Jennings, ‘The Law and the Constitution’ (1959) .....	16
Julius Stone, ‘Social Dimensions of Law and Justice’ (1966).....	16
International Commission of Jurists, ‘Report of the International Congress of Jurists, New Dehli’ (1959) .....	16
Sir Ninian Stephen, ‘The Rule of Law’ (1959).....	16
Robert French, ‘Rights and Freedoms and the RoL’ (2017) .....	16
<b>Separation of Powers .....</b>	<b>18</b>
Overview.....	18
Definition .....	18
Relationship.....	18
The bodies .....	18
Overview of Checks and Balances .....	18
Exceptions to the SoP .....	18
Baron de Montesquieu, “The Spirit of the Laws” (1949).....	19
Owen Hood Phillips and Paul Jackson, “Constitutional and Administrative Law” (1987) .....	19
Gerard Carney, ‘Separation of Powers in the Westminster System’ (1994).....	19
Lisa Burton and George Williams, “The Integrity and Function and ASIO’s Extraordinary Questioning and Detention Powers” (2012) .....	20
<b>Acquisition of Legal Independence .....</b>	<b>21</b>
Overview.....	21
<b>The Colonial Legislatures .....</b>	<b>21</b>
R v Burah.....	21
Hodge v The Queen (1883).....	22
Australian Implications .....	22
Alex Castles, ‘The Reception and Status of English law in Australia’ (1963).....	22
<b>The Colonial Legacy .....</b>	<b>22</b>

Overview.....	23
<b>Doctrine of Repugnancy .....</b>	<b>23</b>
Union Steamship Co v Commonwealth (1925).....	23
Commonwealth v Limerick Steamship Co (1924).....	23
Skin Wool Case (1926).....	23
<b>Doctrine of Extraterritoriality .....</b>	<b>23</b>
Implication for Australia .....	23
<b>Statute of Westminster .....</b>	<b>23</b>
Overview.....	23
Geoffrey Sawyer, 'The Australian Constitution' (1988).....	24
Provisions of Statute of Westminster (1931) .....	24
Australia's reluctance .....	24
<b>The Australia Act 1986 (Cth) .....</b>	<b>24</b>
Overview.....	24
Sue v Hill (1999).....	24
<b>Overview of the Acts .....</b>	<b>25</b>
<b>Popular Sovereignty .....</b>	<b>25</b>
Definition .....	25
Legal Validity of the Constitution .....	25
<b>The Path to Federation .....</b>	<b>Error! Bookmark not defined.</b>
Overview.....	<b>Error! Bookmark not defined.</b>
Timeline .....	<b>Error! Bookmark not defined.</b>
For and against .....	<b>Error! Bookmark not defined.</b>
Why no bill of rights?.....	<b>Error! Bookmark not defined.</b>
<b>Australia's Constitutional Hybrid .....</b>	<b>Error! Bookmark not defined.</b>
Introduction.....	<b>Error! Bookmark not defined.</b>
<b>Australia: Overview of the Constitutional Hybrid.....</b>	<b>Error! Bookmark not defined.</b>
UK (Westminster System).....	<b>Error! Bookmark not defined.</b>
US (Federation System) .....	<b>Error! Bookmark not defined.</b>
Canada .....	<b>Error! Bookmark not defined.</b>
<b>Westminster Model.....</b>	<b>Error! Bookmark not defined.</b>
History .....	<b>Error! Bookmark not defined.</b>
Responsible and Representative Government .....	<b>Error! Bookmark not defined.</b>
Martin Loughlin, Foundations of Public Law .....	<b>Error! Bookmark not defined.</b>
<b>Parliamentary Sovereignty .....</b>	<b>Error! Bookmark not defined.</b>
AV Dicey, Introduction to the Study of the Law of Constitution (1885) .....	<b>Error! Bookmark not defined.</b>
Geoffrey Walker, 'Dicey's Dubious Dogma of Parliamentary Sovereignty' (1985).....	<b>Error! Bookmark not defined.</b>
<b>defined.</b>	
Jeffrey Goldsworthy, 'The Sovereignty of Parliament: History and Philosophy' (1999)	<b>Error! Bookmark not defined.</b>
<b>defined.</b>	
W Jennings, 'The law and Constitution' (1959) .....	<b>Error! Bookmark not defined.</b>
TRS Allen, 'Law Liberty and Justice' (1993).....	<b>Error! Bookmark not defined.</b>
R ( <i>Jackson</i> ) v Attorney General [2006] .....	<b>Error! Bookmark not defined.</b>
<b>Constitutional Conventions .....</b>	<b>Error! Bookmark not defined.</b>
AV Dicey, Introduction to the Study of the Law of Constitution (1885) .....	<b>Error! Bookmark not defined.</b>
NW Barber, The Constitutional State (2010) .....	<b>Error! Bookmark not defined.</b>
Definition of Constitutional Conventions .....	<b>Error! Bookmark not defined.</b>
Function.....	<b>Error! Bookmark not defined.</b>
Practise .....	<b>Error! Bookmark not defined.</b>

Function in Australian.....	Error! Bookmark not defined.
Re Resolution to amend the Constitution [1981].....	Error! Bookmark not defined.
Nicholas Aroney, 'Law and Constitution' (2015).....	Error! Bookmark not defined.
<b>American Inheritance .....</b>	<b>Error! Bookmark not defined.</b>
Overview.....	Error! Bookmark not defined.
Timeline .....	Error! Bookmark not defined.
Stephen Gageler, 'Foundations of Australian Federalism and the Role of Judicial Review' (1987) .....	Error! Bookmark not defined.
<b>Bookmark not defined.</b>	
<b>Separations of Power: Horizontal and Vertical.....</b>	<b>Error! Bookmark not defined.</b>
Overview.....	Error! Bookmark not defined.
Michael Burgess, Comparative Federalism: Theory and Practice (2006) .....	Error! Bookmark not defined.
<b>Federalism.....</b>	<b>Error! Bookmark not defined.</b>
Definition .....	Error! Bookmark not defined.
Overview.....	Error! Bookmark not defined.
AV Dicey, Introduction to the Study of the Law of Constitution (1885) .....	Error! Bookmark not defined.
<b>Australian Federalism.....</b>	<b>Error! Bookmark not defined.</b>
Constitutional Commission, Final Report of the Constitutional Commission (1988) ...	Error! Bookmark not defined.
<b>defined.</b>	
Brian Galligan and Cliff Walsh, 'Australian Federalism Yes or No?' (1992) ....	Error! Bookmark not defined.
James Gillespie, 'New Federalism' (1994) .....	Error! Bookmark not defined.
<b>Judicial Review .....</b>	<b>Error! Bookmark not defined.</b>
Overview.....	Error! Bookmark not defined.
Definition .....	Error! Bookmark not defined.
Barry Friedman, 'How Public opinion has influenced the supreme court and shaped the meaning of the constitution' (2010) .....	Error! Bookmark not defined.
Marbury v Madison .....	Error! Bookmark not defined.
JR Lucas, 'The Principles of Politics' (1966).....	Error! Bookmark not defined.
Worcester v Georgia.....	Error! Bookmark not defined.
Brown v Board of Education .....	Error! Bookmark not defined.
Cooper v Aaron.....	Error! Bookmark not defined.
In Australia.....	Error! Bookmark not defined.
<b>Australian Federalism in Practice.....</b>	<b>Error! Bookmark not defined.</b>
<b>Intergovernmental Relations .....</b>	<b>Error! Bookmark not defined.</b>
Overview.....	Error! Bookmark not defined.
Robert French, 'The Incredible Shrinking Federation', (2012).....	Error! Bookmark not defined.
Tony Abbott, 'Battlelines', (2009).....	Error! Bookmark not defined.
<b>Federal Financial Relations .....</b>	<b>Error! Bookmark not defined.</b>
Overview.....	Error! Bookmark not defined.
Russell Matthews, Revenue Sharing in Federal Systems (1980) .....	Error! Bookmark not defined.
Commonwealth Grants Commission (2013) (HFI) .....	Error! Bookmark not defined.
WA Dept. of Treasury and Finance (2006) (VFI) .....	Error! Bookmark not defined.
<b>Popular Sovereignty .....</b>	<b>Error! Bookmark not defined.</b>
The Australia Act.....	Error! Bookmark not defined.
Sue v Hill (1999).....	Error! Bookmark not defined.
<b>Overview of the Acts .....</b>	<b>Error! Bookmark not defined.</b>
Popular Sovereignty Definition.....	Error! Bookmark not defined.
Legal Validity of the Constitution .....	Error! Bookmark not defined.
<b>Indigenous Sovereignty and Crown Sovereignty .....</b>	<b>Error! Bookmark not defined.</b>
<b>Indigenous Peoples.....</b>	<b>Error! Bookmark not defined.</b>

