Week 1 - Introduction

- Section 2 *Constitution Act 1902* (NSW)
  - Recognises Aboriginal peoples as traditional custodians and occupants of the land of NSW and spiritual, social, cultural and ec[illegible] relationship with their traditional lands & waters.
- Constitution **does not recognise this**
- High Court of Australia ('HCA[illegible]nours pri[illegible]es embed[illegible]nto Australian Constitution
- HCA = **originalist** (prudent) vs[illegible]uth Africa Hi[illegible]ourt (transformative).
- Ronald Dworkin (Freedom's Law[illegible]is impossibl[illegible]have a judge of a Supr[illegible] Court / High Court, that is **not political.**
- **Australia's High Court is <u>more rigid</u>** vs activist in othe[illegible]s.
- **Interpretation**
- **The Text (provision)**
  - Context is important when reading text. Especially when **s[illegible]al opinion** s[illegible] (especially important in Australia, as constitution is old).
- **Principle**
  - To find a principle, we need to <u>make a construction</u>.
- **Constitutional Practice**
  - What Judges have said about the <u>meaning of the constitutional text</u>
- These three elements allow for **<u>construction (interpretation)</u>**
- **<u>Living Theory of Constitution</u>**
- Created in Canada
- Views the Constitution as a 'living thing' whose nature adapts, and the nature of it adapts over time
- **<u>Popular in United States</u>**: 1920's Supreme Court wanted <u>to maintain economic liberalism</u>

Week 2 - Indigenous Peoples and the Constitution

- **<u>Sovereignty</u>** = <u>supreme authority</u> in a territory
- Clash of sovereignty during the English colonisation
- The concept is tied to political power and authority, often determined through military might or control.
- Sovereignty in legal and political contexts often differs, with Indigenous notions of sovereignty incorporating cultural and spiritual dimensions, emphasizing the ancestral connection to the land.

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- **<u>Indigenous Sovereignty</u>**

- The Landing: **<u>26 Jan 1788</u>**
  - Governor Arthur Phillip arrives with First Fleet: **declares British sovereignty**
  - Established colony of NSW
  - <u>Terra Nullius</u>: Fiction that **land was uninhabited** because Indigenous peoples had no pre-existing systems of laws.
  - Indigenous people **never ceded sovereignty** to the British (no treaties etc).
- James Cook was originally instructed to 'take possession of convenient situations <u>with consent of the natives</u>'.
- Arthur Phillip was instructed to *'<u>by every possible means, to open an intercourse with the natives, and to conciliate their affections, enjoining all our subjects to live in **amity and kindness with them**</u>*.

- **<u>Colonisation</u>**

- Edward Wilson (1856): *<u>"In less than twenty years, we have nearly swept them off the face of the Earth"</u>*

- **Lack of Consent and Sovereignty**

- *R v Ballard* (1829) - **Justice Dowling:** I know of no reason human or divine which ought to justify us interfering with their institutions even if such interference would be practicable
- *R v Bonjon* (1841) – Willis J urged that treaties should be made with Indigenous peoples

- **Section 51(xxvi) - The Race Power**

- The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to (xxvi): the people of any race, ~~other than the aboriginal race in any State~~ for whom it is deemed necessary to make special laws.

Reference to **<u>Aboriginal race was removed in 1967 referendum</u>**

Constitution & Discrimination Against Indigenous Australians

- [illegible]aws denying right to vote
  - [illegible]ws and policies enabling unequal wages
  - [illegible]tionist policies (controlled where they could live, who they could marry, property righ[illegible]). – *White Australia Policy*
  - Polic[illegible]anning languages
  - Laws[illegible]venting ATSI people being paid welfare (e.g *Tuberculosis Act* **<u>prevented Ind[illegible]ous TB patients from</u>** accessing welfare support)

M[illegible]ormal Constitutional Change Examples

- **Change via legi[illegible]n and policy practice**
  - **S 2**[illegible]Constitution contemplates banning races of voting
  - [illegible]ered inoperative largely by the ***Racial Discrimination Act* 1975 (Cth).** *Roach and [illegible]we* voting rights decisions sugg[illegible]st that the franchise can now no longer be significantly wound back, dem[illegible]ng how legislative change and judicial interp of the *Constitution* can combin[illegible]e formal change.
    - Additional ex[illegible] = S 11[illegible]tate may make anything but gold and silver coin a lega[illegible]r in payment[illegible]bts) – **challenges under this basis re payme[illegible] electronically[illegible]** been struck out.
- **Via Constitutional Co[illegible]ons**
  - Republic issue[illegible]**dual diminishment of Britain's influence**, and the ceremonial nature of the G-G[illegible]s as rep of Monarch.
  - Informal evolution =[illegible]rch and G-G's has been Australianised: is there any need for formal change?
    - E.g **British Kin**[illegible]itled 'King of Australia' under *Royal Style and Titles Act 1973*, also removed references to UK.

Should Australia become a Republic

- **Australia has taken steps toward independence:**
  - 1986 *Australia Acts* severed most remaining ties with U.K
  - Function of King's domestic reps have diminished (role of G-G)
  - G-G is the de-facto HoS; King a **sym**
- **President would replace Governor General,**
- **Minimalist Models**
  - Appointed by Gvnmt except w/o in ment of the C
  - McGarvie Model (19 council c er Govern ould act on PM's advice to select President.
- **Parliamentary Models**
  - Two-thirds parliament ppointment - ( ) model.
- **Popularly Elected Model**
  - Elected by the people. **Cons priate**, as G-G ro pe ed to be political, whereas President is; could lead to p struggles etc

Arguments For

Maintaining the King **maintains colonialism**, inappropriate
Modernisation: Australia must shed its Imperial past and become a bold, indepen ation es).
The King is too remote: Inadequate as a symbol to reflect Australian identity (Keating
Crown symbolism is outdated: Undemocratic, aristocratic, sexist, sectarian, and unsuita modern nation (Fidler).
Need to fill a symbolic vacuum: Provides a clear national identity (Jones & McKenna).
Maturity of government: A republic represents Australia taking responsibility for its o fairs, rathe ain g a parent-child relationship with Britain (Keating).
Public Support: Australian Republic Movement's 2023 research found **92% of Austr ns are o a repu** with **60% preferring an Australian head of state over King Charles**.

