



HD APPROVED

CONSTITUTIONAL
LAW

MLP323

COMPREHENSIVE NOTES

-UPDATED FOR 2026-

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1 | AN INTRODUCTION TO AUSTRALIAN CONSTITUTIONALISM

CHECKLIST FOR CONSTITUTIONAL PROBLEM SOLVING

- 1) Identify the power(s) that might be invoked to support the law
- 2) Describe the ambit of the power(s) by reference to the relevant case law
- 3) Characterise the law — consider what rights, duties, obligations, privileges or immunities the law creates, affects or destroys — and whether those rights etc are sufficiently connected to, and/or reasonably appropriate and adapted to the power(s) invoked to support them
- 4) Reach a conclusion as to the validity of the law (a preliminary conclusion if the problem also raises issues about the applicability of prohibitions or limitations on power)
- 5) Identify the prohibitions or limitations that might be invoked to strike down the Cth law
- 6) Describe the ambit of those prohibitions or limitations by reference to the relevant case law
- 7) Characterise the law to consider whether it is struck down by the prohibitions or limitations (i.e. interpret the law and apply the relevant test(s))
- 8) Reach a conclusion as to the validity of the law

AUSTRALIAN CONSTITUTIONALISM

The Australian Constitution is our fundamental law. It is the primary source of public power in Australia. It also distributes this power between the different arms and levels of government. In this way, public power is controlled and limited by law and democratic government. In addition, the High Court, through its power of judicial review, ensures that government action is sanctioned by the Constitution. It is the point where law and politics collide. Thus, reviewing the constitutionality of government action will also involve more than strict legal analysis. To this end, the successful study of constitutional law requires a student to grasp a combination of historical, legal, political, social and even economic factors that characterise constitutional law issues and their resolution.

- Constitutional law defines the institutions of Government, assigns them to areas of operation and sets limits on their functions
- it is the most important and fundamental legal document we have as it is the supreme law of our nation state
- it is regarded and thought of as an **organic document** as it is superior to both Commonwealth and State laws

Basic structure

- it has a preamble which identifies Australia as having a federal system and as a constitutional monarchy
- we have 9 covering clauses with the 9th being our Constitution

SOURCES OF AUSTRALIAN CONSTITUTIONAL LAW

- *Commonwealth of Australia Constitution Act 1901* (UK)
- *Constitution Act 1975* (Vic)
- *Statute of Westminster 1931* (UK), *Statute of Westminster Adoption Act 1942* (Cth)
- Australian acts / Associated acts / Prerogative instruments
- Constitutional conventions / Judicial decisions

HISTORY – COLONIAL PERIOD 1788-1900

Overview

Constitutional history begins in 1788

- Australia declared *terra nullius* —
 - no indigenous constitutional history
 - no recognition of aboriginal government or prior sovereignty (cf NZ & Sth Africa)

Terra nullius (contra *Mabo (No. 2)* [1992])

- reception of English law (both statute and common law and English constitutional law) to extent applicable in the Australian colonies.
- until 1828 date of reception of English law determined by common law
- *Australian Courts Act 1828* (Imp)
 - deemed date of reception of English law
 - confirmation of power of imperial Parliament to enact legislation for Australia

1788-1850s

- 1788-1850s to 1890s evolution from penal settlement and executive government to responsible government and parliamentary democracy based on British system e.g.
 - *NSW Act 1823* (Imp) re Legislative Council
 - 1855 'responsible government' established in NSW, Vic & Tas
 - modelled on Westminster system (UK)
 - 'bicameral' legislature
 - *Australian Constitutions Act (No. 2) 1850* (Imp)

Victoria separated in 1851

- 'bicameral' Victorian parliament in 1855
- pass of *Constitution Act 1855* (Imp) (formed basis of Victorian Constitution until 1975)
- peaceful change facilitated by British Government — experience of US Revolution in 1770s
- plenary 'sovereign' Parliaments: *R v Burah* (1878) 3 App Case 889
 - plenary powers of legislation, as large, and of the same nature, as those of the Imperial Parliament itself'

Parliaments can enact legislation on any topic:

- not constrained by entrenched rights
- override common law
- executive government beholden to parliament (responsible government)

