

TOPIC 3: FIRST NATIONS PEOPLES AND THE CONSTITUTION | Constitution ss 25, 51(xxvi), 51(xix), 122

The Constitution contains no recognition of Aboriginal and Torres Strait Islander peoples. 1967 Referendum (90.77% yes): removed s 127; amended s 51(xxvi) to include Aboriginal peoples: highest yes vote in Australian referendum history. Australian law treats British sovereignty as monistic: no parallel law-making system possible (Yorta Yorta). OPEN QUESTION: scope of s 51(xxvi) race power (Kartinyeri 1998).

s 25 Constitution	If a State law disqualifies people of any race from voting for the State Parliament, those people are not counted in calculating the State's representation in the HoR. Now a dead letter. Proposed for removal by Expert Panel (2012).	
s 51(xxvi): Race Power	Power to make special laws for the peoples of any race. After 1967 Referendum: extends to Aboriginal and Torres Strait Islander peoples. OPEN QUESTION: limited to beneficial use only (Gaudron J, alone) OR plenary including detrimental use (Brennan CJ and McHugh J): no majority resolved this in Kartinyeri (1998).	
Case	Result	Key Principle
Kartinyeri v Commonwealth (1998) 195 CLR 337	Divided; beneficial use question UNRESOLVED	Race power scope unresolved: Gaudron J (alone): beneficial use only. Gummow and Hayne JJ: declined to decide. Brennan CJ and McHugh J: plenary, not limited to beneficial uses. CRITICAL OPEN QUESTION.
Love v Commonwealth; Thoms v Commonwealth (2020) 270 CLR 152	4:3: cannot be aliens	Aboriginal Australians who have connection to country under traditional law cannot be constitutionally aliens under s 51(xix), even if not statutory citizens. Contested 4:3 decision.
Members of the Yorta Yorta Aboriginal Community v Victoria (2002) 214 CLR 422	Native title claim failed on facts	British assertion of sovereignty necessarily entailed that there could thereafter be no parallel law-making system in the territory (Gleeson CJ, Gummow and Hayne JJ). Monistic sovereignty principle.

REFORM PROPOSALS AND THE 2023 VOICE REFERENDUM

Constitution Alteration (Aboriginal and Torres Strait Islander Voice) 2023: proposed inserting Chapter IX, new s 129. DEFEATED 14 October 2023: 60.06% No, 39.94% Yes. Every State returned a No majority (ACT returned Yes). Cost: approximately \$364 million.

REFORM SEQUENCE	<p>Expert Panel (2012): remove ss 25 and 51(xxvi); insert new s 51A (positive power + recognition preamble); new s 116A (prohibition on racial discrimination by government); new s 127A (recognition of Indigenous languages).</p> <p>Joint Select Committee (2015): proposed ss 80A and 60A: power for protecting cultures, languages and heritage; non-discrimination provision.</p> <p>Uluru Statement from the Heart (2017): Voice enshrined in Constitution; Makarrata Commission for treaty-making; truth-telling. Sovereignty was never ceded, relinquished or validly extinguished.</p> <p>Referendum Council (2017): recommended referendum for a Voice to Commonwealth Parliament with function of monitoring use of ss 51(xxvi) and 122.</p>
ARGUMENTS AGAINST THE VOICE	<p>Liberal equality (Turnbull): each Australian equally represented as an individual; race-specific body contradicts liberal equality (Lockean tradition: individuals in a state of equality, property in their own persons).</p> <p>Sovereignty argument (some Indigenous advocates): constitutional recognition without treaty first was the wrong sequence and potentially foreclosed recognition of Indigenous sovereignty.</p>

TOPIC 4: FLEXIBILITY AND RIGIDITY IN AUSTRALIAN CONSTITUTIONS | Constitution s 128 | CLVA 1865 s 5 | Australia Act 1986 (Cth) s 6 | Referendum (Machinery Provisions) Act 1984/1986 (Cth)

A. AMENDING THE COMMONWEALTH CONSTITUTION: SECTION 128

Section 128: the EXCLUSIVE mechanism for formal amendment of the Commonwealth Constitution. Requires: (1) absolute majority of each House; (2) referendum; (3) DOUBLE MAJORITY: majority of all electors nationally AND majority of electors in at least 4 of 6 States. Special cases require TRIPLE MAJORITY (that State must also approve). Of 45 proposals: only 8 approved; last 1977.

