

## Class 7—Topic 10 (The Legislature)

### Bicameralism

- Historically, elite control: distinction between nobility and clergy and the common people. (House of Lords in the UK; colonial Parliaments)
- Deepening of democracy had different effects in different polities:
  - Queensland and NZ: complete abolishment of upper houses
  - Britain: weakened powers of House of Lords
  - Canada: severely diminished legitimacy
  - Australia: made upper Houses more democratic → this allows for the upper House to retain power.
- Federalism**: another rationale for bicameralism. Lower House is the house of representatives, whereas the upper House of Senate is composed of Senators, each elected to represent a state or territory. There are 76 senators in the upper House, with 12 representing each state and 2 each from the Australian Capital Territory and the Northern Territory.
  - Bicameralism is indispensable for a federation to safeguard the rights of smaller units (states) and to accommodate the diversity in the legislature. The Senate provides a feasible platform to the units for representation on the principle of equality.
- Contemporary rationale: Offers greater deliberation and makes legislature more effective
  - Because a government will generally have the support of the lower House, the lower House will tend to pass laws desired by the executive branch without much deliberation. Having an upper House that is diverse and representative of the States ensures effective scrutiny and further contributes to separation of powers (executive branch will not be able to directly “legislate” by having the majority of lower House agree; the bill must pass through the Senate).

### Bicameralism in Australia:

	State Level	Commonwealth Level
Upper House	Legislative Council	Senate
Lower House	Legislative Assembly	House of Representatives

- Features of upper Houses (in contrast of lower Houses):
  - Include some Ministers
    - No Prime Minister or Premier (belong to the government and thus, the lower house)*
    - No Treasurer because lower house usually makes financial decisions*
  - Democratically elected (different constituency/electoral district and other arrangements)
    - S 22A and the Sixth Schedule of the Constitution Act**
  - Sometimes the upper House has a longer rotating fixed term (usually 6 years, with half of the upper House rotating every 3 years)
    - S 22B of the Constitution Act**—Legislative Council holds office for a term longer than the Legislative Assembly.
    - Consequence of structural difference: the government may not command the sure support of a majority in the Legislative Council.
  - Powerful, but usually no or limited power over money bills
  - Do not form governments but help to hold them accountable.
- Bicameralism may cause disagreement between the two Houses on passing a bill, causing a deadlock
- Australian Senate**
  - Framework in Cth Constitution (State Constitutions for Legislative Councils)
  - S 7 of Constitution**: 12 Senators for each Original State, for all 6 states
  - Nexus between the size of the Senate and the House of Representatives (The House of Representatives is twice the size of the senate)
  - Senators have fixed, rotating six-year terms, half ending every three years
  - Elected with proportional representation, each state as a single electorate
  - It is rare for the government to have majority in the Senate (usually the gov. has majority of the House of Rep.)
  - S 53 of Constitution**: Same powers as lower House, except for certain money bills

- The Senate does not form government. However, in 1975, the Senate caused the government to fall by continuously rejecting money bills

- **Deadlocks between Senate and House.**

A deadlock happens when a bill passes the House of Representatives but does not pass in the Senate. The process of deadlock resolution is found in **s 57 of Constitution**

**S 57  
Constitution**

“Disagreement between the Houses’

- 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
- Three-month interval
- The House of Representatives again passes the proposed law with or without any amendments which have been made, suggested, or agreed by the Senate, and the Senate rejects or fails to pass it, or passes amendments to which the House of Representatives will not agree
- Governor-General may dissolve the Senate and the House of Representatives
- Bill passes (new) House but does not pass (new) Senate.
- Governor-General may call a ‘Joint Sitting’ to pass bill
  - Joint sitting shall vote upon the proposed law as last proposed by the House of Representatives and upon any amendments which have been made by one House and not agreed by another. If the proposed law 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 duly passed by both Houses of the Parliament and shall be presented to the Governor-General for the Queen’s assent → **process favors lower house (and therefore government) as lower house has double the number of members of upper house**

**Egan v Willis (1998)**

*(Role of upper Houses, Australian bicameralism on responsible government, ‘privileges’ of Parliament, justiciability of developments in Parliament)*

- **Facts:** Egan was the Leader of the Government in the Legislative Council of NSW, and the Treasurer, Minister for Energy, Minister for State Development and Minister Assisting the Premier. Egan was asked by the Legislative Council to table papers and deliver them to the clerk but failed to do so. The LC passed a resolution adjudging the appellant guilty of a contempt of the house. He was suspended from service of the House for the remainder of the day and when he failed to leave the House, Willis (president of the LC) asked the Usher to escort Egan from the chamber and the parliamentary precincts. Egan brought action against Willis in the Supreme Court NSW seeking declarations that suspension of service for a day due to contempt of the house were invalid and that his removal from the chamber and the parliamentary precincts constituted trespass. The NSWSC dismissed the claim for the first declaration but declared that Willis committed actionable trespass.
- **Issue:** Does the Legislative Council (upper House) have the power to remove a member from the house for non-compliance with resolutions that he/she table certain State papers?
- **Rule:** NSW Legislative Council has the implied power to require one of its members, who is a Minister, to produce State papers to the House, together with the power to counter obstruction where it occurs (hold in contempt, suspension for a day and removal from parliamentary precincts)  
**Test:** an implied power of such type must be reasonably necessary for the exercise of the Council’s functions (primary legislative functions, as well as the role of the upper house to scrutinize the Executive generally). **Test for reasonably necessary: conventional practices** established and maintained by the Legislative Council. (per Gaudron, Gummow, and Hayne JJ)
- **Reasoning:**
  - Justiciability:

- **Art 9 of the Bill of Rights:** ‘The Freedom of Speech, and Debates or Proceedings in the Parliament ought not to be impeached or questioned in any Court or Place out of Parliament’.
- **Imperial Acts Application Act 1969 (NSW):** implements the above in NSW: ‘these Acts have remained in force and shall be in force in the State’
- Evident intention: there should be some limits on the extent that the courts can consider the events that happen in the NSW legislative branch.
- **R v Richards; Ex parte Fitzpatrick and Browne: Dixon J—**‘it is for the courts to judge the existence in either House of Parliament of privilege, but given an undoubted privilege, it is for the House to judge of the occasion and of the manner of its exercise’
- Thus, whether the House of Parliament has privilege is a justiciable matter.
- Privileges of the Legislative Council
  - **Kielly v Carson:** power in question ‘is necessary to the existence of such a body, and the proper exercise of the functions which it is intended to execute’→test of reasonable necessity
  - **Barton v Taylor (British case):** power suspending a member guilty of obstruction or disorderly conduct during the continuance of a current sitting was reasonably necessary for the proper exercise of the functions of the Legislative Assembly.
  - Is Barton v Taylor applicable to an Australian case? **Australia Act 1986 (Cth)** terminates responsibility of the UK in relation to State matters. However, neither the Cth Constitution nor the Australia Act diminishes the powers/privileges of State Parliaments. Thus, it is sufficient to apply the tests applied in earlier British authorities.
- Functions of Legislative Council
  - Responsible government: the upper House can demand tabling of the documents to hold government to account.
  - **S 5 of the Constitution Act:** ‘to make laws for the peace, welfare and good government of NSW in all cases whatsoever’. This indicates an imperative need for each chamber to have access to material which may help in considering the making of changes/manner of operation of existing laws.
  - If a member will not produce documents sought by the House, there may be some limits to the steps it may take in response→short suspension of a member is within the scope of the privileges of the Legislative Council. It was also, by convention, ‘reasonably necessary’ for the exercise of the Council’s function.

## Class 8—Topic 11 (Delegated Legislation), 12 (Structure of the Executive)

### Practice of delegated legislation:

Practice of Parliaments delegating legislative power to the executive (legislation may also create executive power)

- Almost any statute delegated legislative power to someone.
- Traditionally, the power is delegated to the Governor-General in Council; increasingly it is delegated to the responsible Minister.
  - Legislation created by the executive branch via delegated legislative power is called ‘regulation’, or ‘rules’. The collective term used at the Commonwealth level is now ‘Legislative Instrument’
- Very common practice. Primary legislation delegates the legislative power.
- Delegation of legislative power is usually found towards the end of a primary legislation.
- May potentially perform a useful function if used appropriately: where main points are determined by the Parliament, the power to add/change minor rules may be delegated to the executive branch to increase efficiency. However, legislation without any major point that only serves to delegate legislative power defeats the purpose of separation of powers.