But subject to **four fetters** —

FOUR FETTERS

1) Doctrine of Repugnancy

- laws could not be repugnant to English law
- *Colonial Laws Validity Act*: abolished doctrine of repugnancy with **1 condition**: UK law not expressly or by necessary intendment to apply in Australia
- narrowed concept of repugnancy to statute law only and only if 'extended' to colonies
- **note**: inconsistency & Boothby (SA, 1853-67) on grounds 'inconsistent with laws of England': *Colonial Laws Validity Act 1865* (Imp) (cont'd next page)

2) Territoriality i.e. laws could not extend past their boundaries

- could only pass laws for the '**peace, order and good government**' of the colony (cf UK Parliament)

3) Disallowance by Monarch (cf royal assent)

- monarch could disallow **any** law
 - legislation passed by both houses, then presented to local governor for governor's assent
 - British had power to disallow legislation, regardless of being passed by both houses and assented to by local government
- **note: s 59** providing that this is still technically possible but it has been understood as practically unusable (since latter part of 19th century)

4) Reservation for assent by Monarch

- certain types of legislation couldn't be assented to by local government — had to be by Monarch
- Monarch acting on advice by ministers in UK, not from local government where law relative

Note: still exists in **s 60** but has similar status as **s 59** (i.e. barely used)

HISTORY — COLONIAL PERIOD: TOWARDS FEDERATION 1880s & 1890s

- political movement favouring uniting of colonies and national government for Australian continent
- Tenterfield Oration of 1889 by Henry Parkes and 1890 Colonial Conference
- led to drafting of first constitution

Reasons for national constitution —

- **defence**
 - British concerned about ability of various colonial resources to defend large land-mass of Australia in event of an attack by another European great power
- **economic** (e.g. **s 92** 'trade, commerce and intercourse between states shall be absolutely free')
 - wide thought that Australia should become one nation to increase success of economy etc
- **idealism** (e.g. Henry Lawson, Australian impressionism)
 - distinct Australian national identity (rather than just English)
 - development of Australian voice, impressionism
- **racism** & 'White Australia' policy

- perception of the 'white race' — people believed Australia should be maintained for the 'white race' — necessary to create Australia as a colony to restrict non-whites from entering etc — Australia had to be preserved for the 'white race'

Note: 'Founding fathers'

- Henry Parkes
- Alfred Deakin (1st Cth Attorney-General and 2nd Prime Minister)
- Samuel Griffiths (drafter of 1st draft; 1st Chief Justice, pro states)
- Andrew Inglis Clark (favoured US Bill of Rights)
- Edmund Barton (1st PM, 1st High Court)
- Isaac Isaacs (Cth A-G, CJ, Governor-General, centralist)

Constitutional conventions

- first convention: Sydney 1891
- second convention: first session, Adelaide (1897); 2nd session Sydney (1897) & 3rd session, Melbourne (1898)
- most states elected delegates to attend the convention
- **note** exclusion of —
 - working class / Labor Movement
 - non protestants
 - Aboriginals or non-white people
 - women
- plebiscites 1899 & 1900 (WA)
- negotiations with British & Passage of *Commonwealth of Australia Constitutional Act 1900* (Imp) on 9th July 1900

HISTORY — FEDERATION 1901

Commonwealth of Australia Constitution Act 1900 (Imp): preamble + nine sections 'covering clauses' (covering clause 9 = *Australian Constitution*)

8 Chapters —

I. 'The Legislature'

- **s 51** re legislative power of Cth Parliament
- 'heads of power' (placitum/placita)
- 'subject to Constitution'
- with respect to ('characterisation')
- concurrent (cf **s 52**)
 - contrast with State legislative power ('plenary') & Canada

II. 'The Executive'

III. 'The Judicature'

IV. 'Finance and Trade' (inc **s 92**)

V. 'The States'

- preservation of state Constitutions: **s 106**
- state legislative power: **s 107**
- inconsistency: **s 109**

VI. 'New States'

VII. 'Miscellaneous'

VIII. Chapter 8 (**Section 128**)

- entrenched constitution — cannot be amended by ordinary legislation
- referendum and 'double majority'
 - majority of electors in majority of states (i.e. 51%* and 4/6 states)
- frozen continent (Geoff Sawer) — only 8/44 referendums successful;
 - cf *Constitution Act 1975* (Vic)
- basis for 'popular sovereignty' argument — idea that Australian people now control the constitution and give it its ultimate authority: re **s 128**

Chapter VIII — Alteration of the Constitution: s 128

Steps:

- 1) Law passed by Parliament by absolute majority (more than 1/2 total members of House, rather than more than 1/2 of members voting at the time) in each House (**note:** there is an exception — see later topics)
- 2) Submitted to electors not less than 2 months and not more than 6 months after passage
- 3) Must be approved by majority of electors in Commonwealth **and** majority of electors in a majority of states
- 4) **Section 128** further constrains alteration by stating that if referendum will affect representation in one state, it must be approved by majority in that state

Strictness of s 128

- **Section 128** makes it quite difficult to have a successful referendum (i.e. only 8/44 have been successful)
- it is because of this difficulty in altering our Constitution that it has been described as the 'frozen continent'
- nevertheless **s 128** is part of the basis for the **popular sovereignty** argument which states that the authority of the Constitution is reposed in the Australian people, rather than the former argument which stated that the authority was the UK parliament passing an Act: *Australian Capital Television Pty Ltd v Commonwealth* (1992)

Note: context as important as text — text may only give vague sense of what Constitution is about; need to read between lines

EVALUATION OF CONSTITUTION

- 1) Very **pragmatic** rather than idealistic — More concerned with the division of functions between branches of Government
- 2) Very **limited amount of rights** compared to US constitution — Should we have a Bill of Rights?
- 3) It is **remarkably stable** (due to **s 128**) but seriously **out of date: s 59, 60, 61** and **74**
- 4) **Context** as important as text, e.g. conventions — text may only give vague sense of what Constitution is about; need to read between lines

CONSTITUTIONAL INTERPRETATION

Means by which the High Court interpret the text of the Constitution.

1) Originalism

- interpreting with particular view of the **original intention** of the document
- idea constitution has an original meaning, and that meaning should govern / determine how we apply constitution now

2) Literalism/Textualism

- emphasises significance of the words of the provision itself — conceived in *Engineer's Case* (1920)
- read the words, give them their plain/natural meaning

3) Progressive interpretation ('living tree')

- refers to a contemporary policy on significance of a provision — *Kirby* for example
- Constitution interpreted as a 'living' document — each generation reads constitution in a new light, gives new/modern meaning

Through this mechanism the High Court to some extent are the **'creators' of the Constitution**, as their interpretations of provisions create our understanding of the law and the way it applies — they don't use any one of the interpretations above but combines / uses all in different circumstances.

HISTORY — FEDERATION 1901 TO 1986

Balfour Declaration 1926

- 1) There was an Imperial Conference called by Canada's PM due to concerns over UK conduct — suggested conference to settle relationship between dominions British Empire and UK
- 2) During conference Balfour Declaration occurred — declares that dominions like Australia are **autonomous** and **not subordinate**; each of the dominions are **self-governing** and of co-equal status (with each other and the UK)
 - **Balfour Dec** = document from Imperial Conference which declares UK and its Dominions equal in all matters of external and internal affairs
 - document represented an **important step in Australia's path in becoming an independent nationhood**
 - **international recognition** of the free and equal status of the dominion members of the League of Nations was thus affirmed within the British Cth
- 3) Governor-General is now **representative** of Australia (not the UK government) — changes the communication channels to Gov & Gov rather than GG and UK Gov.

Note: 'unfinished business'

- legal disabilities on Dominions which conflicted with broad scope of Balfour
- dominion parliaments could not make laws contrary to the Acts of Imperial parliament
- doubted whether dominion parliaments could make laws operating outside their territories

Statute of Westminster 1931 (UK)

Note: Adopted by Australia in 1941 (*Statute of Westminster Adoption Act 1941*)

- applied to Commonwealth **but not** States
- adopted by Australia in 1942 and backdated to 1939 (had legal operation then — start of WWII)

Significance

- gave **legal independence** to Australian parliament, recognising Australia's autonomy
- the 'unfinished business' of Balfour was abolished by Statute of Westminster

- **s 4**: no act of UK Parliament should extend to a dominion as part of its law unless it expressly declared that the dominion had requested and consented to the enactment
- **ss 8 and 9**: ensured that power given to the Parliament of Cth to repeal/amend imperial laws operation in Aus did not extend to overriding the constitution

1) **Can now enact legislation and legislation that overrides English legislation.** UK no longer legislated for Aus (a dominion to the British)

2) Also made clear that **Australian parliament could now legislate extraterritorially** — meaning Aus can legislate outside of Australian territory (e.g. asylum seekers)