Step 1: Parliament	Absolute majority (majority of TOTAL membership, not just those present and voting) of EACH House. Deadlock path: if one House passes twice by absolute majority and the other rejects, GG MAY (not must) submit to electors.
Step 2: Referendum Procedure	Referendum (Machinery Provisions) Act 1984/1986 (Cth). s 45: compulsory voting. s 11: YES/NO pamphlet (max 2,000 words each side). Must be submitted not less than 2 months and not more than 6 months after passing Parliament.
Step 3: Double Majority	National majority: majority of ALL electors voting nationally. PLUS State majority: majority of electors in at least 4 of 6 States. Both must be satisfied.
Step 4: Triple Majority (special cases)	Applies where amendment would: (a) diminish proportionate State representation in either House; OR (b) diminish minimum number of State members in the House; OR (c) alter the limits of a State. THEN that State's electors must also approve. No referendum has required a triple majority to date.
Republic Referendum 1999	Defeated: 45.13% Yes. No State majority. Key controversy: Clause 62: PM could immediately remove President by instrument; House must ratify within 30 days, but failure to ratify did not reinstate President. This dismissal mechanism was a primary objection. s 51(xxxviii): head of power for Australia Acts 1986 (Cth).

B. STATE CONSTITUTIONAL AMENDMENT: MANNER AND FORM

State constitutions are generally FLEXIBLE: amended by ordinary legislation, including through implied repeal (Taylor; McCawley). However, a State Parliament may impose binding MANNER AND FORM requirements on later legislation amending the cpp of the Parliament. Compliance with manner and form is a condition of validity.

SOURCE 1: CLVA 1865 s 5 (pre-3 March 1986)	Power to make laws respecting cpp of the legislature, PROVIDED passed in such MANNER AND FORM as required by existing colonial law. Applies to amending laws made BEFORE 3 March 1986. Consequence of breach: NO POWER to enact the amending law at all.
SOURCE 2: Australia Act 1986 (Cth) s 6 (post-3 March 1986)	A law made after 3 March 1986 respecting the cpp of the State Parliament shall be of no force or effect unless it is made in such manner and form as may from time to time be required by a law made by that Parliament. Consequence of breach: NO FORCE OR EFFECT.

B1. TWOMEY'S MANNER AND FORM FRAMEWORK (Steps A to G)

Apply in sequence. A: Does the amending law conflict with the entrenching provision? B: Is the entrenching provision doubly entrenched? C: Is it a true MFR or an abdication of legislative power? D: Does the amending law concern the cpp of Parliament? E: Timing (CLVA or Australia Act)? F: Consequences of breach? G: Justiciability?