### Public Law issues of delegated legislation:

- **Constitutional constraints on delegating legislative power?**

- Separation of power: clearly makes separate definitions for legislative and executive powers. Limits the extent to which you can
- Federalism: If the delegation of legislative power is so broad that you cannot tell whether the Commonwealth Parliament is acting within its power.
- Should legislature and law makers be responsible and accept that there are limits to the extent of delegation of power?
  - Consider the subject-matter of delegation: never delegate legislative power to important matters of rights?
  - Scope: no major policies should be made via delegated legislative power; only minor details.
    - **Henry VIII** clause in primary legislation that allow executive branch to use the delegated legislative power to make legislative instruments that override other legislations made by the Parliament.
  - Choice of recipient of the delegation:
    - Criteria in choosing who should be the 'respectable recipient' of delegated legislative power.
    - Governor-General and ministers are accepted recipients. However, should legislative power be delegated to any member of the executive branch?

- To what extent is delegated legislation scrutinized by the Parliament?

- **Senate Standing Committee on delegated legislation**

- Established after Dignan's case to ensure scrutiny on legislative instruments
- Has the power to scrutinize and recommend to the Senate disallowance of most delegated legislation (except for those exempt from disallowance under **s 44 of the Legislation Act 2003 (Cth)**) → **Legislation Act 2003, chapter 3, part 2**
- Processes: tabling → scrutiny (under the terms below) → report to Senate → potential for disallowance
- Terms of reference: does not look at questions of politics (right or wrong). Looks at technicalities and procedural process: compliance with statutory requirements, protection of individual rights and liberties.

a	Is it in accordance with its enabling Act and complies with legislative requirements?
b	Does it appear to be supported by constitutional head of legislative power and is otherwise constitutionally valid?
c	Does it make rights, liberties, obligations or interests unduly dependent on insufficiently defined administrative powers?
d	Were those likely to be affected by the instrument adequately consulted?
e	Is the drafting defective or unclear?
f	Can the instrument and any document it incorporates be freely accessed and used?
g	Does the accompanying explanatory material provide sufficient information to gain a clear understanding of the instrument?
h	Does the instrument trespass unduly on personal rights and liberties?
i	Does it unduly exclude, limit, or fail to provide for independent review of decisions affecting rights, liberties, obligations, or interests?
j	Does it contain matters more appropriate for parliamentary enactment?
k	Does it comply with any other ground relating to the technical scrutiny of delegated legislation that the committee considers appropriate?

*This scrutiny will not be done by the lower House of Representatives, as the majority will support the government and therefore will not go against a legislative instrument enacted by the executive branch.*

- **Senate Standing Committee on Scrutiny of bills**

- Established to ensure scrutiny on primary legislation delegating legislative power.
- Government does not have a majority in the committee
- Looks at the primary enabling Act (bill) that delegated legislative power.
- Attempts to answer whether the primary enabling Act delegated 'too broad of a legislative power'.
- If affirmative, the committee will recommend senate to amend or reject the bill.

## Legislation Act 2003 (Cth)

3. Object: 'The object of this Act is to provide a comprehensive regime for the management of Acts and instruments...'

8	<b>Definition of legislative instrument</b> (3) an instrument made under a power delegated by the Parliament is a legislative instrument if it is registered as a legislative instrument. (4) an instrument is a legislative instrument if: (a) the instrument is made under a power delegated by the Parliament; and (b) any provision of the instrument i. determines the law or alters the content of law rather than determining cases where the law or another legislative instrument is or is not to apply. ii. has the direct or indirect effect of affecting a privilege or interest, imposing an obligation, creating a right, or varying or removing an obligation or right
12	Commencement (1) legislative instrument commences: a. at the start of the day after the day the instrument is registered; or b. so far as the instrument provides otherwise—in accordance with such provision
15G	Lodgment on Register (1) the rule-maker for legislative instrument must lodge the instrument for registration as a legislative instrument as soon as practicable after the instrument is made Explanatory statement for legislative instruments (4) the rule-maker for an instrument that is lodged for registration as legislative instrument must: (a) lodge an initial explanatory statement for the instrument as soon as practicable after the instrument is lodged for registration
15K	Enforceability (1) a legislative instrument is not enforceable by or against any person unless the instrument is registered as a legislative instrument (2) failure to lodge explanatory statement does not affect validity or enforceability of the instrument
17	Consultation—makers should consult before making legislative instrument
38	Tabling (1) The office of Parliamentary Counsel must arrange for a copy of each registered legislative instrument to be delivered to each House of Parliament to be laid before each House within 6 sitting days of the House after the registration of the instrument (3) If (1) is not done, the legislative instrument is repealed immediately after the last day for it to be so laid.
42	Disallowance (1)(b) within 15 sitting days of the House of the Parliament passes a resolution disallowing the instrument or provision, the instrument or provision so disallowed is repealed immediately after the passing of that resolution .... (more ways legislative instruments can be disallowed)
44	Exemptions from disallowance (1) s 42 does not apply if the enabling legislation for the instrument: (a) facilitates the establishment or operation of an intergovernmental body or scheme involving the Cth and one or more States and Territories (2)(a) an Act declares that s 42 does not apply in relation to the instrument or provision
48	Remaking disallowed instruments (1) a legislative instrument or a provision of a legislative instrument that is the same in the substance as a legislative instrument or a provision of a legislative instrument that has been disallowed under s 42(1) or (2) must not be made within 6 months after the day of disallowance.
50	Sunsetting (2) Sets out the 'day of repeal' for legislative instruments made in specific years: i.e. 1. A year before 1930 → Day of repeal (1 April 2015)

### Trends and issues of delegated legislation:

- Very extensive use of delegated legislation

- Increasing exemptions from parliamentary scrutiny, particularly using s 44 to exempt from disallowance
- Use of delegated legislation for too significant of legislative purposes → primary enabling Act has been delegating too broad of a power
- Covid-19: formation of 2 Senate Committees to scrutinize covid-19 instruments

### Dignan's case (Victorian Stevedoring and General Contracting Co P/L v Dignan) (1931)

- **Facts:** Transport Workers Act 1928-1929 delegated legislative power to the Governor-General to make regulations that will have the force of law, with respect to the employment of transport workers (limits: A. legislative instrument cannot be inconsistent with this primary act. B. legislative instrument will be subject to Acts Interpretation Act). The legislative instrument enacted by the Governor-General contains cl 3, which states that waterside workers are in force priority shall be given in employment to those waterside workers who are available and are members of an organization known as the 'Waterside Workers Federation of Australia. Dignan sues by attacking the validity of provision in Transport Workers Act 1928-1929, which 'attempts to grant to the Executive a portion of the legislative power vested by the Constitution in the Parliament'
- **Issue:** Can state delegate broad legislative powers (that can override other legislations made by Parliament) to the Governor-General?
- **Rule:** Yes. Three-way separation of powers under the Cth does not prevent the delegation of broad legislative power to the executive.
- **Reasoning:**
  - Wide delegation of law-making power to executive was said to be consistent with long standing British practice. High Court has accepted validity of delegating legislative power in *Roche v Kronhemier*. Too late to disturb it now.
  - If legislature was not allowed to delegate some of its power to the executive, effective government would be impossible.
  - Under the doctrine of responsible government, final oversight over executive power remains with the legislature, thus providing a check on the use of delegated power. For this reason, delegated legislative power is not 'true' legislative power.
  - **Minimal limits of delegation:** a delegation of power may be invalid where the subject matter is so wide that 'it is not a law with respect to any particular head or heads of legislative power'.
  - Parliaments in this tradition are not considered delegates as in the USA.
  - The Australian separation of powers is asymmetrical: judicial power is firmly segregated from executive and legislative powers, but the division between executive and legislative branch is less clear.

### Structure of the Executive Branch (Hanks)

Commonwealth's executive power is identified in s 61 of the Cth Constitution

*'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'*

This marks the external boundaries of the Commonwealth executive power but leaves entirely untouched the definition of that power and its ascertainment in any given instance. Thus, the extent of executive power will be further determined by legislation (i.e. ~~delegated legislative power~~, statutes) and the common law.

The location of executive power in Australia

The Queen	<ul style="list-style-type: none"> <li>• The Queen's function in relation to the government of Australia are exercised by her representatives</li> <li>• Queen's appointment of representatives must be exercised on advice</li> <li>• Sue v Hill: various legal identities of the Queen. Share the same Queen with the UK, but when the Queen is acting on matters of Australia, the Queen's legal identity is the 'Queen of Australia'</li> </ul>
'Crown'	Collection of individuals and institutions that make up the executive branch of government
Governors	<b>Governor-General (Cth)</b>