Note: Australia maintained ability to ask UK to pass legislation on their behalf (e.g. *Australia Acts*)

Important sections:

- **s 1** — re 'dominions' (i.e. Cth, not states); statute had no affect on Australian states, only affected Commonwealth
- **s 2(1)** — *Colonial Laws Validity Act* does not apply to any law made after this Act commences (**note** only inapplicable for Cth laws)
- **s 2(2)** — No law made by dominion shall be void on ground that it is repugnant
- **s 3** — full extra-territorial powers
- **s 4** — No Act of UK shall extend to Dominions, unless dominion requested and consented to enactment (i.e. renunciation of UK legislative power except where requested by Commonwealth Parliament)
- **s 8** — Nothing in this Act permits the repeal or alteration of the Constitution (i.e. excludes Constitution from being amended by Aus Commonwealth)

HISTORY — 1986 TO TODAY

Position of states was **unaltered** until *Australia Acts* —

- *Australia Acts (Request) Act 1985* (Vic)
- *Australia Act 1986* (Cth) (**s 51(xxxviii)**) & *Australia (Request and Consent) Act 1985* (Cth)
- *Australia Act 1986* (UK)
- both *Australia Acts* commenced 03/03/1986

Australia Act 1986 (Cth)

- despite passing of *SoW Act*, states **remained subservient to UK**: *China Ocean Shipping v South Australia*: HCA found that SA legislation invalid due to inconsistency with UK law

Steps taken to pass the Act

- 1) Each State passed *Australia Acts (request) Act 1985* — involved **s 51(xxxviii)** of Constitution allowing Cth to pass *Australia Act 1986* (Cth)
- 2) Cth then passed *Australia (Request and Consent) Act 1985* (Cth) directed to the UK asking them to pass the *Australia Act 1986* (UK)

Important sections

- **s 1** — **terminates right of UK Parliament to legislate for States or Cth** (Replaces *Statute of Westminster 1931*, s 4); UK Parliament will no longer legislate for Australia: [1.2.27], [1.2.29]
- **s 2** — States have **extra-territorial powers**
- **s 3** — *Colonial Laws Validity Act 1865* no longer applies to any subsequent legislation of State (e.g. abolition of repugnancy for states except for *Stat of West. 1931* and *Constitution Act 1900* (see **s 5**))
- **s 6** — 'manner and form' provisions: "constitution, powers and procedures"
- **s 7** — Crown's powers re state are exercised by Governor, not Queen (**s 7(1), (2)**) except power of appointment (**s 7(3)**) and termination of G-G

- **note:** advice to Queen re appointment given solely from State Premier (cf British Govnt): **s 7(5)**
- **ss 8 and 9** — State laws **not subject to disallowance/reservation** by the Monarch
- **s 11** — Effectively **abolishes appeals** from State supreme courts **to Privy Council** in matters of State jurisdiction
 - appeals from courts exercising federal jurisdiction abolished in 1968: *Privy Council (Limitation of Appeals) Act 1968* (Cth)
 - all appeals from HC abolished in 1975: *Privy Council (Appeals from the High Court) Act 1975* (Cth)
 - **s 11** effectively abolishes final avenue of appeal from state Supreme Courts to Privy Council in matters of state jurisdiction
- **s 15** — Entrenchment: *Australia Acts can only be repealed or amended* either **indirectly** by altering the Constitution under **s 128**; or **directly** through **s 51(xxxviii)** procedure

Note: appeals to Privy Council from the HCA possible but highly unlikely as they require a certificate from hCA (**s 74**), which has said it will never issue one: *Kirimani v Captain Cook Cruises Pty Ltd* (1985)

Significance of Australia Acts

Mason CJ in *Australia Capital Television v Cth* stated that the *Australia Act* **marked the end of legal sovereignty of UK** and recognised that ultimate sovereignty resided in the people of Australia.