A. Conflict?	Does the amending law seek to repeal or modify an entrenched provision without complying with the entrenching provision? If YES: continue. If NO: ordinary implied repeal operates (Taylor; McCawley).	
B. Double entrenchment?	If the entrenching provision does NOT protect itself: the amending law also impliedly repeals the entrenching provision and compliance is unnecessary. If DOUBLY ENTRENCHED: continue. Trethowan would have failed without s 7A(6) double entrenchment.	
C. True MFR or abdication?	<p>Valid MFR (true manner and form): referendum of electors; absolute majority; 2/3 majority. Electorate reconstituted as third chamber: Trethowan.</p> <p>Abdication (INVALID): consent of extra-parliamentary body (company, tribunal, local council): West Lakes Ltd v South Australia (1980). King CJ obiter: even 100% majority might be so onerous as to deprive Parliament of its sovereign powers.</p> <p>Not a MFR: requirement for specific wording (magic formula): South-Eastern Drainage Board (SA) v Savings Bank of SA (1939). Legislature cannot be commanded to express intention in a particular literary form.</p>	
D. Concerns cpp?	<p>Constitution, powers or procedure (cpp). Constitution extends to features giving Parliament its representative character, including how electoral districts are drawn and number of members: Marquet (2003).</p> <p>Does NOT extend to: laws concerning the judiciary alone; local government alone (South-Eastern Drainage Board). If no cpp: s 6 AA does not apply. Consider Ranasinghe principle (doubtful in Australia after Marquet).</p>	
E. Timing	Before 3 March 1986: CLVA s 5 applies (consequence: no power to enact). On or after 3 March 1986: Australia Act 1986 (Cth) s 6 applies (consequence: no force or effect).	
F. Consequences of breach	<p>Under CLVA s 5: no power to enact the amending law at all.</p> <p>Under Australia Act s 6: amending law is of no force or effect.</p>	
G. Justiciability	<p>General rule: courts prefer to wait until law is enacted: Cormack v Cope (1974) 131 CLR 432.</p> <p>Trethowan exception: entrenching provision expressly prohibits presentation to Governor unless complied with. Court can enjoin presentation before assent.</p> <p>Marquet exception: no effective remedy after assent, or not in public interest to wait. Court may intervene before royal assent.</p>	
RANASINGHE (doubtful in Australia)	Bribery Commissioner v Ranasinghe [1965] AC 172 (PC): legislature has no power to ignore the conditions of law-making imposed by the instrument which itself regulates its power to make law. Could support MFR requirements beyond cpp. STATUS: Doubtful after Marquet: s 6 AA leaves no room for any other principle in the field it operates. Note in exam but dismiss.	
Case	Result	Key Principle
Taylor v Attorney-General (Queensland) (1917) 23 CLR 457	Valid abolition of upper house	States have constituent power; implied repeal of constitutional provisions permitted. Referendum Act impliedly repealed Constitution Act (Qld) s 2 to extent of inconsistency. Pre-Taylor position (express only: Cooper v Commissioner of Income Tax (Qld) (1907)) rejected.
McCawley v The King (1920) 28 CLR 106	Valid implied repeal	Implied (not merely express) repeal of State constitutional provisions is permitted.

TOPIC 5: REPRESENTATIVE GOVERNMENT, THE FRANCHISE, AND ELIGIBILITY | Constitution ss 7, 8, 9, 24, 29, 43, 44, 45, 47 | Commonwealth Electoral Act 1918 (Cth) ss 163, 240, 245, 329A

A. EQUAL VOTE, EQUAL VALUE? ELECTORAL DISTRIBUTION

Sections 7 and 24 require the Senate and HoR to be directly chosen by the people. This does NOT require mathematical equality of electorates (McKinlay; McGinty). Grossly disproportionate distributions may at some point fail the constitutional test: an unresolved threshold. s 29: electoral divisions cannot cross State lines. s 43: cannot sit in both Houses simultaneously.

s 29 Constitution	Electoral divisions for the HoR must not be formed out of parts of different States. Divisions must remain within State boundaries.	
s 43 Constitution	A member of either House is incapable of being chosen or sitting as a member of the other House. Cannot simultaneously hold seats in both chambers.	
Gerrymandering vs Malapportionment	<p>Gerrymandering: drawing electoral boundaries to favour one party by twisting around areas with different voter profiles (named after Governor Elbridge Gerry, 1812).</p> <p>Malapportionment: significant discrepancy in voter numbers between electorates. 1993 WA election: electorates ranged from 34,161 to 9,097 enrolled electors (approx 3.75:1 ratio): factual background to McGinty.</p>	
Case	Result	Key Principle
Attorney-General (Cth); Ex rel McKinlay v Commonwealth (McKinlay) (1975) 135 CLR 1	No implied equality guarantee	s 24 does not require mathematical equality of electorates. Mason J: grossly disproportionate distributions might still fail: threshold unresolved.
McGinty v Western Australia (1996) 186 CLR 140	No requirement of equality	ss 7 and 24 do not apply to State elections. WA Constitution does not require equal distribution. Toohey and Gaudron JJ (dissenting): departures from equality require substantial justification.

