Topic 1: Introduction to Constitutional Law

Federalism:

Australia has a federal system of government. It divides public power between two levels of government, state and Commonwealth. Former Chief Justice of the High Court, Murray Gleeson, has described the Australian federation in the following way:

The union to which the people of what were formerly self-governing colonies agreed was a federal union, and the colonies became States of the new federation. Each State retained its own Constitution and its own organs of government: legislative, executive and judicial. This division of power between a central government and the governments of the State or provinces is the essence of a federation.

It is from the US Constitution that our founding fathers took inspiration when they chose to establish and incorporate a federal system of government within the Australian Constitution. The move towards the federation of the colonies in the 1890s was hastened by concerns over trade and defence. Although inter-colonial rivalries were fierce, it was understood that more open trade between the colonies held the key to long-term economic prosperity. Consequently, Chapter IV of the Australian Constitution is devoted to finance and trade with s 92, and its decree that trade, commerce and intercourse between the states shall be absolutely free, its cornerstone. In addition, at that time, many of the powerful and aggressive European nations were active in the Pacific and the colonies realised they were isolated and vulnerable. This provided further incentive to federate and enjoy the protection and security under the British Empire which was then at its zenith.

Doctrine of Separation of Powers:

The doctrine of the separation of powers involves the tripartite division of public power between three independent arms of government: the parliament, executive and judiciary. A pure separation of powers involves no cross membership or overlapping of functions between these three arms. In very simple terms, law is made by parliament, administered by the executive and, in the event of legal uncertainty or ambiguity, interpreted by the judiciary.

The doctrine is founded upon the need to preserve and maintain the liberty of the individual. The mechanism it adopts is to divide and distribute the power of government to prevent tyranny and arbitrary rule. The essence of the doctrine is therefore one of constitutionalism or limited government … the basic control adopted is to vest the three types of government power, legislative, executive and judicial in three separate and independent institutions … with the personnel of each being different and independent of each other.

In Australia, at the Commonwealth level, the separation of powers has been inferred from the text and structure of the Australian Constitution: Chapter I establishes and organises the institutions and powers of the parliament, Chapter II the executive and Chapter III the judiciary. However, s 64 of the Constitution mandates that Commonwealth Ministers (members of the executive) are drawn from and are accountable to the parliament. This characteristic of the Constitution is known as responsible government (discussed below) and means that no strict separation of powers exists between the parliament and the executive in Australia. Consequently, only a partial separation of powers is recognised by the Australian Constitution.

In contrast, no Constitution of any Australian state formally recognises a separation of powers. In this respect, State Constitutions more closely resemble the constitutional arrangements in the United Kingdom where legislative power is not limited or controlled by a written constitution. However, State Constitutions are subject to the Australian Constitution by virtue of ss 106 and 107 and an appeal lies to the High Court from any judgment of a state court.

Parliamentary Sovereignty v Supremacy:

Parliament has the power to make or unmake any law within its sphere of competence (ie authorised under the Constitution): 'The doctrine of parliamentary supremacy is a doctrine as deeply rooted as any in the common law. It is of its essence that a court, once it has ascertained the true scope and effect of an Act of Parliament, should give unquestioned effect to it accordingly.' (McHugh J in *Kable*, Hanks 53)

Both Commonwealth and State Parliaments are 'supreme': State parliaments' power to make laws for the 'peace, order/welfare, and good government' of those states is plenary: 'The words … are not words of limitation' (*Union Steamship v King* (1988), *Hanks* 52). S 2 Australia Act. S 16 of Vic Const. confirms not confers this plenary power.

Parliament is sovereign in an absolute sense and this in turn precludes any person or body having the power to override or set aside a law. For Dicey, the remedy to prevent or abolish unpalatable laws was political not legal. The people, through the democratic process, could vote out a government that pursued such a legislative agenda.