	<ul style="list-style-type: none"> <li>• <b>S 2 of the Constitution (Cth)</b>—‘a GG appointed by the Queen shall be Her Majesty’s representative in the Cth’</li> <li>• <b>Balfour Declaration (Imperial Conference) 1926</b>—autonomy of the Cth executive government confirmed</li> <li>• Autonomy of the GG further confirmed in 1975 during the dismissal of PM Gough Whitlam. When the speaker of House of Representatives asked the Queen to intervene, the Queen responded that ‘She had no power in the decisions which the GG must take in accordance with the Constitution’.</li> <li>• Sources of power, beyond exercising the executive power of the Cth: <ul style="list-style-type: none"> <li>○ <b>S 5 Constitution (Cth)</b>—power to dissolve House of Representatives</li> <li>○ <b>S 58</b>: GG may assent to laws in the name of the Queen</li> <li>○ <b>s 64</b>: GG may appoint officers to administer government departments, who shall become members of the Executive Council and Ministers of State for the Cth</li> <li>○ <b>s 72</b>: GG may appoint justices for the High Court</li> </ul> </li> <li>• <b>Constitutional Convention</b>: In practice, GG Must act on advice of Executive Council and Ministers of the Cth. (<i>practice/habit not written anywhere; unenforceable by the courts</i>)</li> </ul> <p><b>State Governors</b></p> <ul style="list-style-type: none"> <li>• <b>S 7 Australia Act 1986 (Cth)</b>—‘Her Majesty’s representative in each state shall be the Governor. S 7(2) ‘all powers and functions of Her Majesty in respect of a State are exercisable only by the Governor of the State’ <ul style="list-style-type: none"> <li>○ Subject to 2 qualifications: the power to appoint and remove the Governor of a State and; the exercise of the Queen’s powers and functions while Her Majesty is personally present in the State.</li> </ul> </li> <li>• <b>S 6 of the Constitution Act 1975 (Vic)</b>—office of the Governor in Victoria is an entrenched constitutional status. The Governor in Vic must act on advice of the State’s Executive Council and Premier.</li> <li>• Primary source of power set forth by the State’s Constitution Act: <ul style="list-style-type: none"> <li>○ Appoint ministers and executive councilors</li> <li>○ Fix time and place for sessions of Parliament, summoning Parliament, prolonging Parliament, and dissolving the lower House.</li> <li>○ Appoint other public officers</li> <li>○ Convene joint sitting of two Houses of Parliament for deadlock resolution (Vic and South Australia only)</li> <li>○ Recommend Bills for appropriating revenue and taxation to Legislative Assembly or House of Assembly</li> </ul> </li> </ul>
<p>Ministers <i>Usually must be active member of Parliament (at Cth or State level)</i></p>	<p><b>Cth Ministers</b></p> <ul style="list-style-type: none"> <li>• Appointed pursuant to <b>s 64 Constitution (Cth)</b> by the GG.</li> <li>• ‘No Minister of State shall hold office for longer than 3 months unless he is or becomes a senator or a member of the House of Representatives’ → <i>similar requirement for State Ministers.</i></li> <li>• <b>s 44 Constitution (Cth)</b>: Ministers cannot be disqualified from Parliament (if a member of Parliament receives payment for discharging the duties associated with an office in the government, the member will be disqualified from Parliament unless he is a Minister appointed under <b>s 64</b>).</li> </ul> <p><b>State Ministers</b></p> <ul style="list-style-type: none"> <li>• In each State, the Governor may appoint Ministers of the Crown. These appointments will come from the current members of Parliament (State)</li> <li>• In the event the appointed Minister is not a current member of Parliament, he/she must become so. Failure to do so will result in disqualification.</li> </ul>
<p>Cabinet</p>	<ul style="list-style-type: none"> <li>• The effective center of all executive power</li> <li>• Body responsible for the creation of state policy at the Highest level (<b>Commonwealth v Northern Land Council</b>)</li> </ul>

	<ul style="list-style-type: none"> <li>No legal power or function is conferred on the Cabinet, either by the Constitution or any legislation.</li> </ul>
Executive Council	<p>Cth Executive Council</p> <ul style="list-style-type: none"> <li>s 62 Constitution (Cth)—‘to advise the GG in the government of the Commonwealth’</li> <li>Usually members of the Executive Council move on to become Ministers appointed by the GG.</li> </ul> <p>State Executive Council</p> <ul style="list-style-type: none"> <li>Appointed by the Governor at the same time they are appointed as Ministers</li> <li>Transform decisions of Ministers and the government into ‘effective decisions’</li> <li>Advise State Governors (reflecting Government policy as settled by Cabinet)</li> </ul>
Public Corporations	<ul style="list-style-type: none"> <li>At the margin of the executive branch</li> <li>Legislative power will usually not be delegated here</li> </ul>
Public Servants	<ul style="list-style-type: none"> <li>Government employees who work in any of the departments of a state or territory government.</li> </ul>
Contractors	<ul style="list-style-type: none"> <li>Government may outsource activities to contractors and can regulate a variety of activities through the contractual relationship.</li> <li>See <i>Bropho v State of Western Australia</i> → the role of ‘Western Australian Development Corporation’</li> </ul>