B. THE IMPLIED RIGHT TO VOTE | Ratchet Principle

The implied right to vote is found in ss 7 and 24 themselves, NOT in s 41 (which is spent and transitional: Ex parte Sipka (1983)). Universal adult citizen suffrage is now constitutionally mandated. Ratchet principle: once Parliament has enacted a durable provision expanding the franchise, it cannot retreat without substantial justification. Parliament is NOT required to maximise participation: Keane J, Murphy (2016). Nettle J, Murphy (2016): 30-year established practice is not new law.

s 41 Constitution (SPENT)	R v Pearson; Ex parte Sipka (1983) 152 CLR 254: s 41 was TRANSITIONAL: spent once Cth enacted franchise legislation in 1902. Does not give a continuing right to vote at Cth level. Implied right found in ss 7 and 24 directly.
Compulsory Voting	s 245(1) Commonwealth Electoral Act: voting compulsory at federal elections. Langer v Commonwealth (1996) 186 CLR 302: compulsory full preferential voting under s 240 CEA is valid. Choice in ss 7 and 24 = choice between candidates, not freedom to abstain. s 329A: offence to publicise alternative methods: also upheld.

B1. TWO-PART TEST FOR EXCLUSIONS FROM THE FRANCHISE

To validly exclude a class from the franchise: (1) **SUBSTANTIAL REASON**: rationally connected to purposes of representative government; AND (2) **PROPORTIONALITY**: means reasonably appropriate and adapted to serve the legitimate end. Parliament is **NOT** required to maximise participation: Keane J, Murphy. Nettle J, Murphy: 30-year established practice is not new law and not invalid merely because a less burdensome alternative exists.

Step 1: Substantial Reason	<p>PASS: citizenship (membership in civic community); mental competence; serious criminal offending (repudiation of civic responsibility); treason.</p> <p>FAIL: religion; race; short-term imprisonment not demonstrating serious culpability.</p>
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Step 2: Proportionality	<p>Courts consider: (a) how many people affected; (b) whether law retreats from a durable legislative development; (c) whether evidence supports the claimed purpose; (d) whether less burdensome alternatives existed.</p> <p>Rowe: retreat from a durable development requires substantial justification. Detriment must not be disproportionate to any benefit achieved.</p> <p>Murphy: 7-day enrolment period maintained for 30 years; not a new restriction; orderly administration is a legitimate purpose. No compelling case for less burdensome alternative.</p>
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Case	Result	Key Principle
Roach v Electoral Commissioner (2007) 233 CLR 162	Blanket all-prisoner ban: INVALID; 3-year threshold: valid	Blanket ban not proportionate: minor offenders swept up without sufficient culpability. 3-year threshold reflected the electoral cycle and seriousness of offending. Serious criminal offending CAN justify disenfranchisement as civic repudiation.
Rowe v Electoral Commissioner (2010) 243 CLR 1	Removal of grace period: INVALID	Grace period since 1983 = durable legislative development. No existing fraud problem. 100,000 people disenfranchised. Detriment disproportionate to any benefit achieved. Ratchet principle: Parliament cannot retreat from established franchise right without substantial justification.
Murphy v Electoral Commissioner (2016) 261 CLR 28	7-day enrolment period: VALID	Not required to maximise participation. 7-day period was a 30-year established practice (not a new restriction). Legitimate purpose: orderly administration. Nettle J: no least-burdensome-alternative test.