In Australia, the Commonwealth and state Parliaments are not sovereign in a Diceyian sense. They do *not* have unrestricted legislative power. Sections 51 and 52 of the Australian Constitution outline the subject matters for which the Commonwealth can pass laws. For the most part, the States can also pass laws in these areas subject to s 109 of the Australian Constitution. But, in addition, the States can pass laws on any subject matter that is not mentioned in s 51. They possess the unexpressed residuary of legislative power. Moreover, as discussed above, the High Court (unlike the House of Lords) has the power of judicial review and can strike down any Commonwealth or state law that is unconstitutional.

Although the Commonwealth and State Parliaments are not sovereign in the Diceyian sense, they are, in theory, *supreme* over the other two arms of government. So long as the law it enacts is constitutional, a Parliament can legislatively abrogate the effect of a judicial decision. In addition, responsible government dictates that the Executive Government is accountable to the Parliament and, as we will see later in the course, no area of executive action appears beyond the reach of legislation. The fact that Parliament is the supreme arm of government in Australia is consistent with the authority it derives from its democratic mandate.

Representative and Responsible Government:

The doctrine that elected members of parliament be representative of the people (i.e. their constituents)

The constitutional underpinnings of representative government are contained in ss 7 and 24 of the Constitution

Contours of 'representative government' in Australia have been determined largely by Parliaments (Mulholland, *Hanks* 64-66). Eg:

- Voting franchises have changed over time
- Compulsory voting
- Proportional representation in Senate voting

Responsible Gov.

The doctrine of responsible government is implicitly recognised in the Australian Constitution, in particular by s 64. As mentioned above, s 64 requires that all Government ministers must be drawn from and accountable to the Parliament and, therefore, ultimately the Australian people. In addition, while the power to do the business of government (executive power) is formally vested in the Governor-General by s 61, responsible government dictates that the Governor-General must act on the advice of ministers so long as the government of the day commands a majority in the House of Representatives. However, access to treasury finance is required in order to carry on the business of government. But the keys to the Treasury are held by the Parliament by virtue of s 83 of the Constitution. In short, the Executive Government (Ministers) have the power but the Parliament has the money. It is this constitutional reality that ensures government accountability to the Parliament and ultimately to the Australian people.

Many of the characteristics of responsible government are not formal written rules but apply by convention:

- Responsibility of government to the people.
- Responsibility of the executive to act on legislative authority.
- Responsibility of the Governor-General to act on the advice of the executive.

Members of the executive will only remain as such for as long as they command the support of the majority of the House of Representatives.

S 61: Executive Power: The executive power of the Commonwealth is vested in the Queen and is exercisable by the Governor-General as the Queen's representative and extends to the execution and maintenance of this Constitution, and of the laws of the Commonwealth.

S 64: Ministers of State: The Governor General may appoint officers to administer such departments of State of the Commonwealth as the G.G in Council may establish.
Such officers shall hold office during the pleasure of the G.G. They shall be members of the Federal Executive Council and shall be the Queen's Ministers of State for the Commonwealth.

The practical result of responsible government in Australia can be summarised as follows:

Responsible Government, as applied to parliamentary systems modelled on the Westminster system, mean that government, though formally carried out in the name of the Crown (Executive), in reality is conducted by Ministers who are members of parliament

Judicial Review:

Judicial review is the power that permits a court to review and determine the constitutionality of legislative and executive or administrative action. For example, it enables the High Court to strike down a Commonwealth or State law if it offends or is not supported by the Australian Constitution. It is consistent with the view that the High Court is the ultimate guardian of the Australian Constitution.

The power to exercise judicial review, and in particular the ability to invalidate unconstitutional legislation, makes the High Court a powerful institution in our system of government.

The power to declare invalid an expression of the will of a democratically elected legislature involves a responsibility of a special kind. The existence of an unelected body with a capacity to decide that an enactment of an elected parliament is without effect will only be accepted if the community is confident that such power will be exercised for the purpose for which, and in accordance with the conditions upon which, it was given

Rule of Law:

The Australian Constitution implicitly recognises the rule of law in covering Clause 5 where it states that '[t]his Act, and all laws made by the Parliament of the Commonwealth under the Constitution, shall be binding on the courts, judges and people of every State and every part of the Commonwealth'.