Arguments Against

- No need for change: Australia has a stable, successful Constitution—why alter it?
- Proven success of constitutional monarchy: Four of the six oldest continuous democracies (B d, Sweden, Australia) operate under this system.
- Uncertainty of change: Republican reform could introduce complexity and instability—better to maintain the tested system.
- Independence already achieved: Australia's status as an independent nation does not require becoming republic.
- Symbolic change, not practical necessity: Michael Kirby argues republicans focus on symbols rather than constitutional realities.
- Distraction from real issues: Reforming the system diverts attention from more pressing national concerns.

- The 1999 republic referendum failed **due to divisions among republicans** → some supported a parliamentary-appointed President, while others preferred direct election, leading to a split that monarchists exploited.
- The final referendum result was **55% No and 45% Yes**, rejecting the move to replace the Queen and Governor-General with a parliament-appointed President.

Aus Republic Movement's 2023 Proposal

- Outlines the "Australian choice" model, detailing a process **where candidates for Head of State are nominated by parliaments, elected by the people, and held accountable**.
- The proposal presents a structured approach to transitioning to a republic, emphasizing democratic involvement and the responsibilities of the Head of State.

Changing the Constitution Preamble

- The preamble of the Australian Constitution is considered outdated, failing to acknowledge Indigenous peoples and Western Australia, prompting calls for change.
- Two options for reform: **altering the *UK Constitution Act*** or **introducing a new preamble via referendum** to better reflect modern values and historical context.

Section 44 – Disqualification of being elected to Parliament for Dual-Citizens

- HCA ruling in ***Re Canavan*** (2017) set strict liability disqualification criteria under s 44(i) for Parliament members **holding foreign citizenship at nomination**, regardless of intent or knowledge. **15+ MP's & Senators disqualified from Plmt**
- Disqualification depends on foreign citizenship laws, with a narrow exception for individuals who took all reasonable steps to renounce but faced legal or practical barriers from other country.

Referendum success = bipartisanship, proposal, need for change (that galvanises public), combat disinformation.

- **Indigenous Advocacy Cases**

***Sea and Submerged Lands Case* (1975):** Asserted that "the acquisition of territory by a sovereign state for the first time is an act of state which cannot be challenged by the Courts of that state".
1979 *Coe* (No.1): Held there was no Aboriginal nation exercising sovereignty in Australia
1992 *Mabo (*No. 2): Recognised Native Title, however held **that the issue of surviving Indigenous sovereignty is not justiciable** in an Australian court [50]
1993 *Coe (No 2)*: Rejected the claim that the Wiradjuri people were a sovereign nation, a line of argument seen in the U.S
***Koowarta* (1982):** Related to the Racial Discrimination Act, highlighting the use of the "race power" by the federal government and the lack of constitutional protection against racial discrimination

- **Recognition in other Constitutions**
- **Rights guarantees**
  - Bill of rights (Canada guarantees Aboriginal and treaty rights

1. **Representative mechanisms**
   a. I.e Maori people have reserved parliament seats
   b. Finland & Norway have advisory bodies
2. **Cultural and Language Recognition**
   a. South African constitution recognises indigenous languages
   b. New Zealand recognises Maori as national language
3. **Agreement Making & Treaties**
   a. Canada, US, Treaty of Waitangi (NZ)
   b. Australia displays this through *Native Title Act* etc.

- **Discriminatory Provisions in Australian Constitution**

.25 - Contemplates banning races from voting
S.51 (xxvi) - Gives Parliament power to make race-based laws (originally excluded ATSI)
S.127 - REPEALED: provided Aboriginal people were not counted as population for voting purposes

- **K ase (1998)**
  - it and uncertain decision
  - ined that law making power under s. 51 (xxvi) could be used to create laws that both were both **ad geous and disadvantageous** to ATSI Australians
- **oowarta Case (1**
  - Koow argued against the Government's refusal to allow Aboriginal Land Fund to purchase large tra and violat the *Racial Discrimination Act 1975*
  - HCA upheld th A as an exercise of C-wealth's power to make laws with respect to external affairs under s. 51
  - Quee Gov's policy breached the RDA, as it was discriminatory.
- **Kruger (19**
  - High Court confirmed the absence quality before the law under the Constitution, allowing discriminatory laws towards Indigen
  - if the Ordinance enabled de, this t beyond constitutional remit of the ent/Government
- **Mabo No. 1 (1988)**
  - Queensland Gover had passe *Queensland Coast Islands Declaratory Act 1985* to extinguish Meriam people' to the islands.
  - HCA used **s.109 o Constitution** to rul Coast Islands Act as invalid, because it violated the *Racial Discrimina ct*
- **Mabo No. 2 (1992)**
  - Overturned the doctrine of terra us (found to be wrong): HCA held that Indigenous rights to land could survive the acquisition of sovereignty by British, where the Crown had not already extinguished said rights
  - Confirmed indigenous sovereignty was a non-justiciable issue in domestic courts.
  - *Native Title Act 1993* was subsequently passed to give common law recog of native title.