C. SECTION 44: DISQUALIFICATION FROM PARLIAMENT

Section 44 sets out grounds of disqualification. Self-executing: seat becomes vacant automatically from the moment of the disqualifying event (s 45), NOT from judicial determination. Questions determined by the HCA as Court of Disputed Returns (s 47, Part XXII Commonwealth Electoral Act 1918 (Cth)). Eligibility under s 163 CEA: at least 18 years, Australian citizen, qualified to vote.

C1. s 44(i): FOREIGN ALLEGIANCE / CITIZENSHIP

Two limbs: (1) active acknowledgment of allegiance to a foreign power (requires positive act of will); (2) objective status as subject or citizen of a foreign power (NO mental element: ignorance is no defence: Re Canavan). Constitutional imperative: if foreign law IRREMEDIABLY prevents renunciation (insurmountable obstacle, not merely administrative delay: Re Gallagher), person must take all reasonable steps and will not be disqualified.

Step 1: Foreign citizenship?	Determined by the law of THAT foreign state (objective question). Knowledge or intent of candidate is irrelevant. Even long-held belief that you are not a citizen is no defence.
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TOPIC 8: NON-STATUTORY EXECUTIVE POWER | Constitution ss 61, 51(xxxix), 82, 83, 96 | Migration Act 1958 (Cth) ss 196, 198, 198AHA

A. PREROGATIVE POWERS

Prerogative powers: rights, powers, privileges and immunities which the relevant government possesses at common law: DHA Case (1997). Two definitions: Blackstone (narrow: powers NOT shared with private citizens; accepted by Gageler J in Plaintiff M68 at [133]); Dicey (broad: every act the executive can lawfully do without parliamentary authority). Existence and extent determined by examining the common law. No new prerogatives can be created by courts (R (Bancoult) v Secretary of State).

EVATT J'S THREE CATEGORIES	<p>(1) Executive prerogatives: execute treaties, declare war, coin money, pardon offenders (prerogative of mercy), confer honours, appoint ministers, detain aliens, command the military.</p> <p>(2) Immunities and preferences: priority of Crown debts; certain immunities from suit.</p> <p>(3) Proprietary prerogatives: Crown's right to precious metals, royal fish, treasure: remain with States unless transferred to Commonwealth.</p>
GENERAL LIMITS ON PREROGATIVE	<p>Cannot authorise breach of law: A v Hayden (1984) 156 CLR 532, Gibbs CJ: The executive has no power to authorise a breach of the law. Brennan J: The incapacity of the executive government to dispense its servants from obedience to laws made by Parliament is the cornerstone of a parliamentary democracy.</p> <p>Cannot impose taxes or create offences: without statutory authority.</p> <p>Subject to legislative abrogation: all non-statutory power can be displaced by legislation.</p>

A1. THE DISPLACEMENT PRINCIPLE | De Keyser; Jarratt

When a prerogative power is directly regulated by statute, the executive can no longer rely on the prerogative but MUST act in accordance with the statutory regime: Jarratt v Commissioner of Police (NSW) (2005) 224 CLR 44, 69-70 (McHugh, Gummow and Hayne JJ). Displacement by: (1) express words; OR (2) necessary implication (statute covers the ground). Whether statute displaces a prerogative: question of statutory construction.

Case	Result	Key Principle
Attorney-General v De Keyser's Royal Hotel [1920] AC 508	Compensation required; prerogative displaced	Once statutory scheme covers the ground of a prerogative power, executive must act in accordance with the statute and cannot revert to prerogative to avoid statutory limitations. What use would there be in imposing limitations if the Crown could at its pleasure disregard them and fall back on prerogative? (Lord Dunedin).
Jarratt v Commissioner of Police (NSW) (2005) 224 CLR 44	Prerogative displaced by statute	When prerogative directly regulated by statute: executive can no longer rely on prerogative; must act in accordance with the statutory regime. Accepted in Australia.
Cadia Holdings Pty Ltd v New South Wales (2010) 242 CLR 195	Copper and intermingled gold privately owned	Historic prerogative over gold in mines was abridged by Royal Mines Act 1688 before common law was received in NSW. Prerogative as received in Australian law must be assessed at the time of reception, not the original grant.