Topic 2: Parliament and Legislative Procedures

Structure of Parliament

State Parliaments:

There are 9 parliamentary bodies in Australia
The legislative power in Victoria is vested in a parliament consisting of the Crown, the Legislative Council and the Legislative Assembly as per the Constitution Act 1975 (Vic) s 15. The legislative assembly is comprised of 88 representative members that represent single-member electorates. The Legislative Council is comprised of 40 members that come from the eight regions, each of which has five members: Constitution Act 1975 (Vic) ss 15, 26 & 27.

The commencement of the Commonwealth Constitution did not alter the way in which the state parliaments operated. S 106 allowed for the continuation of each state's constitution as it were at the establishment of the commonwealth, until altered in accordance with the constitution of that state. Additionally, S 107 declared that state parliaments were to retain all of their legislative powers with the exception of those expressly withdrawn by the new Constitution. In regard to territories, the legislatures can be altered or abolished by valid legislation authorised by s 122 of the Constitution (*Bennett v Commonwealth* (2007)).

Commonwealth Parliament:

The Federal Structure:
Derived from the federal structure of the United States which would be a three-part legislature. Only change was that senators were to be directly elected rather than chosen by the Parliament of each state. Federalism ensures that the state's share power with the national government.

The legislative power of the Commonwealth is vested in a Federal Parliament, which consists of the Queen, a Senate and a House of Representatives. This is referred to as the Australian Parliament.

The Senate: is composed of senators from each State, directly chosen by the people of that State, voting, until the Parliament otherwise provides, as one electorate:

> Until the Parliament of the Comm. Otherwise provides, the Parliament of the State of Queensland, if it is an original State, may make laws dividing the State into divisions and determining the number of Senators to be chosen for each division, and in the absence of such provision the State shall be one electorate.

Until the Parliament otherwise provides there shall be six senators of each Original State. The Parliament may make laws increasing or diminishing the number of senators for each State, but so that equal representation of the several Original States shall be maintained and that no Original States have less than six senators.

The senators shall be chosen for a term of six years, and the names of the Senators for each state shall be certified by the Governor to the Governor-General.

The House of Representatives:
Composed of members directly chosen by the people of the Commonwealth, and the number of such members shall be, as nearly practicable, twice the number of the senators.
The number of members chosen in the several States shall be in proportion to the respective of their people, and shall, until the Parliament otherwise provides, be determined whenever necessary, in the following manner:

(i) a quota shall be ascertained by dividing the number of the people of Commonwealth as shown by the latest statistics of the Commonwealth, by twice the number of the senators;
(ii) The number of members to be chosen in each State shall be determined by dividing the number of the people of the State, as shown by the latest statistics of the Commonwealth, by the quota; and if on such division there is a remainder greater than one-half of the quota, one more member shall be chosen in the State.

Notwithstanding from anything in this section, five members at least shall be chosen in each Original State.

The Queen: The powers of the Queen are exercised by a Governor-General. As per s 2 of the Constitution, it is Her Majesty's representative who is capable of exercising those powers which the Queen may be pleased to assign. The need for assignment is however doubtful as many powers are expressly vested in the Gov-Gen by the Constitution. E.g.: S 5 (summoning, proroguing and dissolving parliament), 58 (recommending money bills to parliament), 57 (dissolving both houses in a deadlock situation), 58 (assenting to legislation) and in very general terms 61 (the executive power of the Commonwealth is exercisable by the Gov-Gen as the Queen's representative.

The functions that only the Queen can exercise: S 2 (formal appointment of Gov-Gen), 59 (disallowance of legislation passed by Comm parliament) and 60 (giving assent to legislation that must be reserved for the Queen's pleasure.