Introduction.....	Error! Bookmark not defined.
Key Events .....	Error! Bookmark not defined.
Milirrpum v Nabalco Pty Ltd (1971).....	Error! Bookmark not defined.
Mabo v QLD (No 2) (1992).....	Error! Bookmark not defined.
<b>Indigenous Sovereignty .....</b>	<b>Error! Bookmark not defined.</b>
Perspectives on Sovereignty.....	Error! Bookmark not defined.
Brennan, Gunn and Williams ‘Sovereignty and its Relevance to Treaty-Making’ (2004) ....	Error! Bookmark not defined.
<b>not defined.</b>	
Mansell, Treaty and Statehood (2016) .....	Error! Bookmark not defined.
Aboriginal Sovereignty today .....	Error! Bookmark not defined.
<b>United States.....</b>	<b>Error! Bookmark not defined.</b>
Introduction.....	Error! Bookmark not defined.
Worcester v Georgia (1832) .....	Error! Bookmark not defined.
<b>The Australian situation .....</b>	<b>Error! Bookmark not defined.</b>
Introduction.....	Error! Bookmark not defined.
Coe v Commonwealth (1993) (No 2) .....	Error! Bookmark not defined.
Walker v NSW (1994).....	Error! Bookmark not defined.
Wik Peoples v Queensland (1996) .....	Error! Bookmark not defined.
Yorta Yorta Community v Victoria (2002).....	Error! Bookmark not defined.
Native Title Report 2012.....	Error! Bookmark not defined.
R.S French, ‘A Constitutional Shift’ (2009).....	Error! Bookmark not defined.
<b>Self-Determination .....</b>	<b>Error! Bookmark not defined.</b>
Introduction.....	Error! Bookmark not defined.
Definition .....	Error! Bookmark not defined.
Sanders ‘Toward an Indigenous Order of Australian Government’ (2002) ....	Error! Bookmark not defined.
Janet Hunt, ‘Between a Rock and a Hard Place’ (2008).....	Error! Bookmark not defined.
M Davies ‘Indigenous Struggles in Standard-Setting’ (2008).....	Error! Bookmark not defined.
Difficulty in the responding to Aboriginal issues in Gov .....	Error! Bookmark not defined.
<b>Aboriginal and Torres Strait Islander Peoples .....</b>	<b>Error! Bookmark not defined.</b>
Overview.....	Error! Bookmark not defined.
Council for Aboriginal Reconciliation (2000) .....	Error! Bookmark not defined.
Brennan, Behrendt, Strelein and Williams ‘Treaty’ (2005).....	Error! Bookmark not defined.
<b>Indigenous Peoples and the Constitution.....</b>	<b>Error! Bookmark not defined.</b>
Overview.....	Error! Bookmark not defined.
Cn Mentions of Aboriginal People .....	Error! Bookmark not defined.
Consequences.....	Error! Bookmark not defined.
<b>Races Power .....</b>	<b>Error! Bookmark not defined.</b>
Introduction.....	Error! Bookmark not defined.
<b>A Cth Power in Relation to Aboriginal People .....</b>	<b>Error! Bookmark not defined.</b>
Introduction.....	Error! Bookmark not defined.
French, ‘The Race Power: A Constitutional Chimera’ (2003).....	Error! Bookmark not defined.
<b>Reform: Constitutional Recognition .....</b>	<b>Error! Bookmark not defined.</b>
Recognition.....	Error! Bookmark not defined.
Report of the Expert Panel (2012) .....	Error! Bookmark not defined.
Uluru Statement from the Heart (2017).....	Error! Bookmark not defined.
Final Report of the Referendum Council (2017).....	Error! Bookmark not defined.
Current efforts for Constitutional Change .....	Error! Bookmark not defined.
<b>Legislature .....</b>	<b>Error! Bookmark not defined.</b>
History .....	Error! Bookmark not defined.
Overview of Australian Federal Parliament.....	Error! Bookmark not defined.

**Powers and Functions: Representation, Legislation, Accountability .....** *Error! Bookmark not defined.*

<b>Legislative powers of the Cth Parliament .....</b>	<i>Error! Bookmark not defined.</i>
Executive, Residual and Concurrent Powers .....	<i>Error! Bookmark not defined.</i>
The Division of Legislative Power: Australia .....	<i>Error! Bookmark not defined.</i>
The Division of Legislative Power: Canada .....	<i>Error! Bookmark not defined.</i>
The Division of Legislative Power: India .....	<i>Error! Bookmark not defined.</i>
Concurrent Powers: Australia .....	<i>Error! Bookmark not defined.</i>
Exception to Concurrent Powers .....	<i>Error! Bookmark not defined.</i>
Implied Immunity of Instrumentalities .....	<i>Error! Bookmark not defined.</i>
States Constitutional Protection .....	<i>Error! Bookmark not defined.</i>
Amalgamated Society of Engineers v Adelaide Steamship (1920) .....	<i>Error! Bookmark not defined.</i>
<b>Parliamentary Privilege .....</b>	<i>Error! Bookmark not defined.</i>
Definition .....	<i>Error! Bookmark not defined.</i>
Why is it necessary .....	<i>Error! Bookmark not defined.</i>
S 49 .....	<i>Error! Bookmark not defined.</i>
R v Richards: Ex Parte FitzPatrick v Brown .....	<i>Error! Bookmark not defined.</i>
Parliamentary Privileges Act (1987) Cth .....	<i>Error! Bookmark not defined.</i>
Parliamentary Privileges Act – s 16 (3) .....	<i>Error! Bookmark not defined.</i>
Purpose .....	<i>Error! Bookmark not defined.</i>
Limits .....	<i>Error! Bookmark not defined.</i>
Controversies .....	<i>Error! Bookmark not defined.</i>
<b>Composition: Eligibility, Representativeness and Diversity .....</b>	<i>Error! Bookmark not defined.</i>
<b>Eligibility for Election .....</b>	<i>Error! Bookmark not defined.</i>
Commonwealth Electoral Act (1918) s 163 .....	<i>Error! Bookmark not defined.</i>
Constitutional Restrictions .....	<i>Error! Bookmark not defined.</i>
Re Webster (1975) .....	<i>Error! Bookmark not defined.</i>
Re Wood (1988) .....	<i>Error! Bookmark not defined.</i>
Sykes v Cleary (1992) .....	<i>Error! Bookmark not defined.</i>
Citizenship Seven [2017] HCA .....	<i>Error! Bookmark not defined.</i>
<b>Judicial Review of Primary Legislation .....</b>	<i>Error! Bookmark not defined.</i>
Overview .....	<i>Error! Bookmark not defined.</i>
Definition .....	<i>Error! Bookmark not defined.</i>
Marbury v Madison .....	<i>Error! Bookmark not defined.</i>
Worcester v Georgia .....	<i>Error! Bookmark not defined.</i>
Brown v Board of Education .....	<i>Error! Bookmark not defined.</i>
Cooper v Aaron .....	<i>Error! Bookmark not defined.</i>
In Australia .....	<i>Error! Bookmark not defined.</i>
<b>Compulsory Voting at Federal Elections .....</b>	<i>Error! Bookmark not defined.</i>
Voting and Elections .....	<i>Error! Bookmark not defined.</i>
Constitution .....	<i>Error! Bookmark not defined.</i>
Commonwealth Electoral Act 1918 (Cth) .....	<i>Error! Bookmark not defined.</i>
Judd v McKeon .....	<i>Error! Bookmark not defined.</i>
<b>Express Right to Vote .....</b>	<i>Error! Bookmark not defined.</i>
Overview .....	<i>Error! Bookmark not defined.</i>
King v Jones (1972) .....	<i>Error! Bookmark not defined.</i>
R v Pearson; Ex Part Sipka (1983) .....	<i>Error! Bookmark not defined.</i>
<b>Implied Right to Vote .....</b>	<i>Error! Bookmark not defined.</i>
Overview .....	<i>Error! Bookmark not defined.</i>
Roach v Electoral Commissioner (2007) .....	<i>Error! Bookmark not defined.</i>
Rowe v Electoral Commissioner (2010) .....	<i>Error! Bookmark not defined.</i>
Murphy v Electoral Commissioner (2010) .....	<i>Error! Bookmark not defined.</i>