### Executive Immunity

- Bingham’s equality principle that governments and people are subject to the same law in the same courts. There are exceptions:
  - ‘Crown’ immunity from suits in contract and tort: the government governs in the public interest. If someone is successful in a suit in contract and tort against the Crown, tax money will be used to pay for individual personal damages.
  - Presumption of statutory interpretation: ‘Crown’ is not bound by legislation.
    - The legislation traditionally ‘belonged’ to the Governor-General, who is part of the Crown. Will the Crown be passing legislation that binds itself?
  - Other include a degree of executive immunity from the production of certain kinds of documents in courts and legislatures.
  - As generalization, the trend is to limit executive immunity
- Judiciary Act (1903)**
  - Foundation statute for the Commonwealth judiciary, exercising some of the judicial powers in Chapter III of the Constitution
  - Part IX: ‘Suits by and against the Commonwealth and the States’
    - Sections under Part IX provide jurisdiction for suits against the commonwealth or a State in federal jurisdiction and to make provision for incidental matters*
    - S 63 Service of process when Cth or State is party:** where Cth or State is a Party to a suit, all process in the suit required to be served upon that party shall be served upon the Attorney-General of the Cth or of the State, or upon some person appointed by him or her to receive service.
    - S 64 Rights of parties:** in any suit to which the Cth or a State is a party, the rights of parties shall be as nearly as possible be the same, and judgment may be given and costs awarded on either side, as in a suit between subject to subject.
  - Each State also has its own legislation authorizing suits against the crown in State jurisdiction; i.e. *Victoria Crown Proceedings Act 1958 (Vic)*
- Bropho v Western Australia (1990)**

*(Crown immunity and privileges, rebuttable presumption of crown immunity, test of purpose)*

  - Facts: The ‘Swan Brewery Site’ is situated within an Aboriginal site to which s 5 of the Aboriginal Heritage Act applies. S 17 of the Act provides that ‘a person who (a) excavates, destroys, damages, conceals or in any way alters the Aboriginal site [...]’ commits an offence unless with authorization of Trustees under s 16 or the consent of the Minister under s 17. Western Australian Development Corporation is an agent of the Crown.
  - Issue: Does the provision of s 17 of Aboriginal Heritage Act 1972 apply to the Crown, or does the Crown have immunity? Yes.

- Rule: The Crown and its agent can be bound to Statutes—the Crown’s prima facie immunity can be rebutted by considering the purpose of the statute.
- Reasoning
  - **Rebuttable presumption:** The rule that statutory provisions worded in general terms are to be construed as prima facie inapplicable to the Crown. This reflects the prerogative power of the Crown to override words in a statute capable of applying to it. This presumption is not confined to the Sovereign herself and extends to confer prima facie immunity to agents acting on behalf of the Crown.
  - **Pre-Bropho: stringent test** → presumption of Crown immunity can only be rebutted by: 1. Express words of the legislation; 2. Necessary implication (that there was an *apparent* intention to bind the Crown based on words of the statute and general context of subject matter; that the beneficial purpose of the statute would be *wholly* frustrated)
    - *Other ‘rules of construction’ that require clear and unambiguous words before one can construe legislative intent: abolishment or modification of common law principles or rights; retrospective operation of a common law; depriving a superior court of power to prevent an unauthorised assumption of jurisdiction → all require stringent necessary implication or clear express words to rebut presumptions opposite to these ideas. Similarly, it would be hard to prove that the Crown is not immune to statutes.*
  - **Post-Bropho:** Due to the expansion of identity and the activities of governmental instrumentalities and agents into commercial, industrial, and developmental realms, it has become inevitable that legislation has increasingly intended to bind the Crown. **There is no basis in holding the rule of stringent test as an inflexible one. The purpose of the statute will be more heavily considered.**
  - Regardless of what test is applied, it is clear that the legislative intent of s 17 of the Aboriginal Heritage Act is to apply to employees and agents of the Crown: If 93% of Western Australian land is Crown land and 50% is described as ‘Vacant Crown Land’, the Act would be extraordinarily ineffective if it did not bind the Crown.
- Holding: Bropho succeeds; declaratory and injunctive relief granted. Appeal allowed. The Cth later used the Minister’s consent to circumvent this decision. The Swan Brewery Site was still demolished in the end.
- Crown immunity is **not** a constitutional convention. Common law rules of statutory interpretation, including interpretation of intention to bind the Crown, can be overridden by Acts Interpretation Act in the presence of inconsistencies.