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Introduction to Australian Constitutional Law

Australian Constitutionalism

→The Australian Constitution is our fundamental law. It is the primary source of public power in Australia. It distributes 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.
→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 where 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)
- 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)

→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 minsters 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)

9 Chapters —

1. **'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
2. **II. 'The Executive'**
3. **III. 'The Judicature'**
4. **IV. 'Finance and Trade' (inc s 92)**
5. **V. 'The States'**
    - Preservation of state Constitutions: **s 106**
    - State legislative power: **s 107**
    - Inconsistency: **s 109**
6. **VI. 'New States'**
7. **VII. 'Miscellaneous'**
8. **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 8/45 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
9. **Chapter VIII — Alteration of the Constitution**: **s128** Steps:
    1) Law passed by Parliament by absolute majority (more than ½ (half) total members of House, rather than more than ½ (half) 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; and
    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 8/45 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)

EVALUATION OF CONSTITUTION

1. Very pragmatic rather than idealistic — More concerned with the division of functions between beaches 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

Commonwealth of Australia Constitution Act 1900 (UK)

→Section 9 of the Commonwealth of Australia Constitution Act 1900 (UK)
- Any amendments to it must now follow the process in section 128 of the Constitution — that is:
  - Passed by an absolute majority of both Houses of Parliament, and
  - Approved by a double majority in a national referendum (a majority of voters nationwide and in a majority of states).

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
- s 8 and s 9: ensured that power given to the Parliament of Cth to repeal/amend imperial laws operation in Aus did not extent 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 (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 effect 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)

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) Commonwealth 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, s4); 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)
- **s 8 and s 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 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.

<u>State vs Cth powers</u>

→**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).
→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 *<u>Union Steamship Co of Australia Pty Ltd v King (1988) 166 CLR 1</u>*. The HC based interpretation of the phrase on the doctrine of Parliamentary Sovereignty — 'the right to make or unmake any law whatever': Dicey, 1959.

→States Parliaments are not sovereign: Dicey held that *"The right of Parliament to make or unmake any law whatsoever, and ... no person or body is recognised by the law as having a right to override or set aside the legislation of Parliament"- Dicey*. However Section 109 of the constitution restricts State's sovereignty to the extent of any inconsistency.

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.

<u>Parliamentary Sovereignty</u>

→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

Key points:
Note: this is a common law rule, and in Australia it's 'Parliamentary supremacy'

- no Australia Parliament is absolutely sovereign as they're constrained by the 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.

<u>The Rule of Law</u>

→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."
    a. "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:
    a. '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.
- All are 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:

1) The rule is expressly found in covering **clause 5 —**

Operation of the Constitution and laws This Act, and all laws made by the Parliament of the Commonwealth under the Constitution, shall be binding on the courts, judges, and people of every State and of every part of the Commonwealth, notwithstanding anything in the laws of any State; and the laws of the Commonwealth shall be in force on all British ships, the Queen's ships of war excepted, whose first port of clearance and whose port of destination are in the Commonwealth.

2) **Separation of power** and the role of the judiciary in Chapter III
3) **Section 75(v) of the Constitution**

75 Original jurisdiction of High Court In all matters: … (v) in which a writ of Mandamus or prohibition or an injunction is sought against an officer of the Commonwealth; the High Court shall have original jurisdiction.

→The relevance of the Rule of Law is demonstrated by application of the following principles in practice.

- The separation of powers between the legislature, the executive and the judiciary.
- The law is made by representatives of the people in an open and transparent way.
- The law and its administration is subject to open and free criticism by the people, who may assemble without fear.
- The law is applied equally and fairly, so that no one is above the law; The law is capable of being known to everyone, so that everyone can comply.
- No one is subject to any action by any government agency other than in accordance with the law and the model litigant rules, no one is subject to any torture.

- The judicial system is independent, impartial, open and transparent and provides a fair and prompt trial.
- All people are presumed to be innocent until proven otherwise and are entitled to remain silent and are not required to incriminate themselves.
- No one can be prosecuted, civilly or criminally, for any offence not known to the law when committed; No one is subject adversely to a retrospective change of the law.

Constitutional Conventions

→Constitutional law consists of more than just the text itself, for e.g. consider section which reposes all of the Executive power in the GG.

Conventions

→Customs or practices that are habitually followed by Government who are under a moral or political obligation to follow them (S Joseph).
→A breach does not attract legal sanction.
→It is necessary as the text has holes that need to be filled by the development of conventions — e.g. the GG acts on the advice of the Government of the day; this has been broken once by Sir John Kerr in 1975 when he sacked Whitlam's Government.

- Considering the stagnant nature of the Constitution, conventions allow the development of the law.
- They are not expressed in any document. Should they be expressed in a document to provide certainty or should we prefer flexibility?

Importance of conventions

- Legally unenforceable rules which governments have political and moral obligation to follow.
- Non textual.
- Based on practice.
- If not followed system breaks down.
- Only remedy is political effect.

Disadvantages of codifying conventions in the Australian Constitution:

1. Not necessarily the case that codification would mean that the conventions would become justiciable, as there as many non-justifiable provisions in the Constitution.
2. Might bring the High Court into the political arena.
3. 1977 amendment to **s 15** re casual senate vacancies which codified what had initially been a convention: Its intended purpose was to prevent major changes in the balance of power in the senate in the middle of a parliamentary term, but as it did not provide any time limit within which the appointment had to be made, the state legislature remained free to decline to fill the vacancy. As **s 11** of the Constitution permits the Senate to carry on despite the failure to fill any vacancy, the amendment did not completely solve the problem.
4. Codification is unnecessary given that the conventions are normally complied with: e.g. royal assent and disallowance.
5. English constitutional tradition would suggest that the system generally works well notwithstanding the unwritten nature of the conventions.

6. Desirably of flexibility is demonstrated by the evolution of a convention convening the appointment of the GG on Australian advice from 1930 onwards.
7. Would require a referendum which would be difficult to accomplish and which would make codified conventions very difficult to change. May be more ideal to codify the conventions in a separate Act of Parliament, perhaps on ordinary act or an Act like the Australia Acts.

Advantages of codification:

→Part of a move to a republic. For instance, if we have an elected head of state, it would be a worthwhile decision to codify the convention which apply to the head of state to ensure that the elected head of state's powers are restricted.

→Conclusion: obvious problem is uncertainty as evidenced by the controversy surrounding the events of 1975. It not clear that codification would necessarily prevent further controversies arising.

Responsible Government

→**Responsible government** is the term used to describe a political system where the executive government, the Cabinet and Ministry, is drawn from, and accountable to, the legislative branch.

→**Representative government** is where the Government is made up of those directly chosen by the people, and therefore are representative of the people.

1) Government is responsible to the GG as the Queen's representative;
2) House is responsible to the Senate;
3) Government will only remain in power while they command the majority in the House of Reps and maintain confidence — responsible to parliament and the people.

- The conventions provide that government is conducted with support of members of Parliament who represent the voters (representative government).
- The Executive government have the power but the Parliament has the more and as such government accountability is ensured: **s 83.**
- The executive branch of the government is responsible for its actions to the legislative branch — members of executive responsible/accountable to Parliament (personally and collectively) so ultimately accountable to the people/electors.
    - e.g. the G-G acts on the advice of its government ministers. These ministers (including prime minister) are collectively and individually responsible to the parliament for their actions; they are to remain in office while they have the confidence of the parliament, and the support of the majority in parliament.
- Should the government lose majority in parliament, by convention government should resign from office.
- Westminister system — executive members of legislature: s 64 (e.g. G-G (executive) to act on advice of ministers who have majority in House of Reps.

Ministerial Responsibility

1) Collective responsibility to parliament; and
2) Individual responsibility to parliament.

Individual responsibility

→Minister is responsible for his/her department's conduct — minister individually responsible for their portfolios, their own conduct and the general conduct of the departments which they administer e.g. question time.
→Minister should resign when personal conduct falls short of high standard or where general conduct of department is seriously flawed + when loss of confidence (convention).
→Question time exists partly to expose ministerial misconduct and free press operates to scrutinise the Government: *Egan v Willis (1998)*.

Collective responsibility

→Ministers give public support to the Cabinet's decisions.
→Members of cabinet keep deliberations secret.
→Cabinet collectively responsible to Parliament.
→Government only holds office with confidence of the Parliament.
→Therefore, all members must resign if Government loses confidence of the House.

Note: Collective ministerial responsibility governed by convention but —

- Parliamentary control over taxation (Petition of Right 1628; Glorious Bill of Rights 1688)
- Parliamentary control over expenditure — expenditure requires approval of parliament e.g. appropriation acts or appropriation provisions
- links executive to the people
- implicit: **ss 64 & 61**
- "the efficient secret'
- Role of Senate

Example: Money ($) —

- executive government (i.e. PM and cabinet ministers) have power (**s 61**) but Parliament controls money (**s 83**)
- responsibility of executive to legislature — legislature control supply, ministers to be members of legislature, privilege of the freedom of speech in debates, power to coerce provision of information: *Lange v ABC (1997)*

Parliamentary Control Over Supply

→Budget for the Government must be authorised by Parliament: **s 83**
→Money bills cannot originate in the Senate and the Senate cannot amend money bills: **s 53**
→the above shows why its the Party that holds the majority in the House of Reps forms Government ($).

Separation of Power

→Political theory recognises three powers of government:

(1) the legislative power to make laws;
(2) the executive power to carry out and enforce the laws; and
(3) the judicial power to interpret laws and to judge whether they apply in individual cases.

→Origins in Magna Carta: 'no Freeman shall be taken or imprisoned, or be diseased of his Freehold, or Liberties, or free Customs, or be outlawed, or exiled, or any other wise destroyed … nor condemn him, but by lawful judgement of his peers, or by the Law of the land': CI XXIX

Three separate areas of power (inferred from text / structure of Cth constitution):
1) Legislature: Ch I — makes the laws (parliament)
2) Executive: Ch II — administers / enforces the laws (cabinet, Gover General, prime minister, ministers)
3) Judiciary: Ch III — interpret/apply the laws + authoritatively declare what the law is and determines legal disputes conclusively (courts)

→Doctrine prescribes that three arms must be clearly and institutionally separated to provide for checks and balances upon each branch so no branch unduly harms the interests of the people.
→However, in Australia the executive is drawn from the legislature (**s 64**) and as such we only have a partial separation. This heightens importance that judiciary is free from political interference (see below).

Overlap between power:

Legislature & Executive:	Executive and Judiciary:	Legislature and Judiciary:
- G-G part of legislature (i.e. royal assent) and executive - some MP's members of parliament and - government: s 64	- judicial appointment by executive - note: parliament cannot invest body with judicial power except a court under s 71	- 'judge-made' law

Reasons for the separation of legislative, executive and judicial power

→To ensure that too much power is not concentrated in the hands of any one arm of the government — thereby ensure no abuse of power by any one arm of government.
→Provides system of checks and balances — three arms check / balance one another — so that each are not unduly harmed by any one arm of government.
→In Australia not a strict separation of powers between Executive and Legislature — Commonwealth ministers are members of both Executive and Legislative branches of government: **s 64**
→Therefore institutional overlap however, Aus legal system conforms of doctrine of separation of judicial powers from two other arms of government — is vital that judiciary is separate from other two arms.

Note:
→Collapse of separation between executive and legislature
→English Constitution i.e. 'Westminster system' compared to U.S. e.g. President & Congress contra Prime Minister and Parliament
→'Washminister' system with separation of judicial power of the Commonwealth

Federalism

→Australia has a federal system of government. It divides public power between two levels of government, state and Commonwealth. Former Chief Justice Murray Gleeson, described the Australian federation as: *The union to which the people of what were formerly self-governing colonies agreed was a federal union, and the colonies became States of the new federation. Each State retained its own Constitution and its own organs of government:*

legislative, executive and judicial. This division of power between a central government and the governments of the State or provinces is the essence of a federation. — Chief Justice Murray Gleeson.

→Federalism refers to the fact that the power to govern is divided between two levels: State and Commonwealth.

Balance of power

→Early on in the HCA's history it was very pro State rights: R v Barger, however, after the Engineers' Case that all changed to favour the Commonwealth:

1) Interpretations of tax power, grants power and the prohibition of the States from imposing excuse duties (**s 90**) have left financial powers and resources disproportionately in the hands of the Commonwealth.
2) While Australia remains a federation, the States' abilities to function are increasingly dependent on a good faith attitude to practical federalism on the part of the Commonwealth.

Powers divided between:

1) **Specific (enumerated) powers** are those physically written within the Constitution; e.g. **s 112** (state power re inspection laws) vs **s 115** 'states not to coin money' enumerates the power to coin money exclusively to Commonwealth.
2) **Concurrent / exclusive powers** = both Commonwealth and State powers.
3) **Residual powers** = only States.
4) **Exclusive powers** = only Commonwealth.

Specific/enumerated powers

→Those powers listed in Constitution exercised by either Commonwealth parliament, State parliament or both concurrently (located mainly in **s 51** and **52** of constitution)
→Expressly listed in constitution (e.g. s 51 and 52)

Exclusive powers

→Those specific/enumerated powers exercisable only by the Commonwealth.
→**s 51** provides list of areas with respect to which both Commonwealth and State parliaments can exercise power.
→**s 114** prohibits state parliaments from making laws with respect to raising and maintaining military / naval forces without Commonwealth approval.

- Therefore, Cth parliament only has authority to raise/maintain army

→**s 115** prohibits state parliaments from coining money

- By virtue of this section, only the Cth parliament who has the authority to make laws with respect to currency

→**s 52** exclusively states that the Cth parliament has the exclusive power with respect to the determination of the seat of the Cth parliament (i.e. Canberra)

Concurrent powers

→Those specific/enumerated powers exercisable by both Cth and state parliaments laws e.g. marriage, divorce, taxation etc.

Residual powers

→Those powers not expressly stated in the Constitution therefore belong to States e.g. criminal law, public transport, environment etc.

- i.e. Cth cannot exercise

Reasons for Commonwealth dominance?

- Determinism;
- Constitutional interpretation (e.g. Engineers' Case (1920; see below)
- $$ — 'the Constitution left the State legally free but financially bound to the chariot wheels of the Commonwealth'

Engineers' Case (1920) 28 CLR at 145

→In this case, majority of the HC rejected the doctrines of state reserved powers and implied intergovernmental immunity on the basis that they were grounded on implications 'formed on a value, individual spirit of the compact' and did not accord with the words of the constitutional text.
→Majority noted that there was nothing in the text of the Constitution that indicated any limitation on the power of the Cth to exercise its power under **s 51(xxxv)** to regulate the states in their capacity as employers.
→Court eschewed consideration of political consequences of their decision and noted that the states could be protected from an overbearing Commonwealth parliament by the people through representative institutions.
→Majority held that the constitution should be interpreted in accordance with the 'ordinary' principles of statutory interpretation, rather than to be consistent with any doctrines said to be 'implied' by the constitution relating to the relationship between Commonwealth and states.

Note: the 'golden rule' of statutory interpretation is that the language of the Constitution is to be read in its natural and ordinary sense: *Engineers' Case (1920)*

Judicial Review

→The power permitting a court to review and demonstrate the constitutionality of legislative and executive or administrative action.

→Purpose

- Diminishing the purpose of the rule of law if there is a lack of the enforcement of accountability over the legislative and executive arms of government, and the people.
- The courts need to state what the law is and enforce it accordingly.
- Therefore, if the government official or member of the Executive exceed what they are lawfully authorised to do, judicial review can be used to enforce the correct rights.

→Controversy?

- The power of the High Court, which is an unelected body to declare invalid at their own discretion of a democratically elected legislature, inconsistent with the concept of responsible government.
- Not written in the constitution: there is no specified provision providing for judicial review.

- However, HC judges can be removed by GG on a address of both houses of parliament on the grounds of proven misbehaviour or incapacity, s72C(ii).
- democratic?

Parliament and Legislative Procedures:

The Legislature

Colonial History

→Origin in Australian Constitution Act 1850 (Imp) 13 & 14 Vict c 59
→Created legislative councils in WA, Tas, SA and Vic
→Empowered those councils and NSW Legislative Council (established in 1842 (Australian Constitutions Act (No 1) 1842 (UK) 5& 6 Vict c 76) to draft and enact their own Constitution Acts establishing parliamentary government
→Bicameral and modelled on 'mother Parliament' in terms of structure and procedure
→Legislative assembly — broader franchise (initially property but by 1890s universal male suffrage)
→Legislative council — restrictive franchise or appointed
→Colonial constitutions were flexible

Structure of Commonwealth Legislature

→**Bicameralism** & **Federalism** (hence adoption of US terminology)
→Senate ('upper house')

Senate: S 7 / S 122

→**s 7** The Senate: "The Senate shall be composed of Senators for each State, directly chosen by the people of the State…"
→**s 122** Government of territories: "The Parliament may make laws for the government of a territory … and may allow the representation of such territory in either House of the Parliament to the extent and on the terms which it thinks fit."

- Senators for each state which are 'directly chosen by the people'
  - precludes indirect election
  - implied right to vote
  - does not mandate a particular voting system as long as electors are able to make a choice (Lange)
- Each state voting as one electorate ('until Parliament otherwise provides')
- **Six senators** for each state ('until Parliament otherwise provides') — 10 — 12
- Equal representation or each original state
- Fixed **six-year term** commencing July: **s 13**; e.g. 01/07/2025
  - explains why Senate changed political complexion in 1/7/14
  - however, when double dissolution election (like 2016) back-dated to previous 1 July
  - writs issued by Governors (not Governor-General): **s 12**
  - division of senators into short- and long-term senators with 1/2 coming up for election every three years (cf 'double dissolution'): **s 13**

Casual vacancies

→Filling of casual vacancies by party allegiance: **s 15**
→Breach of convention in 1975 — lead to 1977 amendment
→Then Senator either leaves, dies etc, system whereby casual vacancies are filled

→Until 1975, the replacement senator would be a person who was nominated by their party (e.g. Labor senator dies, Victorian Labor party assigns new Senator from same party)
→In 1975, Qld parliament breached convention (appointed non-Labor senator to replace Labor senator)

→led to amendment of Constitution in 1977 — s 15 amended to codify the convention, therefore now if Labor senator resigns/dies, s 15 requires a Labor party member to be appointed in their place.

House of Representatives: s 24

→'directly chosen by people'
→twice number of senators ('nexus') — currently 150 House of Reps & 76 Senators
→proportion from each state in proportion to population + five members from each original state: **s 24** i.e.

- No electorates extending beyond boundaries of more than one state (s 29)
- Five members from each original state
    - Three-year *maximum* duration from first sitting (s 28) but can be dissolved earlier
- Relationship with s 28 re House of Representatives (maximum terms)
- Possibility of lack of synchronisation and half Senate election e.g. 1970 & John Gorton (like by-election)

→HoR 3 years maximum duration: s 28
→Representation of territories in Senate:

Western Australia v Cth (Territorial Senators' Case (No 1)) (1975)

→Whitlam Government

- 1974 double dissolution election
- 1974 joint sitting
- 'Conservative' states seek declaration of constitutional invalidity (i.e. judicial review)

→The Senate (Representation of Territories) Act 1973 (Cth) — passed to allow 2 'full' Senators for ACT and NT — same powers as State Senators.

- Act gave 2 territories (ACT + NT) senate representation (2 senators to elect, sit in senate etc) — enacted through double dissolution process in 1974.
- States challenge the constitutional validity of the Act, in particular WA due to an alleged contravention of s 7.
- terms of service linked to HoR.

→Issue — should senators from the Territories have the same rights as state senators? Consider operation of **s 7 and s 122**

- conflict between s 7 and s 122 ('territories power')

→Held — legislation valid (majority)

- All **s 7** says is that at Federation Senate shall be composed of Senators from each state and **s 122** implies that founding fathers intended that over course of time Cth may make laws to reflect changing political landscape of Australia (Temporal dimension).
- Overall democratic theme of Constitution demanded Territories receive some degree of representation in Senate.
- constitution was meant to be flexible to ensure it remained in touch (living-tree approach) (Progressivism).

- Dealt with argument about swamping of Senate — no constitutional limit on number of territory senators.
    - swamping = tactic used by Labor party to get rid of opponents in Qld

Note Stephen J dissent —
- Argued that Senate was the States' chamber because of **s 7, 12** and **15**
- Focused on the literal approach — 'shall' be 'composed' of Senators for each state: **s 7**
- Held that s 7 enshrined Senate's position as States' house and any territorial rep should lack voting rights.
- Federal Parliament has power to create new States (s 121) and that is proper avenue for representation.

Note: it can be argued that the majority favoured democracy while the minority preferred States' rights.

This case —
- Demonstrates the inadequacy of **Textualism** — the constitutional text of s 7 and s 122 is contradictory — need to look further than just the literal words.
- **Originalism**/intentionalism/federalism cf progressivism;/representation and democracy
- territory senators splitting 1:1
- postscript*: Queensland v Commonwealth ('Second Territory Senators Case') (1977)*
    - retirement of McTernan J & appointment of Aickin J
    - 5:2 split: Stephen & Gibbs changed position bc of principle of stare decisis — once a case is determined, the precedent is binding

<u>Second Territorial Senators' Case (No. 2) (1977)</u>

- Triggered by the retirement of a majority judge in first case.
- At time where Whitlam dismissed. Coalition in power.
- New conservative judge appointed.

→Held:
- Legislation ruled valid again.
- New judge did dissent, however majority of same ruling of first case prevailed.
- High court followed precedent of first case.
- Two judges that dissented before, voted with majority because thought unacceptable that case brought again because of change of judges.
- If did change law when change of judges, would have undone legitimacy of the High court.

<u>Structure of The Victorian Legislature</u>

→***Constitution Act 1975 (Vic)***

→**Section 35(1)** —
- Legislative Assembly
- 88 single members (thus 88 districts)

→*Constitution (Parliamentary Reform) Act 2003 (Vic*) re Legislative Council
- 44 members (22 constituencies);
- 8 regions;
- electing 5 members each i.e. multi member electorate;
- elected by proportional representation like Senate & Tasmanian Assembly.

Structure of Territorial Legislature

Northern Territory:

- Legislative Council (1947-74)
- Legislative Assembly (1974—)
- established under Northern Territory Self-Government Act 1978 (Cth)

Australian Capital Territory:

- Legislative Assembly (1988)
- established under Australian Capital Territory Self-Government Act 1988 (Cth)

Norfolk Island:

- Advisory Council (1935-1979)
- Legislative Assembly (1979—) under Norfolk Island Act 1979 (Cth)
- 9 member legislative assembly
- Note: Christmas Island and Cocos (Keeling Islands) have no legislatures.