- **states given power to legislate over British legislation** (until enacting AA's British law trumped state law)
 - state parliaments could enact legislation inconsistent with British legislation
- until 1986, British legislation overrode state law, now states given ability to enact legislation which overrode imperial legislation
- also confirmed **states power to legislate extraterritorially** (e.g. regulation of fishing off Victorian coast)
- can **no longer appeal state Supreme Court decision to PC** — could go to HCA
- **constitution is binding** on us, as accepted as legitimate by Australian people. 'Popular sovereignty'
 - no need to rely on British authority, as accepted by Australians
 - HC also recognised this authority, thus legally enforceable
 - governor, now appointed **on advice from state parliament, no longer queen**

POST FEDERATION — Australian law currently

Australia is now completely legally autonomous and independent through a process of evolution:

- G-G is now representative of Australian Govnt, not British Govnt
- Parliaments not b found by UK Parliament
- HC not bound by British precedent

Note:

- full legal independence not achieved until 1986
- symbolic independence still not achieved because our head of state, the Queen of Australia also the Queen of the UK

POST FEDERATION — The future

- recognition of indigenous peoples
 - 'race power' amended to delete exclusion of Aboriginal people in 1967 (**s 127** abolished)
- preamble

- recognition of local government
- fixing the financial imbalance and clarifying Cth's spending powers
- recognising areas where Cth has effectively taken over from states
- greater rights protection?
- 'The Crown' & republicanism

FUNDAMENTAL PRINCIPLES

Broad conception of constitutional 'law'

Constitutional 'law' consists of more than 'black letter' law: e.g. **s 64**

Importance of constitutional conventions (**topic 2**):

- legally unenforceable rules which governments have a political and moral obligation to follow
- non textual
- based on practice
- if not followed system breaks down

State vs Cth powers

Section 109 provides that if a law is made by both the state and Cth, the state law will be invalid to the extent of the inconsistency/ies. The states enjoy general legislative power to make laws for the 'peace, welfare and good government' or 'peace, order and good government' of the respective state: *Constitution Act 1975* (Vic) **s 16**. Therefore, re **s 109**, the states have the power to make any laws that are not inconsistent with Commonwealth legislation.

The meaning of the phrase 'peace, order and good government' was considered in *Union Steamship Co of Australia Pty Ltd v King* (1988) 166 CLR 1. The HC based interpretation of the phrase on the doctrine of Parliamentary Sovereignty — 'the right to make or unmake any law whatever': Dicey, 1959.

Note limitation: as established in *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 1, HC recognised that the state parliaments could **not** abolish state courts, and could not vest powers in state courts that were incompatible with their character as courts, re **s 77** Constitution.

PARLIAMENTARY SOVEREIGNTY

- UK concept — seen to be the ‘most fundamental rule’ of English constitutional law: de Smith 1981, p. 73

The rule —

‘The Queen in Parliament is competent, according to UK law, to make or unmake any law whatsoever or any matter whatsoever, and no UK court is competent to question the validity of an Act of Parliament.’: de Smith 1981

- an **absolutely sovereign** parliament can enact any law it likes
 - e.g. killing of all blue eyed babies
 - no judicial review of validity of legislation

Key points

Note: this rule is a rule of common law, and in Australia it’s ‘Parliamentary supremacy’

- no Australia Parliament is absolutely sovereign as they are constrained by Constitution
- Parliamentary sovereignty/supremacy **only** relates to the legislature being supreme over the other two arms of government — this is consistent with the authority it derives from its democratic mandate
- judicial review of legislation (U.S. contra U.K.) and of executive action: e.g. **s 75(v)**
 - working principle in colonial era
 - assumed because of US experience: *Marbury v Madison*
- our parliaments are supreme but not truly sovereign

RULE OF LAW

According to Dicey it embodies the notion that **all people are equal before the law**: ‘Diceyan’ (Albert Venn Dicey 1835-1922) *An Introduction to the Study of Law of the Constitution* (1885)

1) People are free from capricious government decision-making. All people are “ruled by the law and law alone; a man may be punished for a breach of the law but he can be punished for nothing else.”

- “Equality before the law — equal subjection of all classes to the ordinary law of the land, administered by ordinary law courts. It excludes the idea of any exemption of officials or others from the duty of obedience to the law which governs other citizens.”: *Diceyan*, p. 2 textbook

2) People are equal in the eyes of the law — governors will be subject to same law as the governed

*‘The rule of law is an overarching principle which ensures that Australians are **governed by laws which their elected representatives make and which reflect the rule of law**. It requires that the laws are administered **justly and fairly**.’ — Robin Speed, RoLIA President*

Conception of rule of law

- absence of arbitrary power
- equality before law
- ‘bottom up’ constitutionalism
 - everyone is equal before the law and if government official acted against the law, people can go to a court and seek remedy against the government officials

The rule of law can be found in the Constitution in three places: