

- Withdrew through *Statute of Westminster (1931)*, Australia adopted in 1939
- Judicial: Australian cases could be appealed from HCA to Privy Council
  - s 74 of Constitution establishes HCA authority
- Control of Australian states: states kept links to UK Crown
  - *Australia Acts (1986)* severed these final links:
    - s 1 UK parliament cannot make laws in Australia at any level
    - s 11 Appeals to Privy Council terminated

Indigenous recognition movement through 1967 referendum

- Removed:
  - s 127 (Indigenous Australians not counted in population)
  - s 51 (Parliament cannot make special laws for Indigenous Australians) from Constitution
- Kept:
  - s 26 (Indigenous Australians disqualified for voting)
  - s 51 (non-beneficial laws can be made for Indigenous Australians)
- added
  - s 116A (prohibition of racial discrimination)

## 4.2 Devolution – Crawford

Binding legal instruments in treaty form render it difficult for dependent entities to attain legal personality and independence (349)

1919 - Dominions signed and approved ratification of the Treaty of Versailles (363)

- They became separate members of the League of Nations and acquired a distinct legal personality
- Mandates within the League were entrusted with each Dominion, rather than the Empire as a whole
- However, this did not mean the Dominions were independent:
  - The League recognised Dominions as an entity between States and Colonies (364)
  - The Dominions signed under the heading "British Empire"

1900 - *Commonwealth of Australia Constitution Act 1900* (UK) - established Australia's Commonwealth

1923-1926 – UK announces Dominions are autonomous

1931 – *Statute of Westminster*, UK withdraws legislative power

1986 - *Australia Act 1986* (Cth) - sets out the agreed-upon powers of the Commonwealth and each State (372)

1999 – *Sue v Hill* establishes the UK as a foreign power

## 4.3 Sue v Hill

<i>Sue v Hill</i> – HCA 1999	
Issue	Is a British citizen barred from becoming MP due to s 44(i) of Constitution?
Facts	Hill is dual citizen MP
Held	Hill is the citizen of a foreign power, therefore barred
Law	<i>Commonwealth Constitution</i>

	s 47 any question about the qualification of an MP shall be determined by the House in which the question arises s 44 (i) someone under allegiance to a foreign power cannot be MP <i>Commonwealth Electoral Act</i> s 353(1) election validity can only be disputed by address to the Court of Disputed Returns s 354(1) High Court is the Court of Disputed Returns
Reasoning	Hill was a British citizen, this constitutes a 'foreign power' regardless of Australia's relation with the state in-question [48-49] Australia has a distinct legal personality from the UK, so the UK is a foreign power [96]
Relevance	Australia held to be legally separate from the UK

#### 4.4 Uluru Statement from the Heart 2017

Indigenous Sovereignty 'has never been ceded or extinguished, and co-exists with the sovereignty of the Crown'

'Call for the establishment of a First Nations Voice enshrined in the Constitution'

'Seek a Makarrata Commission to supervise a process of agreement-making between governments and First Nations'

### III. Australian Domestic Public Law

#### 1. Legislature

##### Lecture 1.1

Comparing the 2 federal legislatures	
HoR	Senate
Bigger states have more seats	Each state has the same number of seats
3 year terms	6 year terms
Preferential electoral systems -> major parties	Single transferable vote system -> minor parties
Majority in this house forms the government	House of review
Approx. double Senate	Smaller house

#### 1.2 The Constitution of Australia: A Contextual Analysis – Saunders

Argument that HoR 3-year elections are so frequent that governments do not take long term decisions (121)

- Government is formed by majority in HoR

#### 1.3 Australian Constitutional Exceptionalism – Partlett

Rowe shows that history can support forms of constitutional interpretation (2)  
Constitution

- 'directly' in ss 7 and 24 is progressive at the time
- s 41, if one can vote for one house, then they can also vote for the other

Australian states were at the forefront of making electoral processes more inclusive

- E.g. SA pioneered women's suffrage

This constitutional exceptionalism is continued through compulsory voting and AEC oversight

### 1.4 Rowe

<i>Rowe v Electoral Commissioner</i> – HCA 2010	
Issue	Is a law restricting polling closure unconstitutional?
Facts	<i>Commonwealth Electoral Act</i> close electoral roll earlier than before, citizen sues and claims this is unconstitutional
Held	Law is unconstitutional
Law	<p><i>Commonwealth Constitution</i></p> <p>s 7 Senate 'directly chosen by the people of the State'</p> <p>s 24 HoR 'directly chosen by the people of the Commonwealth'</p> <p><i>Commonwealth Electoral Act 1918</i></p> <p>Electoral roll closes on the day the electoral writ is issued, used to be open for 7 more days</p>
Reasoning	<p><u>French CJ</u>: Electoral laws serve ss 7 and 24 Constitutional mandate, otherwise invalid <b>Substantial reason required to justify an exception to universal adult-citizen franchise</b></p> <p><u>Crennan J</u>: ss 7 and 24 of the Constitution constrain any reversion to arbitrary exclusions from the franchise The electoral laws in-question disentitle people from the right to vote Historical perspective – amendments as a threat to the tradition of protecting franchise Definition of 'representative government' – 'a government in which members of the Parliament represent those who have voted for them in an election'</p>
Relevance	<p>Australians have a constitutionally entrenched right to vote, HCA protects this right unless there is substantial reason</p> <p>Concerning that unelected judges are required to determine/protect representative democracy?</p>

### 1.5 Egan v Willis

<i>Egan v Willis</i> – HCA 1998	
Issue	Does the Legislative Council have power to suspend one of its members for failing to produce state papers that the House has sought?
Facts	<p>NSW Legislative Council - any papers can be ordered to be laid before the House</p> <p>Egan is Minister of the Crown, he refused to table papers per lower house requests</p> <ul style="list-style-type: none"> <li>• He did this because he is a member of the government and it was within his party interest to maintain secrecy</li> </ul> <p>Lower house finds him guilty of contempt of the House and suspends him from service</p>

	Egan refuses to leave Egan is removed from the House onto the street
Held	It is within Legislative Council's powers to suspend a member if <b>reasonably</b> necessary for the proper exercise of its functions
Reasoning	Egan is not exempt from responsible doctrine government just because he is a Minister and MP The primary role of Parliament is to pass laws, but it also has functions of questioning and criticising the government on behalf of the people <ul style="list-style-type: none"> <li>• The legislature needs to scrutinise the executive</li> <li>• Therefore, the legislature has powers, privileges and immunities that are necessary for the exercise of these functions</li> </ul>
Relevance	Scrutinising government is a proper function of the legislature [42] Judiciary supporting legislature in its role of holding the executive accountable

## 2. Executive

### 2.1 Lecture

Roles of the executive:

- Administer the law
- Formulate policy
- Make law through delegated legislation

Executive immunities – 'preferences, immunities and exceptions' that the Crown is entitled to (Evatt J in *Federal Commissioner of Taxation v Official Liquidator of EO*)

50% of law is made through delegated legislation

### 2.2 Bropho

<i>Bropho v WA</i> – HCA 1990	
Issue	Are agents of the Crown immune from statute?
Facts	WADC, set up by WA Parliament, threatens to set up a brewery on land protected under <i>Aboriginal Heritage Act</i> . Is sued as agent of the Crown.
Held	WADC is subject to the provisions
Law	<i>Aboriginal Heritage Act</i> (WA) s 17 offence for destruction/alteration of Aboriginal sites
Reasoning	Historical presumption that the Crown is not generally bound to statutory provisions because of: <ul style="list-style-type: none"> <li>• The dignity and majesty of the Crown</li> <li>• Ensure that statutory derogation is made apparent</li> <li>• Legislation is meant for subjects</li> </ul> Requirement for the Crown to be bound: 'must be manifest, from the very terms of the statute, that it was the intention of the legislature that the Crown should be bound' (17) <ul style="list-style-type: none"> <li>• This is a stringent and rigid rule that has little applicability in the Australian context, where the Crown reaches into almost all sectors (19)</li> </ul>

	<p>Concept that the role of the executive has evolved</p> <p>Importance of context:</p> <ul style="list-style-type: none"> <li>• In criminal situations, presumption is strong</li> <li>• In commercial/developmental, presumption is just a starting point</li> </ul>
Relevance	<p>No longer requires exemption to be explicitly worded, instead can consider purpose of policy based on extrinsic material, identity of the entity</p> <p>Erosion of executive immunities</p>

### 2.3 Dignan

<i>Victorian Stevedoring and General Contracting Co Pty Ltd v Dignan</i> – HCA 1931	
Issue	Validity of delegated legislation vs separation of powers
Facts	<p>Constitution does not expressly authorise nor prohibit delegated legislation</p> <p>Dignan challenges the <i>Transport Workers Act</i> for breaching the separation of powers</p>
Held	Delegated legislation is valid
Law	<p><i>Transport Workers Act 1928</i></p> <p>s 3 Executive can make regulations with the force of the law with respect to the employment of transport workers</p> <p><i>Commonwealth Constitution</i></p> <p>s 1 'legislative power of the Commonwealth shall be vested in a Federal Parliament'</p>
Reasoning	<p>Parliament cannot confer judicial power to another body, so the executive cannot confer legislative power unto itself</p> <ul style="list-style-type: none"> <li>• 'the Parliament is restrained from reposing any power essentially judicial in any other organ or body' (98)</li> </ul> <p>The Act authorises the Executive to perform a function which would be essentially legislative (100)</p> <ul style="list-style-type: none"> <li>• Gives the GG a complete, unregulated power over large and important subject</li> </ul> <p>A statute conferring upon the Executive a power to legislate upon some matter contained within one of the subjects of legislative power of the Parliament is a law with respect to that subject</p> <p>Limitations on delegated legislation:</p> <ul style="list-style-type: none"> <li>• Delegation has to fall within a head of power</li> <li>• Parliament cannot entirely abdicate its legislative power</li> </ul> <p>In Westminster system, delegated legislation is common, and Constitution drafters did not intend to restrict this</p>
Relevance	Parliament does have the power to delegate certain powers to the executive, but with limitations

### 2.4 Senate Submission on Delegated Legislation – UoM Centre for Comparative Constitutional Studies

The legislation the Executive produces is referred to as delegated legislation

Parliament delegates their legislation making powers to the executive for the sake of efficiency and expediency