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1. Constitutional History

1.1 Pre-Federation

Pre-1788 – ATSI peoples:

- Indigenous Australians, their law and customs.

1788-1800s – Absolutist penal colony:

- Penal colony.
- English law displaced the law and land of the original people as Australia was deemed a settled colony, being seen as terra nullius: *Cooper v Stuart*
- Governance foreign to liberal democracy – total authority in the governor and military courts. English laws intended to apply to the colony prevailed over any other laws by paramount force.

1823 – Beginning of civil government:

- *NSW Act 1832 (Imp) s 24* created the legislative council to advise the Governor.
 - However, nominated by Governor.
 - Merely consultative, Governor not bound to act on the Council's advice.
- Supreme Courts of NSW and Tasmania established: Could deem any Australian Acts repugnant to British laws.

1828 – Reception of English law clarified:

- *Australian Courts Act 1828 (Imp)* clarified the date of reception, holding that all pre-1828 UK laws apply in Australia to the extent that the circumstances allow.
- All post 1828 UK laws may apply by paramount force if this is the express or implied intention of the UK parliament.

1850 – First representative government

- *Australian Constitutions Act 1852 (Imp)* allowed 2/3 of the legislative council to be elected. Also allowed the LegCo and Governor to increase the LegCo's size themselves.
 - Right to vote subject to property restrictions / only for men.
 - LegCo to advise Governor, Governor responsible to the Crown; hence not actually responsible.
 - Governor retained control of finances and held veto power.

1855 – NSW Parliament established

- *NSW Constitution Statute (1855)* created bicameral legislature empowered to create law for the "peace, welfare and good government" of the colony.
 - As explained in *Union Steamship v King*, "peace, welfare and good government" creates a general plenary power and are not words of limitation. NSW parliament had powers equivalent to the UK parliament within its borders.
 - Executive responsible to colonial rather than Imp parliament.
 - However, still subject to repugnancy; no extraterritorial laws or international legal personality.
- Mirrored in Victoria.

1865 – Colonial Laws Validity Act

- *Colonial Laws Validity Act 1865 (Imp)* passed.
 - **Repugnancy** only voids laws when there is explicit inconsistency with an Imperial law intended to apply to the colony per *CLVA s 2*
 - Allowed colonial parliaments to have power over their own constitutions and legislative procedures, provided that such laws are re **manner and form** per *CLVA s 5*
 - Power to create new courts: *CLVA s 5*
- These provisions remained in force for the Cth until the *Statute of Westminster 1932*, and for the States until the *Australia Acts 1986*

1.2 Federation

Reasons / Procedure

- Came about largely due to the commercial and defence benefits involved.
- Grew out of the Constitutional Conventions of the 1890s, with its format being left almost entirely in Australian hands.
- Referenda in each colony to approve.

Occurred in 1900 (effective 1901) by *Commonwealth of Australia Constitution Act 1900* (Imp) which united the colonies as States of the Commonwealth of Australia.

- s 9 contains the Constitution.
- The actual text contained in it was a product of the Constitutional Conventions, reflecting a dual British–American ‘Washminster’ system.
- s 128 of the Act gave Australia power to amend its own Constitution.

1.3 Independence

In 1919 Australia signed the Treaty of Versailles and joined the League of Nations in its own right, manifesting independent international legal personality.

Statute of Westminster 1931

Following pressure by Canada, South Africa and Ireland, the *Balfour Declaration* (1926) stated that the dominions were autonomous of the UK and not subordinate to each other or London.

Soon after, the *Statute of Westminster 1931* (Imp) passed, marking effective legislative independence from the UK:

- s 2(1) – repugnancy under the Colonial Laws Validity Act does not apply to Cth government.
- s 2(2) – the Cth gov’t can amend or repeal UK acts extending to the Cth
- s 4 – the UK parliament could not legislate in relation to the Cth unless the Cth had requested and consent to the enactment
- s 3 – the Cth expressly gained the power to enact extraterritorial legislation.

Note that repugnancy still applied to State laws. Also note that judiciary still not independent; apex of judiciary still the Privy Council.

Statute of Westminster was not adopted by the Cth parliament until 1942, retrospective to 1939 per the *Statute of Westminster Adoption Act 1942* (Cth)

Australia Acts 1986

Combination of Federal, State and Imp acts to enter into force together on 3 March 1986. Represent final step in severing ties with the UK, giving Australia constitutional independence and legal autonomy.

- s 1 – UK parliament can’t legislate for Australia
- s 2 – full plenary power to States to make laws for “peace, order and good government” incl extraterritorially, although subject to Cth Constitution per s 5
- s 3(2) – CLVA no longer applies to states, removing doctrine of repugnancy; States can repeal UK laws previously applied to them.
- s 5 – States are subject to the Cth Constitution and gain no new powers
- s 6 – **manner and form** proviso still applies to States, allowing entrenchment of laws

- ss 8 and 9 – Removed power of UK Parliament/Crown to disallow legislation or require that constitutional amendments be assented to in the UK.
- s 11 – termination of appeals to the Privy Council
- s 15 – entrenches the Australia Acts and Statute of Westminster, stating they can only be repealed by the Cth after the request of all the States.

Sue v Hill (1999) HCA

- UK held to be a foreign power following Australia Acts. HCA confirmed Australia's independence.
- Hence Hill, a One Nation candidate, denied ability to stand for Senate election due to dual Australian–British citizenship.

Attorney-General (WA) v Marquet (2003) HCA

- Argument that the Australia Acts were unconditional in that they altered State Constitutions without referenda conducted in accordance with s 106.
- Kirby found this convincing and thought the Acts were invalid.
- Majority disagreed, holding that Australia Acts fell within the Cth's power to legislate for States with their permission to legislate on the matter (xxxviii)

2. Constitutional Structure & Themes

2.1 The Australian Constitution & Federalism

Formally the constitution draws its force from the enactment of the Imperial Parliament. Informally, it gains legitimacy from popular sovereignty, the HCA having noted that today its true power comes from the people – *Mason CJ in Australian Capital Television*

1. Model

- A 'Washminster' model.
 - From the USA:
 - Judicial review as confirmed by the Judiciary Act
 - Federalism, including choice of decentralised US model
 - Separation of powers, esp separation of judicial power. Aims to limit power due to a wariness of governmental authority, although not to the same degree as the USA
 - From the UK:
 - Responsible government
 - Parliamentary sovereignty / supremacy (blue eyed babies)
 - Representative democracy
 - Westminster parliamentary system, with majority of power vested in lower house + integration of legislature and executive cabinet
 - Absence of a bill of rights & reliance on common law rights
- In the **federal system**, the established States come together, sacrificing some power to the Cth but retaining their own Constitutions and separate existence (s 106-7).
 - In the event of inconsistency between Cth and State law, Cth law prevails per s 109.
 - The Senate derives its power from the States and is designed to protect the interests of smaller ones (e.g. Tasmania); in contrast, House of Reps draws authority directly from the people.

2. Distribution of power

- a) Assume state legislates - plenary (peace, welfare, good governance)
UNLESS
- b) Cth has a concurrent power under s 51 – where inconsistency with state law Cth prevails.
Trade, taxation, bounties, credit, post/phone/telegraph, naval/military defence, lighthouses/sea issues, quarantine, fisheries, census, currency, banking, insurance, weights and measures, bankruptcy, copyrights, divorce, marriage, naturalization, maternity, pensions, racial laws, immigration, criminals, external affairs, Pacific islands, railway, industrial disputes.
- c) Cth has an exclusive power under s 52 (Canberra, the public service); s 90 (customs, excise, bounties) OR defence/coinage issue.

3. Treatment of States

- s 7 – equal representation
- s 51(ii) – taxation power cannot discriminate b/w states
- ss 51(iii) and 88 – customs and bounties duties must be uniform throughout the Cth
- s 99 – Cth cannot legislate on trade/commerce giving preference to a state
- s 118 – full faith and credit by Cth to laws of other states.