**State Legislative Power**..... Error! Bookmark not defined.  
 Introduction..... Error! Bookmark not defined.  
 Evolution of State Constitutions..... Error! Bookmark not defined.  
 Limits on State Power..... Error! Bookmark not defined.  
 Federal Constitution: Impact on States ..... Error! Bookmark not defined.  
 S 106 ..... Error! Bookmark not defined.

**Peace, Welfare and Good Government**..... Error! Bookmark not defined.  
 Overview..... Error! Bookmark not defined.  
 BLF Case (1986) ..... Error! Bookmark not defined.  
 Union Steamship Co (1988)..... Error! Bookmark not defined.  
 Durham Holdings (2001)..... Error! Bookmark not defined.  
 Jeffrey Goldsworthy, 'The Sovereignty of Parliament: History and Philosophy' (1959) Error! Bookmark not defined.

**The Executive** ..... Error! Bookmark not defined.

**The Crown** ..... Error! Bookmark not defined.  
 Overview..... Error! Bookmark not defined.  
 Town Investments v Department of Environment (1978)..... Error! Bookmark not defined.  
 Sue v Hill (1999)..... Error! Bookmark not defined.  
 Anne Twomey, Responsible Government and the Divisibility of the Crown (2008)..... Error! Bookmark not defined.

**The Governor General** ..... Error! Bookmark not defined.

Overview..... Error! Bookmark not defined.  
 Winterton, 'The Hollingworth Experiment' (2003)..... Error! Bookmark not defined.  
 Day to Day role of the GG..... Error! Bookmark not defined.  
 Commentary on the GG's role..... Error! Bookmark not defined.  
 Reserve powers ..... Error! Bookmark not defined.  
 Republic Advisory Committee 'An Australian Republic: The Options' (1993) Error! Bookmark not defined.  
 The 1975 Dismissal ..... Error! Bookmark not defined.  
 BC Wright. 'House of Representatives Practice' (2012) ..... Error! Bookmark not defined.  
 1975: Role of the Queen..... Error! Bookmark not defined.  
 Sir John Kerr, 'Statements by the Governor-General, 1975' (1981) ..... Error! Bookmark not defined.  
 Sir Garfield Barwick (CJ) 'Letter of advice to the GG' (1981) ..... Error! Bookmark not defined.

**Executive Power** ..... Error! Bookmark not defined.  
 Overview..... Error! Bookmark not defined.  
 Prerogative Powers ..... Error! Bookmark not defined.  
 Adam Tomkins, 'Public Law' (2003)..... Error! Bookmark not defined.  
 Sir John Comyns, 'A digest of the Laws of England' (1736) – pg450..... Error! Bookmark not defined.  
 Geoffrey Lindell, 'The Constitutional Authority to Deploy Australian Military Forces against Iraq' (2002) ..... Error! Bookmark not defined.

**Executive Spending Power**..... Error! Bookmark not defined.  
 Overview..... Error! Bookmark not defined.  
 Williams v Commonwealth (No 1) (2012)..... Error! Bookmark not defined.  
 Conclusion ..... Error! Bookmark not defined.

**Executive Accountability**..... Error! Bookmark not defined.

**Appleby et al. 'Australian Public Law' (2018)** ..... Error! Bookmark not defined.  
 Administrative Law ..... Error! Bookmark not defined.  
 Integrity Branch ..... Error! Bookmark not defined.  
 Problems Judiciary face in regard to Accountability..... Error! Bookmark not defined.

**Control of the Executive** ..... Error! Bookmark not defined.  
 Control Mechanisms..... Error! Bookmark not defined.  
 Responsible Government ..... Error! Bookmark not defined.

Ministerial Responsibility .....	Error! Bookmark not defined.
Blackham and Williams, 'The Appointment of Ministers from Outside of Parliament' (2012) .....	Error! Bookmark not defined.
<b>Bookmark not defined.</b>	
Definition .....	Error! Bookmark not defined.
Rationale.....	Error! Bookmark not defined.
Scrutiny.....	Error! Bookmark not defined.
Egan v Willis (1998) .....	Error! Bookmark not defined.

## **Judiciary.....** Error! Bookmark not defined.

### **History and Overview .....** Error! Bookmark not defined.

Current Judges of the HC (2019).....	Error! Bookmark not defined.
Platonic High Court.....	Error! Bookmark not defined.
Hannah v Dalgarno (1903).....	Error! Bookmark not defined.

### **Appointment and Removal of Judges .....** Error! Bookmark not defined.

Overview.....	Error! Bookmark not defined.
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### **Composition and Appointment.....** Error! Bookmark not defined.

Appointment .....	Error! Bookmark not defined.
George Williams, 'HC Appointments: The Need for Reform' (2012) .....	Error! Bookmark not defined.
Reform Efforts .....	Error! Bookmark not defined.

### **Removal .....** Error! Bookmark not defined.

Overview.....	Error! Bookmark not defined.
The case of Justice Murphy .....	Error! Bookmark not defined.
AR Blackshield, 'The Murphy Affair' (1987) .....	Error! Bookmark not defined.
Aftermath .....	Error! Bookmark not defined.

### **Separation of State Judicial Power.....** Error! Bookmark not defined.

Overview.....	Error! Bookmark not defined.
Kable v DPP (1996) .....	Error! Bookmark not defined.

### **Boilermakers Case .....** Error! Bookmark not defined.

History to Boilermakers.....	Error! Bookmark not defined.
History of the Commonwealth Court of Conciliation and Arbitration.....	Error! Bookmark not defined.
Boilermakers Case (1956).....	Error! Bookmark not defined.

### **Defining Judicial Power .....** Error! Bookmark not defined.

Overview.....	Error! Bookmark not defined.
Definition .....	Error! Bookmark not defined.
Momcilovic v The Queen (2011).....	Error! Bookmark not defined.
NSW v Kable (2013) .....	Error! Bookmark not defined.
R v Trade Practices Tribunal; Ex Parte Tasmanian Breweries (1970).....	Error! Bookmark not defined.
Palmer v Ayres (2017).....	Error! Bookmark not defined.
Exception to the Boilermakers case .....	Error! Bookmark not defined.