B. NATIONHOOD POWER | Constitution s 61 and s 51(xxxix)

<p>Section 61 executive power includes power to engage in enterprises and activities peculiarly adapted to the government of a nation and which cannot otherwise be carried on for the benefit of the nation: Mason J, Victoria v Commonwealth (AAP Case) (1975) 134 CLR 338, 397 (canonical test). Supported by s 51(xxxix) (incidental legislative power). Limits: coercive laws must be proportionate; no real competition with State executive powers; does not render s 96 grants otiose.</p>		
LIMB 1: Peculiarly national	Activity must be one that a national (as opposed to State) government is uniquely positioned to undertake. Not just convenient for the Commonwealth: it must be genuinely national in character. Examples: national bicentenary celebration (Davis); short-term fiscal stimulus during GFC (Pape, 4:3 majority).	
LIMB 2: Cannot otherwise be carried on	The States must lack the practical capacity, resources, or legal competence to carry out the enterprise. Must involve no real competition with State executive powers or legislative competence.	
COERCIVE LAWS UNDER s 51(xxxix)	s 51(xxxix) in support of nationhood receives a conservative answer when coercive laws are involved: French CJ, Pape. Must be proportionate and reasonably adapted. Davis v Commonwealth (1988) 166 CLR 79: restricting use of 200 years, Sydney, Melbourne was grossly disproportionate to the national commemoration purpose.	
s 96 GRANTS TO STATES	Section 96 Constitution: Parliament may grant financial assistance to any State on such terms and conditions as the Parliament thinks fit. Does NOT require the Cth to have a specific legislative head of power over the funded activity. Hayne and Kiefel JJ (dissenting, Pape) and Gummow and Bell JJ (Williams No 1): s 96 is the constitutionally appropriate mechanism for the Cth to fund activities in State areas of responsibility, rather than expanding s 61 executive power.	
Case	Result	Key Principle
Victoria v Commonwealth (AAP Case) (1975) 134 CLR 338	Nationhood power exists	Executive power extends to activities peculiarly adapted to the government of a nation and which cannot otherwise be carried on for the benefit of the nation (Mason J at 397). Canonical two-limbed test.
Davis v Commonwealth (1988) 166 CLR 79	Establishing authority: valid; restricting common words: INVALID	Bicentennial Authority validly established (peculiarly national; States could not do it). Restricting use of 200 years, Sydney etc: grossly disproportionate; s 51(xxxix) does not extend to creation of offences except in so far as necessary to protect efficacy of nationhood activity (Brennan J).
Pape v Commissioner of Taxation (2009) 238 CLR 1	Appropriation does not authorise spending (7:0); nationhood power: 4:3 majority	Unanimous: appropriation under s 81 does not authorise spending. 4:3 on nationhood: French CJ: short-term GFC fiscal stimulus within nationhood power. Hayne and Kiefel JJ (dissent): crisis too malleable; other constitutional means available; undermines distribution of powers.
C. NON-PREROGATIVE CAPACITIES: CONTRACTING AND SPENDING Constitution ss 82, 83		
After Williams v Commonwealth (No 1) (2012) 248 CLR 156: legislative authority for executive spending is REQUIRED unless spending falls within a narrow exception. Appropriation alone does NOT authorise spending. Both the broad submission (unlimited contracting capacity) and narrow submission (power co-extensive with legislative heads without actual legislation) were rejected.		
s 82 Constitution	Certain expenditures charged directly by the Constitution itself: charges and liabilities imposed by the Constitution (e.g., GG salary under s 3; judicial salaries under s 72). These do NOT require a separate parliamentary appropriation. One of the narrow constitutionally authorised expenditure categories identified in Williams No 1.	