Aside from the above functions (which have little practical significance), the Gov-Gen discharges the important functions of the Crown. This is confirmed by the Queen's secretary who in so many words stated that the Constitution firmly places the prerogative powers of the Crown in the hands of the Gov-Gen.

Parliament exercised its ability to alter the size of the Senate (s 7) and House of Representatives (s 24) on two occasions. The Representation Act 1948 s 4 increased the number of members in each State to 10 and The Representation Act 1983 s 4 increased the number of members in each State to 12.

The size of the House of Representatives is spelt out in the Commonwealth Electoral Act (1918) ss 45-48.

- Shall 'as nearly as practicable' be twice the size of the Senate;
- Members of the house are chosen in each state (cannot be shared between states);
- The number of members allocated to each state shall be in proportion to their respective numbers of people; but
- Each original state must have at least five members in the house.

In 1974 legislation was passed giving each territory two members of the Senate with full voting rights.

Casual Vacancies: S 15 Constitution

If the place of a senator becomes vacant before the expiration of his term of service, the Houses of Parliament of the State for which he was chosen, sitting and voting together, or, if there is only one House of that Parliament, that House, shall choose a person to hold the place until the expiration of the term. But if the Parliament of the State is not in session when the vacancy is notified, the Governor of the State, with the advice of the Executive Council thereof, may appoint a person to hold the place until the expiration of fourteen days from the beginning of the next session of the Parliament of the State or the expiration of the term, whichever first happens.

Where a vacancy has at any time occurred in the place of a senator chosen by the people of a State and, at the time when he was so chosen, he was publicly recognized by a particular political party as being an endorsed candidate of that party and publicly represented himself to be such a candidate, a person chosen or appointed under this section in consequence of that vacancy, or in consequence of that vacancy and a subsequent vacancy or vacancies, shall, unless there is no member of that party available to be chosen or appointed, be a member of that party.

Where:

(a) in accordance with the last preceding paragraph, a member of a particular political party is chosen or appointed to hold the place of a senator whose place had become vacant; and

(b) before taking his seat he ceases to be a member of that party (otherwise than by reason of the party having ceased to exist);

he shall be deemed not to have been so chosen or appointed and the vacancy shall be again notified in accordance with section twenty-one of this Constitution.

The name of any senator chosen or appointed under this section shall be certified by the Governor of the State to the Governor-General.

If the place of a senator chosen by the people of a State at the election of senators last held before the commencement of the *Constitution Alteration (Senate Casual Vacancies) 1977* became vacant before that commencement and, at that commencement, no person chosen by the House or Houses of Parliament of the State, or appointed by the Governor of the State, in consequence of that vacancy, or in consequence of that vacancy and a subsequent vacancy or vacancies, held office, this section applies as if the place of the senator chosen by the people of the State had become vacant after that commencement.

A senator holding office at the commencement of the *Constitution Alteration (Senate Casual Vacancies) 1977*, being a senator appointed by the Governor of a State in consequence of a vacancy that had at any time occurred in the place of a senator chosen by the people of the State, shall be deemed to have been appointed to hold the place until the expiration of fourteen days after the beginning of the next session of the Parliament of the State that commenced or commences after he was appointed and further action under this section shall be taken as if the vacancy in the place of the senator chosen by the people of the State had occurred after that commencement.

Subject to the next succeeding paragraph, a senator holding office at the commencement of the *Constitution Alteration (Senate Casual Vacancies) 1977* who was chosen by the House or Houses of Parliament of a State in consequence of a vacancy that had at any time occurred in the place of a senator chosen by the people of the State shall be deemed to have been chosen to hold office until the expiration of the term of service of the senator elected by the people of the State.

If, at or before the commencement of the *Constitution Alteration (Senate Casual Vacancies) 1977*, a law to alter the Constitution entitled "*Constitution Alteration (Simultaneous Elections) 1977*" came into operation, a senator holding office at the commencement of that law who was chosen by the House or Houses of Parliament of a State in consequence of a vacancy that had at any time occurred in the place of a senator chosen by the people of the State shall be deemed to have been chosen to hold office:

(a) if the senator elected by the people of the State had a term of service expiring on the thirtieth day of June, One thousand nine hundred and seventy-eight—until the expiration or dissolution of the first House of Representatives to expire or be dissolved after that law came into operation; or

(b) if the senator elected by the people of the State had a term of service expiring on the thirtieth day of June, One thousand nine hundred and eighty-one—until the expiration or dissolution of the second House of Representatives to expire or be dissolved after that law came into operation or, if there is an earlier dissolution of the Senate, until that dissolution.

Duration and Membership of Parliament:

Maximum terms of Victorian Parliament

The Legislative Assembly expires on the Tuesday that is 25 days before the last Saturday in November that is nearest to the fourth anniversary of the election day on which it was elected: s 38

The Governor may by proclamation or otherwise fix such places within Victoria, and, subject to the Constitution Act 1975 (Vic), such times for holding every session of the council and assembly and may vary and alter the same respectively in such manner as her or she thinks fit: s 8(1). The Governor may, if he or she thinks fit, by proclamation or otherwise from time to time (s 8(2)):

- Prorogue (discontinue but not dissolve, means that Parliament can be called again) the council, the assembly, or both the council and the assembly; or
- Dissolve the assembly.

However, the Governor may not dissolve the assembly (including the assembly last elected before the Constitution (Parliamentary Reform) Act 2003 (Vic) receives the royal assent) unless (s 8):

- The assembly is dissolved in accordance with prescribed procedures; or
- The Premier has given advice to the Governor under a prescribed provision.

The assembly may be dissolved if (s 8A(1)):

- a motion of no confidence in the Premier and the other Ministers of State for the State of Victoria is passed by the assembly; and
- during the period commencing on the day of the passage of the motion of no confidence and ending 8 clear days after that day, the assembly has not passed a motion of confidence in the then Premier and the other ministers of state for the State of Victoria.

Notice of a proposed motion of no confidence must be given at least 3 clear days before it is moved: s 8A(2). After a motion of no confidence is passed, unless a motion of confidence is passed, the assembly may not be (s 28):

- prorogued before the end of the 8-day period; or
- adjourned for a period extending beyond the 8-day period.

The Victorian Legislative Council that is in existence immediately before the Constitution (Parliamentary Reform) Act 2003 (Vic) receives the royal assent shall exist and continue until the dissolution or other lawful determination of the assembly last elected before that royal assent is received: s 28(1). The council (other than the council to which the preceding rule applies) shall exist and continue until the dissolution or other lawful determination of the assembly: s 28.

Maximum Terms of Commonwealth Parliament

2.3.10E **Commonwealth Constitution**

13 As soon as may be after the Senate first meets, and after each first meeting of the Senate following a dissolution thereof, the Senate shall divide the senators chosen for each State into two classes, as nearly equal in number as practicable; and the places of the senators of the first class shall become vacant at the expiration of three years, and the places of those of the second class at the expiration of six years, from the beginning of their term of service; and afterwards the places of senators shall become vacant at the expiration of six years from the beginning of their term of service.

The election to fill vacant places shall be made within one year before the places are to become vacant.

For the purposes of this section the terms of service of a senator shall be taken to begin on the first day of July following the day of his election, except in the cases of the first election and of the election next after any dissolution of the Senate, when it shall be taken to begin on the first day of July preceding the day of his election. ...

28 Every House of Representatives shall continue for three years from the first meeting of the House, and no longer, but may be sooner dissolved by the Governor-General.

Double Dissolution, Prorogation and adjournment

Double Dissolution:

If a proposed law passed by the House is rejected by the Senate or passed with amendments to which the House will not agree, or the Senate fails to pass the bill, then the constitutional means for resolving the disagreement between the Houses commences, with a 'double dissolution' provided for by section 57 of the Constitution, whereby both Houses are dissolved simultaneously. The process for the settlement of deadlocks is only applicable to bills which have been initiated and passed by the House of Representatives. There is no similar procedure in the Constitution to resolve any deadlock on legislation initiated in the Senate.

Distinct and successive stages in the procedure of passing a bill in the case of a deadlock:

If the House of Representatives passes any proposed law, and the Senate rejects or fails to pass it, or passes it with amendments to which the House of Representatives will not agree, and if after an interval of three months the House of Representatives, in the same or the next session, again passes the proposed law with or without any amendments which have been made, suggested, or agreed to by the Senate, and the Senate rejects or fails to pass it, or passes it with amendments to which the House of Representatives will not agree, the Governor-General may dissolve the Senate and the House of Representatives simultaneously. But such dissolution shall not take place within six months before the date of the expiry of the House of Representatives by effluxion of time.

If after such dissolution the House of Representatives again passes the proposed law, with or without any amendments which have been made, suggested, or agreed to by the Senate, and the Senate rejects or fails to pass it, or passes it with amendments to which the House of Representatives will not agree, the Governor-General may convene a joint sitting of the members of the Senate and of the House of Representatives.

The members present at the joint sitting may deliberate and shall vote together upon the proposed law as last proposed by the House of Representatives, and upon amendments, if any, which have been made therein by one House and not agreed to by the other, and any such amendments which are affirmed by an absolute majority of the total number of the members of the Senate and House of Representatives shall be taken to have been carried, and if the proposed law, with the amendments, if any, so carried is affirmed by an absolute majority of the total number of the members of the Senate and House of Representatives, it shall be taken to have been duly passed by both Houses of the Parliament, and shall be presented to the Governor-General for the Queen's assent.

A double dissolution cannot take place within six months before the date the House is due to expire by effluxion of time. According to Quick and Garran the purpose of this restriction is that the House of Representatives may not be permitted to court a deadlock and to force a dissolution of the Senate, when the House is on the point of expiry.

In considering whether to grant a double dissolution, the Governor-General may be expected to satisfy himself or herself that there is in reality a deadlock and that the requirements of section 57 have in fact been fulfilled. In addition, regard has been had to the importance of the bill or bills in question and the workability of Parliament.

There must be an interval of three months between the first rejection, failure to pass or passage with unacceptable amendments by the Senate and the passage of the bill a second time by the House.[12] That interval gives time for consideration and conciliation, and permits the development and manifestation of public opinion throughout the Commonwealth. The interval may be composed of time wholly within the same session of Parliament as that in which the bill was proposed and lost, or it may be composed of time partly in that session and partly in a recess, or in the next session. The interval may be longer than three months, but it cannot extend beyond the next session of the Parliament.

The bill which is again passed by the House and sent to the Senate after the three-month interval must be the original bill modified only by amendments made, suggested or agreed to by the Senate.

Interpretations of the phrases ‘interval of three months’ and ‘fails to pass’, contained in section 57, have been the subject of considerable examination. Interpretations of the significance and meaning of these words are dealt with in the case studies which follow.
Once the conditions set by section 57 have occurred, whether and when to advise a double dissolution is a matter for the Prime Minister. There is no constitutional necessity to do so, or to do so within any period of time. Following a double dissolution there is no constitutional necessity to reintroduce a bill that was a cause of the deadlock.

Prorogation:
To prorogue parliament is to terminate a session of parliament. Parliament is dismissed from further sitting, pending its reconvening, without going so far as to dissolve that parliament. Bills that are under consideration will lapse and have to be reintroduced in the next session. Bills that have been passed prior to prorogation can still be presented for royal assent. Power given to the governor-general under s 5 of the constitution.

Adjournment:
A less formal procedure than proroguing which is in the hands of each house of parliament, by which its deliberations are suspended rather than terminated for a short period.