### **Military Tribunals .....** Error! Bookmark not defined.

Overview.....	Error! Bookmark not defined.
Lane v Morrison (2009) .....	Error! Bookmark not defined.

### **Delegation of Judicial Power.....** Error! Bookmark not defined.

Overview.....	Error! Bookmark not defined.
Harris v Caledine (1991) .....	Error! Bookmark not defined.

### **Persona Designata Rule .....** Error! Bookmark not defined.

Overview.....	Error! Bookmark not defined.
Allowed Where.....	Error! Bookmark not defined.
Drake v Minister for Immigration and Ethnic Affairs (1979) .....	Error! Bookmark not defined.
Hilton v Wells (1985) .....	Error! Bookmark not defined.
Aftermath .....	Error! Bookmark not defined.

Grollo v Palmer (1995).....	Error! Bookmark not defined.
<b>Incompatibility Exception</b> .....	Error! Bookmark not defined.
Overview.....	Error! Bookmark not defined.
Arises when .....	Error! Bookmark not defined.
Wilson v Minister for Aboriginal and Torres Strait Islander Affairs (1996).....	Error! Bookmark not defined.
<b>Rights Protection</b> .....	Error! Bookmark not defined.
<b>Human Rights</b> .....	Error! Bookmark not defined.
Overview.....	Error! Bookmark not defined.
Louis Henkin, The Age of Rights (1990) .....	Error! Bookmark not defined.
Examples of articles from the UN Declaration of HR (1948) .....	Error! Bookmark not defined.
UN Declaration of HR (1948) .....	Error! Bookmark not defined.
Australia's Position .....	Error! Bookmark not defined.
Australia's Constitution .....	Error! Bookmark not defined.
<b>Bills of Rights</b> .....	Error! Bookmark not defined.
Overview.....	Error! Bookmark not defined.
America: Bill of Rights.....	Error! Bookmark not defined.
America: 14 <sup>th</sup> Amendment .....	Error! Bookmark not defined.
India.....	Error! Bookmark not defined.
Other Countries .....	Error! Bookmark not defined.
Attorney General v Taylor [2017] NZLR.....	Error! Bookmark not defined.
Protecting HR in Australia.....	Error! Bookmark not defined.
Williams and Reynolds, A Charter of Rights for Australia (2017) .....	Error! Bookmark not defined.
Department of Justice, 'Towards an ACT HR Act' (2003).....	Error! Bookmark not defined.
Victorian BoR .....	Error! Bookmark not defined.
Other States.....	Error! Bookmark not defined.
Human Rights Act 2004 (ACT).....	Error! Bookmark not defined.
Brennan Committee (2009).....	Error! Bookmark not defined.
Debate Today .....	Error! Bookmark not defined.
<b>Constitutional Change</b> .....	Error! Bookmark not defined.
<b>Amending the Cth Constitution</b> .....	Error! Bookmark not defined.
Overview.....	Error! Bookmark not defined.
Referendums .....	Error! Bookmark not defined.
The Referendum Record.....	Error! Bookmark not defined.
Williams and Hume, 'People Power', (2010).....	Error! Bookmark not defined.
<b>The Last Referendum (AU Republic)</b> .....	Error! Bookmark not defined.
Overview.....	Error! Bookmark not defined.
Republic Advisory Committee, (1993).....	Error! Bookmark not defined.
Constitutional Alteration (Est of Republic), (1999).....	Error! Bookmark not defined.
Yes/ No Referendum, (1999) .....	Error! Bookmark not defined.
Constitutional Alteration (Preamble), (1999) .....	Error! Bookmark not defined.
Helen Irving, 'The Republic Referendum of 6 November 1999', (2000).....	Error! Bookmark not defined.
Michael Kirby, 'The AU Referendum on a Republic', (2000).....	Error! Bookmark not defined.
<b>Cn Amendments: States</b> .....	Error! Bookmark not defined.
Overview.....	Error! Bookmark not defined.
Taylor v Attorney-General (Qld) (1917).....	Error! Bookmark not defined.
McCawley v The King (1920).....	Error! Bookmark not defined.
<b>Manner and Form Requirements</b> .....	Error! Bookmark not defined.
Overview.....	Error! Bookmark not defined.
Cn Act 1902 (NSW) .....	Error! Bookmark not defined.
Attorney General (NSW) v Trethowan (1931) .....	Error! Bookmark not defined.



# Constitution

## Overview

### Definition

- Means of achieving **constitutionalism** →  
*'Notion that official powers should be bound by a set of rules → more confined than the RoL and less contested'*  
**AV Dicey, "Introduction to the Study of the Law of the Constitution" (1959)**  
**Constitutional Law:** All rules which **directly or indirectly** affect the distribution or the **exercise of the sovereign power** of the state

	<p><b>Sir Ivor Jennings, 'The Law and the Constitution' (1959)</b>  <b>Constitution:</b> A document setting out the <b>rules governing the composition, powers and methods of operation</b> of the main institutions of government, and the general principles applicable to their relations to the citizens</p> <p><b>Adam Tomkins, 'Public Law' (2003)</b>  <b>Constitution:</b> Establishes <b>institutions and their inter-relationships</b>, explain the <b>place and role of the people</b> and express political values to which a particular society lays claim.</p> <p><b>Giovanni Sartori, 'Constitutionalism: A preliminary dissent' (1962)</b>  <b>Constitution:</b> Is NOT a shorthand report describing the formalisation of the power structure of a given country, but rather <b>established fundamental law</b>, or fundamental principles, and a <b>correlative institutional arrangement which restricts arbitrary power and ensures a limited government.</b></p>
Purpose	<ul style="list-style-type: none"> <li>• <b>Two purposes to a constitution:</b> <ol style="list-style-type: none"> <li>1. Supporting or facilitating the exercise of power by identifying its source</li> <li>2. Focusing on how power is limited or contained</li> </ol> </li> </ul> <p>Which of these purposes you choose to adopt is based on who you are; how you use your power; what you want to use your power for.</p> <p>At the forefront, a Constitution should contain/ set out <b>(Tomkins):</b></p> <ul style="list-style-type: none"> <li>• Institutions and power</li> <li>• Place of the people</li> </ul>
Overview of Australian Constitution	<p><b>Establishes</b></p> <ul style="list-style-type: none"> <li>• Composition of Federal Parliament</li> <li>• How parliament works</li> <li>• Power of parliament</li> <li>• How Federal and State parliaments share power</li> <li>• Roles of the Executive government and HC</li> </ul> <p>Each state has its own Cn – ACT and NT have self-government Acts passed by Aus Government</p>
Features of Aus Cn	<p><b>Consists of 8 chapters and 128 sections</b></p> <p><b>Chapter 1:</b> Composition of our federal parliament</p> <p><b>Chapter 2:</b> Power of the executive government</p> <p><b>Chapter 3:</b> Creation of the Federal Courts, including HC</p> <ul style="list-style-type: none"> <li>• Sets HC as final court of appeal who can interpret law and settle disputes of Cn</li> </ul> <p><b>Chapter 4:</b> Financial and trade matters</p> <p><b>Chapter 5+6:</b> Federal relationship between the Cth and the states and territories</p> <ul style="list-style-type: none"> <li>• If federal and state law conflict, federal law prevails <b>(s109)</b></li> <li>• Cth can legislate for the representation of the territories in Fed Parl</li> </ul> <p><b>Chapter 7:</b> Capital of Australia and power of the GG to appoint/disputes</p> <p><b>Chapter 8:</b> How the Cn can be changed by referendum <b>(s128)</b></p>

Nominal Constitution	
<b>Definition</b>	A constitution that exists only in name.
<b>Example</b>	<p><b>British Indian Ocean Territory (Constitution) Order 2004.</b></p> <ul style="list-style-type: none"> <li>• Established a system of government who could legislate under the RoL and appoint officers</li> </ul>

	<ul style="list-style-type: none"> <li>• However, its only substantive provision prohibited former inhabitants of the land from ever returning</li> </ul> <p>Held to be nominal: <b>A constitution exiling a territory’s inhabitants is a contradiction in terms.</b></p>
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Written/Unwritten	
Written	Unwritten
<b>Written:</b> A single solemn document which founds (or re-establishes) a political community; defines chief political institutions and confers their powers’ circumscribes the permissible limits of those powers.	<b>Unwritten:</b> Self explanatory
<b>Examples:</b> India, USA, South Africa	<b>Examples:</b> NZ and UK.
<b>Commentary:</b> Many of the actual workings depend on unwritten understandings (conventions) → these, as well as HC interpretations of the law, tell us how the law operates in reality.	<b>Commentary:</b> It is exaggerated that they ‘do not exist’ - eg UK has the Magna Carta, legislation, etc.
Australian Cn is both written and unwritten. Each of the Australian states have their own Cn.	

Flexible and Rigid Constitutions	
Flexible	Rigid
<b>Flexible (AV Dicey):</b> Constitution which <b>every description can legally be changed</b> with the same ease and in the same manner by one and the same body. Parliament itself can amend the rules to remove restrictions by exercising its ordinary powers.	<b>Rigid (AV Dicey):</b> Constitutional/ fundamental laws cannot <b>be changed in the same way as ordinary laws.</b> The legislative body may have to follow a special and more difficult procedure.
<b>Examples:</b> <ol style="list-style-type: none"> <li>1. NSW Cn</li> <li>2. China</li> <li>3. UK (unwritten and created through many different bits of legislation; it can change just like legislation can)</li> </ol>	<b>Examples:</b> <ul style="list-style-type: none"> <li>• Australia is considered rigid → amendments are initiated by Cth but can only be effected under <b>s128</b>.</li> <li>• Constitution of Australian states is considered mostly flexible</li> </ul>

Strengths and Weaknesses of Australia’s Constitution	
Strengths	Weaknesses
<ol style="list-style-type: none"> <li>1. Major principles and Cn provisions are fixed</li> <li>• Cannot be changed unless there is a referendum</li> <li>2. Cth does not have all the power – rather there is a separation of power</li> </ol>	<ol style="list-style-type: none"> <li>1. Hard to change Cn</li> <li>• May be less responsive to changing modern circumstance</li> </ol>

<ul style="list-style-type: none"> <li>• Cannot make more power for itself</li> </ul> <p>3. Non-political judges interpret and administer the Cn to ensure provisions are followed (independence of the legislative, executive and judiciary)</p>	<p>2. Final say about Cn resides with non-elected judges (judicial review) – NOT democratically accountable politicians</p>
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History of Australian Constitution	
<b>Pre-Constitution</b>	Ultimate power of colonies rested with UK Parl at Westminster
<b>1890</b>	Series of conferences held to discuss federation
<b>1895</b>	6 premiers of colonies agreed to establish a new Constitutional Convention by popular vote
<b>1898- 1900</b>	Constitution approved in referendum Ratified in 5 of the colonies (except WA) → presented as bill to Imperial Parliament, requesting enactment of the bill
<b>1900</b>	WA voted in referendum to join Commonwealth of Australia
<b>1901</b>	<b>Commonwealth of Australia Constitution Act 1900 (Imp)</b> passed <ul style="list-style-type: none"> <li>• Imp = Imperial Act</li> <li>• Allowed for the 6 British colonies to form their own Commonwealth Government</li> </ul>

## Constitutionalism

Overview
<ul style="list-style-type: none"> <li>• Idea that Government should be limited (<b>John Locke</b>) as opposed to Absolute (<b>Hobbes</b>) and subject to RoL.</li> <li>• This is done through a <b>Cn</b> (written or unwritten) that sets out the only powers Govt have authority to exercise.</li> </ul>

Political and Legal Constitutionalism	
Political Constitutionalism	Legal Constitutionalism
Power is limited by the people - those who exercise political power are held to constitutional account (scrutiny) through political means and political institution (eg. Parliament) → <b>Australia on paper</b>	Power is limited by the constitution - the final say on constitutional limits of power is given to the courts and judiciary (these bodies need independence) → <b>Australia in reality (federal/state level)</b>
A key differentiating factor between systems of government built on the idea of political constitutionalism, or those which contain a strong element of legal constitutionalism, <b>remains to be whether the last say (the decisive legal say) on the limits of constitutional power is given to the judiciary.</b>	
<b>Upheld Through: (Tomkins, Public Law (2003))</b>	
<ul style="list-style-type: none"> <li>• Ministers subject to regular scrutiny                             <ul style="list-style-type: none"> <li>○ Debates</li> <li>○ Question time</li> <li>○ Committee investigations</li> </ul> </li> </ul>	<ul style="list-style-type: none"> <li>• Sue government in court or seek judicial review</li> </ul>
<b>What is needed to be successful (Tomkins, Public Law (2003)):</b>	
<ul style="list-style-type: none"> <li>• Those who perform the scrutiny need to have a <b>high degree of independence from the government</b></li> <li>• A <b>strong and vibrant politics that reinforces a source of accountability</b> – as democratic govts. Possess power for as long as they have the support of the majority                             <ul style="list-style-type: none"> <li>○ Thus, if governments break political boundaries, they lose power</li> <li>○ Therefore the more open, transparent, representative and participatory a political system is – the better the model will work</li> </ul> </li> </ul>	<ul style="list-style-type: none"> <li>• Seriousness and independence</li> <li>• Legal systems, courts and judges require independence from the government of the day and need to take seriously idea that law can/will be used to hold them to account</li> </ul>
<b>Strengths and Weaknesses (Tomkins, Public Law (2003)):</b>	

<p><b>Weaknesses</b></p> <ol style="list-style-type: none"> <li>1. Easier to articulate above than it is to follow in practice</li> <li>2. A democracy (majority rule) will always fail to adequately represent the minority</li> </ol>	<p><b>Weaknesses</b></p> <ol style="list-style-type: none"> <li>1. Notoriously expensive to sue government</li> <li>2. Access to courts is limited to the well resources</li> <li>3. Judges are not democratically elected, accountable, nor representative</li> </ol> <p><b>Strengths</b></p> <ol style="list-style-type: none"> <li>1. Suing may be expensive, but is equally expensive if you are the political majority or not (no discrimination in favour of the majority)</li> </ol>
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### Australia's System (Tomkins, Public Law (2003)):

- Australian system exhibits **strong adherence to political constitutionalism** (taken from its British inheritance), but at federal (and to a lesser degree, the state level), it is **defined by a commitment to legal constitutionalism**.
- One of the main challenges for the High Court remains **how to determine extent to which it should defer to politicians and political process in defining the reach of government power.**

Discussed in following cases:

### Amalgamated Society of Engineers v Adelaide Steamship Co Ltd (1920)

- The extravagant use of the granted powers in the actual working of the Constitution is a matter to be guarded against by the constituencies and not by the Courts → **political**
- If it be conceivable that the representatives of the people of Australia as a whole use their powers to injure the people of Australia, it is certainly within the power of the people themselves to resent and reverse what may be done → **political**

### Australian Capital Television Pty Ltd v Commonwealth

- Those responsible for drafting the constitution saw constitutional guarantees of freedoms as exhibiting a distrust of the democratic process.
- They preferred to place their trust in Parliament to preserve the nature of our society → **Political**

### Plaintiff S157/2002 v Commonwealth

- In any written constitution, when there are disputes over such matters, there must be an authoritative decision-maker.
- Under the constitution of the commonwealth the ultimate decision-maker in all matters where there is a contest, is this court → **Legal**

# Rule of Law

## Overview

- Difficult concept to reconcile
- Every government advocate for RoL – but there are **huge differences in societies**.
  - Some of these Govts. reject democracies; individual rights; are capitalist → others are anti-Western
- Therefore, RoL is an **elusive concept** due to fact that there exists **contrasting meanings** within different societies.

## Definitions

<b>John Wilmott, Power and Governance</b>	<ul style="list-style-type: none"> <li>• Principle that all individuals are equal under the law, and requires that laws must apply equally to all, not be arbitrary and be knowable in advance (this is not in the Cn)</li> </ul>
<b>Blackshield and Williams</b>	<ul style="list-style-type: none"> <li>• Underpins how the Cn operates as it implies that every citizen is subject to the law (including law makers themselves)</li> <li>• Stands in contrast to an autocracy, dictatorship or oligarchy (where rulers are above the law)</li> </ul>

## Brian Z Tamanha, 'On the rule of law: History, Politics, Theory' (2004)

- Despite global unanimity in support of RoL, it is an **"exceedingly elusive [difficult] notion and contrasting meanings are held... [without] agreement of what it means"**
- Tamanha identifies two branches of legal theory separating RoL:

<b>1. Formalist/thin definitions</b>	<ul style="list-style-type: none"> <li>• Focus on proper procedures and a legal framework</li> <li>• <b>Concerned with law applying equally</b> → requires only govt officials and citizens are bound by and must act consistent with the law</li> <li>• Not concerned with 'justness' 'human rights' 'democracy' of the law/ content of the law → renders RoL amenable to all cultures and means that oppressive/immoral laws could be enacted</li> <li>• <b>Tamanha</b> justifies the lack of control around content by suggesting that only liberal democracies have the rule of law</li> </ul>
<b>2. Substantive/thick definition</b>	<ul style="list-style-type: none"> <li>• Still concerned with who it applies to, but <b>includes requirements about the content of the law</b> (ethical, justice or moral principles)</li> <li>• Considers the idea of whether the legal system has a just and fair outcome</li> </ul>

## AV Dicey 'Introduction to the Study of the Law of the Constitution' (1959)

### Takes FORMAL or THIN definition

- Dicey's interpretation is based on the English Constitution
- Identifies three meanings of the rule of law based on the 'thin' definition. These three meanings form fundamental principles of the English Constitution

- |  |  |
|--|--|
| <b>1. A person can only be punished if it is held in court they breached a law</b> | <ul style="list-style-type: none"> <li>• A person cannot be punished arbitrarily</li> <li>• Allows for absolute supremacy and predominance of regular law</li> </ul> |
|--|--|

<b>2. Equality before the law</b>	<ul style="list-style-type: none"> <li>• All classes have equal subjection to the courts of law</li> <li>• There is no exemption of officials (such as the executive) to the law</li> </ul>
<b>3. Constitution is the result of our rights</b>	<ul style="list-style-type: none"> <li>• Constitution is NOT the source of law, but the consequences of the rights of individuals – which is defined and enforced by courts</li> <li>• We don't derive our rights from the Cn</li> </ul>

The constitution establishes basic powers, limits of governments and the relationship between govt and its citizens, through upholding of the RoL.

**W.I Jennings, 'The Law and the Constitution' (1959)**

**Substantive or THICK definition**

- Disputes Dicey → most systems aspiring to RoL incorporate more substantive constitutionalism ('thick')
  - **Eg.** Law has exceptions for people with disabilities/mental illnesses/checked backgrounds (torts, contracts, property, crime)
  - **Eg.** Courts inflict punishment based on particular circumstances of the criminal (preventative rather than punishing)

**Julius Stone, 'Social Dimensions of Law and Justice' (1966)**

**Substantive or THICK definition**

- RoL is ethical rather than legal → meaning those in power need recognise their power is subject to restraints of the people

Ethical RoL looks like:

1. Law must respond to needs of social and economic development
2. RoL does not demand a uniform rule on all matters for everyone
3. RoL should not be limited to principles – is a broad concept prohibiting arbitrary power

**International Commission of Jurists, 'Report of the International Congress of Jurists, New Dehli' (1959)**

**Substantive or THICK definition**

- **Lord Bingham:** All persons/authorities should be bound and entitled by the law

**8 sub rules of RoL**

1. Law must be accessible, intelligent and clear
2. Legal rights and liabilities should be resolved by application of law, not discussion
3. Laws of the land should apply equally to all
4. Laws must afford adequate protection to human rights
5. Means must be provided for resolving civil disputes
6. Ministers and public officers should exercise powers conferred onto them reasonably without exceeding limits
7. Adjudicative procedures provided by the state should be fair
8. State should comply w international law

**Sir Ninian Stephen, 'The Rule of Law' (1959)**

RoL defined into 4 concepts

1. Government should observe and be under law
2. Those who administer law (judges and lawyers) should be independent of Govt
3. There should be ready access to the courts for those who seek legal remedy and relief
4. The law should be certain, general and equal in operation

'Widely shared social and cultural commitments remain central to the maintenance of the RoL in Australia, particularly the protection of rights and freedoms'.

**Robert French, 'Rights and Freedoms and the RoL' (2017)**

**Substantive or THICK definition**



RoL is most important protection of our rights and freedoms, however statutes enacted by Parliament (over time) erode it → '**death by a thousand cuts**'

- Diligent scrutiny of Parl needed to ensure restrictions are publicly known (consider sunset clauses)
- RoL, ultimately, does not provide framework to protect/enjoy rights and freedoms → this is instead found in the liberty of the people

# Separation of Powers

Overview	
Definition	SoP divides the 3 types of governmental power into THREE separate and independent institutions. This is done to prevent the exercise of arbitrary or tyrannical power.
Relationship	Relationship between these three bodies is horizontal – as opposed to vertical (state/ctd)- because they are arguably equal to one another

The bodies			
	Legislative	Judicial	Executive
<b>Composition</b>	<ul style="list-style-type: none"> <li>Queen (represented by GG)</li> <li>Senate</li> <li>HoR</li> </ul>	<ul style="list-style-type: none"> <li>HC</li> <li>Other Courts</li> </ul>	<ul style="list-style-type: none"> <li>Queen (represented by GG)</li> <li>PM</li> <li>Ministers</li> <li>Public servants</li> </ul>
<b>Role</b>	Make and amend the law	Interpret and enforce the law	Carry out/ make judgements about the law

Overview of Checks and Balances			
Being Checked → Checks	Legislative	Executive	Judiciary
<b>Legislative</b>		<ul style="list-style-type: none"> <li>Hard to identify separation – those appointed to Executive are members of parliament</li> </ul>	<ul style="list-style-type: none"> <li>Can pass laws that override Court decisions</li> </ul>
<b>Executive</b>	<ul style="list-style-type: none"> <li>Sets legislative Agenda of Parliament</li> <li>Determines election dates</li> </ul>		<ul style="list-style-type: none"> <li>Appoints and removes judges</li> </ul>
<b>Judiciary</b>	<ul style="list-style-type: none"> <li>Strikes down laws made by legislature</li> <li>Provides legal process in courts for individuals to challenge</li> </ul>	<ul style="list-style-type: none"> <li>Declare actions of executive unlawful</li> </ul>	

Exceptions to the SoP
<ul style="list-style-type: none"> <li>Australia has inherited a system of government from the <b>Westminster system in the UK</b></li> <li>There is <b>NO strict separation</b> between legislative and executive power                             <ul style="list-style-type: none"> <li>The Prime-minister and ministers are part of the executive and parliament</li> <li>The governor general, part of the parliament and executive, <b>officially appoints</b> the high court judges, prime minister and minister</li> <li>Thus, the doctrine is <b>merely a theory</b> that the three arms of government should be kept separate from one another</li> </ul> </li> </ul> <p><b>EXAMPLE if there were no separation of powers:</b></p>

- If the police commissioners (executive) were judges (judiciary), then they could arrest an individual and convict them automatically
  - Exercises arbitrary power
- Thus, by keeping the executive and judiciary separate, the possibility of arbitrary use of power is limited.

Baron de Montesquieu, "The Spirit of the Laws" (1949)

- Montesquieu commented that, *"political liberty can only be found when there is no abuse of power"*
- Thus, there can be **no liberty if there is no separation of power**
- For example, if there is NO separation between legislative and executive power
  - Then the senate/monarchy could enact tyrannical laws and then execute them in a tyrannical manner

Owen Hood Phillips and Paul Jackson, "Constitutional and Administrative Law" (1987)

- **Phillips and Jackson** highlighted that despite the classification of the functions and corresponding powers of government (below), a complete separation will never exist
  - *Categories are inclined to become blurred"*
- They commented that, *"a complete separation of powers ... with no overlapping or coordination, would bring government to a standstill"*
  - Therefore, the doctrine of the separation of powers should be taken as *"an advocacy of the prevention of tyranny by the conferment of too much power on any person or body"*

Gerard Carney, 'Separation of Powers in the Westminster System' (1994)

- There is no contemporary constitutional system which adopts the system of a complete separation of powers.
  - The strict doctrine is only theoretical, meaning that it gives way to the realities of the government where some overlap is inevitable.
- Even though there are overlaps, there is a system of checks and balances which has developed (for example, as seen within the first three chapters of the constitution).
- The Westminster system effects only a partial separation of powers;

Institution	Power	Personnel	Control
<b>Parliament</b>	Make laws	Representatives elected to lower house. Elected or appointed to the upper house.	(Royal Assent). Supervision and/or expulsion by the House.
<b>Executive Council</b>	Executive Power	Ministers appointed by the Crown with the support of the lower house. Must be Members of Parliament.	Maintain the support of lower house. Parliamentary (as well as) judicial review.
<b>The Courts</b>	Judicial Power	Judges appointed by the executive	Superior Court Justices removal by the Crown on an address from both houses on certain grounds.

Lisa Burton and George Williams, "The Integrity and Function and ASIO's Extraordinary Questioning and Detention Powers" (2012)

- **Burton and Williams** express the idea that there should be an, *"integrity branch of government, existing between the traditional three arms and dedicated to supervising the use of public power"*
- Integrity institutions (beyond Parliament) include:
  - The Auditor-General
  - The Ombudsman
  - Information Commissioner
  - NSW Independent Commission Against Corruption (ICAC)
- Former **NSW Chief Justice, James Spigelman (2004)** further commented that a "fourth branch" could include the media or even the people
- However, there is no textual or structural basis for a "fourth branch" within the Australian Constitution

# Acquisition of Legal Independence

## Overview

1865	<b>Colonial Laws Validity Act</b> <ul style="list-style-type: none"> <li>• Doctrine of Repugnancy/Extraterritoriality</li> </ul>
1901	<b>Australian Constitution</b>
1924	<b>Limerick Steamship</b> : Constitution impliedly repeals DoR
1925	<b>Union Steamship</b> : No it does not
1926	<b>Skin Wool</b> : Yes it does – in Aus – but not when acting extraterritoriality
1931s	<b>Statute of Westminster</b> <ul style="list-style-type: none"> <li>• Removes DoR/DoE at federal level</li> </ul>
1986	<b>Australian act</b> (s1,2,3,11)
1999	<b>Sue v Hill</b> : UK regarded as foreign power

## The Colonial Legislatures

- **Bicameral legislatures** established in Australia in 1900s **achieved legal and institutional presence from an act of Parliament** (cf. gradually developing through history) → made them subordinate
- However, by 1850s, colonies were considered to uphold **'responsible government'**
- This, along with idea that Aus legislation was derived from British Parl, meant there was a belief that colonial legislation should be omniscient (able to handle any situation)
  - Tested in **R v Burah**

## R v Burah

### Facts

- Act passed in India 1869 meaning Government could remove 'hill areas' from Jurisdiction of the courts, subjecting Bengal tribes to martial law (military)
- Made Burah and accomplice liable for murder – appealed to High Court who accepted the case. Crown thought HC should not have jurisdiction and appealed to Privy Council

### Legal Issue

1. **Did 1869 act take away right to appeal to HC (removing hill areas from Jurisdiction of Court)?**

Yes – it did

2. **Can legislation validly do that?**

Yes – no inconsistency with Indian High Courts Act 1861 (Imp)

3. **Did the power given to Government involve a delegation of legislative power, violating the **'maxim delegatus non potest delegare'** (a delegate may not itself delegate)?**

- There was no delegation of power – Indian Legislature was not a delegate of Imperial Parliament

### Commentary

- Indian legislature limited by Act of Imperial Parliament, but when acting within those limits has plenary power of same nature as Parliament
  - Also a reminder that colonial leg. Was subordinate
- Colonial and provincial legislatures not delegates of Imperial Parliament
  - However, within conferred powers they had same authority as Imperial Parliament
- Therefore **'maxim delegatus non potest delegare'** couldn't apply as they were not delegates

### Hodge v The Queen (1883)

#### Facts

- Licence Commissioners (Canada) prohibited playing of billiards in taverns under Liquor Licence Act 1877
- Hodge was charged with permitted billiards to be played in his tavern
- Argued that the legislature could not delegate law-making powers to the Licence Commissioners

#### Legal Issues

1. In relation to distribution of powers under Canadian British North America Act 1867 Imp – did liquor licencing come with Dominion powers (Britain) or provincial powers (Canada)

Came within both → double aspect doctrine

2. Did legislation void maximum of **the 'maxim delegatus non potest delegare'** (a delegate may not itself delegate)?

It did not

#### Commentary

- Introduced idea of a double aspect doctrine → allows laws to be created by both province and federal governments under the same subject matter
- Provincial legislation is not a delegate → has same authority as Imperial Parliament

### Australian Implications

- Independence less clear in NSW → **local legislatures WERE subordinate to Imperial Parliament** because:
  - They had been created by it
  - Exercised powers devolved upon them by it
  - Bound by the law it lay down

### Alex Castles, 'The Reception and Status of English law in Australia' (1963)

- Attainment of **Responsible parliament** doctrine resulted in whether new legislatures by local colonies could enact laws contrary to the statutes of Imperial Parliament

#### South Australia – Benjamin Boothby (judge of SC)

- Enactments of legal legislature were repugnant (inconsistent) to laws of England
- Denied power to legal legislature, even in extreme cases when there were only minor technical difficulties
- Reinvigorated idea that state laws were inconsistent with imperial parliament → making it difficult for colonial legislature to pass new laws

Boothby's ideas were cemented and upheld by **Colonial Laws Validity Act 1865**. This act:

- Intended to **remove doubts** as to the **validity of colonial laws**
- Confirmed the scope of legislative powers of the colonies in relation to England → they could repeal received English Statutes and CLaw (despite what Boothby said)
- **Restricted the powers of State legislatures** through **doctrine of repugnancy**
- UK could pass acts of '**paramount force**' → determine **which laws of England bind the colonies**, so even though they could repeal acts – they couldn't repeal ones of '**paramount force**'
- Also passed **doctrine of extraterritoriality** → Colony laws cant have operation unless it connects with the geographical area of the legislating colony

## The Colonial Legacy

### Overview

- **1901 = Birth of Commonwealth**, which seemed like **independence** → however, **legally**:
  - Commonwealth created by Imperial Parliament (England) and passed with Paramount Force

### Doctrine of Repugnancy

**s2 Colonial Laws Validity Act** → 'If Australian legislation is repugnant (inconsistent) with UK, it is invalid'

- Believed that doctrine would no longer apply after Cn → Cn impliedly repeals Colonial Laws Validity Act when there is an inconsistency
- **HOWEVER**, HC considered that Repugnancy doctrine continued to apply in 1925 case:

#### Union Steamship Co v Commonwealth (1925)

- **Provisions of Navigation Act 1912** were invalid by reason of repugnancy to **Merchant Shipping Act 1984** → even though **s98** specified that parliament had power to make laws in navigation and shipping.

**This decision was strange, considering that 6months previous a different view was taken in:**

#### Commonwealth v Limerick Steamship Co (1924)

- Cn Act overrode Colonial laws → holding that when there was repugnancy, it would be impliedly repealed → therefore repugnancy doctrine did not exist in Australia.

The difference between the two cases was explained in following case:

#### Skin Wool Case (1926)

**Reasoning by Isaacs J:**

##### Union Steamship Case

- Regulations dealt with **non-Australian ships** → so rights of OTHER parts of the Empire were involved

##### Limerick Steamship Case

- **Australian Affairs only**

### Doctrine of Extraterritoriality

**Two interpretations:**

**Broad** → Exercise of colonial power **INVALID** unless it has connection to the geographical area of legislating colony

**Narrow** → colony laws cannot have operation outside territorial borders

#### Implication for Australia

- Colony of British Empire, therefore Parliament had no extraterritorial legislative functions
- Concept of Parl Sovereignty enforced this

## Statute of Westminster

### Overview

- **Statute of Westminster (1931)** freed Dominions (inc. Commonwealth) from imperial restrictions

Done through:

- a) **S2** → Excluding operation of **Colonial Laws Validity Act** (goodbye repugnancy doctrine)
- b) Removing Cth legislative power restrictions under Extraterritoriality doctrine

**Australia went from Colonial to Dominion Status (dependency to independence!)**

### Geoffrey Sawyer, 'The Australian Constitution' (1988)

Identified 5 areas of contention that questioned the idea Australia had gone from 'Colonial Dependent' to 'Dominion independent':

1. Royal style and titles → Monarch related to Dominion Govt
2. GG → representatives of the crown
3. Operation of Dominion legislation → extraterritoriality doctrine still stood in regard that crown could reserve and disallow powers
4. British Merchant Shipping Legislation
5. Privy Council judicial appeals

### Provisions of Statute of Westminster (1931)

s1 → Colonial Laws Validity act shall not apply

s2 → Provided that CLVA (and thus doctrine of repugnancy) didn't apply, Comm could enact laws inconsistent with British Legislation

s3 → territorial limits no longer applied

s4 → British parl can legislate for Australia, but only with 'request and consent'

### Australia's reluctance

- Aus was reluctant to accept the new freedom, as s10 provided the act did not automatically apply to Australia. But it came into effect when Aus enacted the Statute of **Westminster Adoption Act 1942 (Cth)**
- However, states were still bound by doctrines of repugnancy and extraterritoriality until:

## The Australia Act 1986 (Cth)

### Overview

#### Final step in severing legal (as opposed to symbolic) ties with the UK

- Regarded as explicit evidence of the independence of Australia within the UK → terminates any remaining residual links in Cn between UK and Aus

#### Provisions

- s1 → ended ability of British Parl to legislate for Aus
- s2 → removed doctrine of extraterritoriality for State Parls
- s3 → Removed doctrine of repugnancy for State Parls
- s11 → removed ability to appeal to Privy Council

### Sue v Hill (1999)

#### Facts

- Hill ran for QLD Senate in 1998 election → however under s44(i) Cn, she was disqualified because she had not renounced her UK Citizenship
- Australia Act 1986 meant that UK was a foreign power
- HC decided that UK retains NO residual influence on legislative, executive or judicial processes in Australia.

#### This had implications on:

##### Legislative

Legislative links between UK and Aus severed through s1 Australia Act 1986

##### Executive

Would be against constitutional practice for British ministers to give advice to Crown about appointment of Australian ministers (as was once the custom)



Executive UK decisions (entering military alliances/ratifying treaties) had no legal consequence on Aus
Judicial
S11 terminated ability to appeal to Privy Council

Overview of the Acts						
	1901 (Cth)	1901 (States)	1931/1942 (Cth)	1931/1942 (States)	1986 (Cth)	1986 (States)
Ability of UK to legislate by paramount	✓	✓	✓ 'request consent'	✓	x	x
Repugnancy Doctrine	✓	✓	x	✓	x	x
Extraterritoriality Doctrine	✓	✓	x	✓	x	x

## Popular Sovereignty

### Definition

'Sovereign (supreme) power is vested in the people, and that those chosen to govern – as trustees of such power – must exercise it in conformity with the general rule'

- Authority of a state and govt is created and sustained by the sovereignty of the people (who are the source of all political power)

### Legal Validity of the Constitution

<b>Sir Owen Dixon, 'The Law and the Constitution' (1935)</b>	<p>The Australian Cn was enacted by the imperial Parliament, and therefore it could be argued that it derives validly through British Sovereignty.</p> <p>Unlike American Cn, our Cn is not a supreme law obtaining force from the people – it is a statute of British Parliament enacted in exercise of legal sovereignty</p>
<b>Geoffery Lindel, 'Why is Australia's Constitution Binding?' (1986)</b>	<p><b>Why is Australia's Cn binding?</b></p> <p>1900 – Because it is derived from Imperial Parliament, making it an original source of law</p> <ul style="list-style-type: none"> <li>• Political legitimacy in preamble, which states that it was established due to popular approval and acceptance by the Australian people</li> <li>• Also supported in s 128, which enables Aus people to amend Cn – illustrating sovereign power</li> </ul> <p><b>1986 – after Australia Act and Statute of Westminster</b></p> <ul style="list-style-type: none"> <li>• Because of will and authority of people, expressed in: <ul style="list-style-type: none"> <li>○ Preamble words</li> <li>○ Agreement of people to federate</li> <li>○ S 128</li> <li>○ Acceptance without protest since enactment (<b>McGinty v WA</b>)</li> </ul> </li> </ul>
<b>George Williams, 'The High Court and the People' (1995)</b>	<p><b>Is it valid?</b> Large sections of community excluded from voting (and many entitled to vote did not)</p> <ul style="list-style-type: none"> <li>• Women → could only vote in SA and WA</li> <li>• Aboriginal people → could not vote</li> </ul> <p>So – it cannot be the peoples document.</p> <p><b>Bistic v Rokob; McGinty v WA</b> – acceptance without protest since enactment argument</p> <ul style="list-style-type: none"> <li>• Australian people are reluctant to amend the Cn</li> </ul>

- |  |   |
|--|---|
|  | <ul style="list-style-type: none"><li>• People are ignorant of Cn → 18% know what it contains, 47% unaware we have one (1987)</li></ul> |
|--|---|

Therefore – hard to argue that Cn is valid because of acceptance of the people