Duration — Introduction & Terminology

→Traditional model
→Lower houses:

- Dissolution
- Maximum (not minimum) duration

→Upper houses:

- Rotation (or appointment with fixed terms)
- Non-dissolution
- Perpetual existence

→Summoning of parliament by Crown:

- Australian Constitution **s 5**
- Constitution Act 1975 (Vic) **s 20**
- minimum of one sitting per year (**s 6**; Constitution Act 1975 (Vic) s **41**) (Period of Personal Rule 1629-40)
- Adjournment of sittings by parliament
- prorogation & dismissal of parliament — dismissed until summoning of new session
    - relatively rare, generally Parliament just adjourns themselves
- (irrevocable) dissolution & election of new parliament

Duration — Victorian Parliament

→Constitution Act 1975 (Vic) **ss 8(3), s 38**

- Assembly dissolution every 4 years (fixed terms) — 25 days before last Saturday in November

→Exceptions: The Governor may dissolve legislative assembly in two circumstances earlier than fixed four years:

1. **S 8(3)(a), s 8A** re 'no confidence' motion in Assembly (note: remember conventions). Must be passed by assembly. Government holds office with confidence of lower house

of parliament. Losing motion of 'no confidence' creates an early election. When assembly gets dissolved so does council.
- parliament has 8 days to pass a motion of confidence in a new premier. If motion not passed, governor can dissolve assembly. Must give 3 days for a motion of confidence to be passed.

2. **s 65(2)** ('Deadlock provision')
   - s 28(2): duration of Council linked to Assembly
   - all 2003 amendments (untested)
   - legislative council ceases to exist once assembly dissolves. Both re-elected at the same time

→**Section 8A**:
- Under s 8A(1)(b) 8 days later no motion of confidence in any new ALP Premier. Because speaker would become part of labour party and would lead to an early election, as liberal would gain back majority.
- Dissolution and early election under s 8(3)(a)

Adjourned/ Prorogation

→Adjourned: When a house gets adjourned the speaker of the house says parliament now adjourned to a certain date.
→Internal parliamentary procedure.
→Parliament can pick up from where they left off.
→Prorogation: GG has power to prorogue parliament. S5 (CTH)
→Like an adjournment however all parliamentary action lapses.
→All bills have to be re-introduced.

Duration — Commonwealth Parliament

→**Senate**
- **6 year** term: **s 7** (half the senators come up for election every 3 years)
- **3 years** rotation: **s 13**
- 'normal' Federal Election e.g. 2013
- **ss 7, 13** re fixed terms of 6 years commencing 1st July (e.g. change in complexion of Senate on 1st July 2014 after 2013 election)
- complications: **s 13** — first election (held just after federation)
- **s 57** re 'Double Dissolution' election (e.g. 1914, 51, 75, 83, 87 and 2016)
- 'long term senators' & 'short term senators'; ss 7, 13 re fixed terms of 6 years commencing 1 July (e.g. change in complexion of Senate on 1 July 2014 after 2013 election) — can be elected again

→**House of Representatives**
- Relationship with s 28 re HoR (maximum terms)
- possibility of lack of synchronisation and half Senate election e.g. 1970 & John Gorton (like by-election)
- House of reps needs to be twice the size of the senate
- Members are chosen in each state, cannot be shared between states

- Number of memberships in each state proportionate to the number of people in each state.
- Each original state must have 5 members.

Qualifications For Membership: (**Commonwealth Parliament**)

→**s 47** re disputed election, court deals with election disputes to HCA or Fed Court.
→Commonwealth Electoral Act 1918 (Cth): s 353.
→High Court or Federal Court sitting as Court of Disputed Return.
→Can be fined per-day if sitting in Parliament while disqualified.

→**Section 34** sets out the default qualifications for members of the House of Representatives.
→These include:

- Minimum age: 21 years (though this has since been changed).
- Must be an elector or qualified to vote.
- Must have been a resident of Australia for at least three years.
- Must be a British subject (now superseded by modern citizenship laws).

→Section 34 "*Until the Parliament otherwise provides*"

- Parliament has since exercised this power and updated these qualifications through the Commonwealth Electoral Act 1973 (Whitham government legislation).
    - E.g., the minimum age is now 18, not 21.
- Citizenship, not just being a British subject, is now the standard.
- Requires a section 128 Cth process to change, s 34 is entrenched.

Disqualification for Membership Cth s44

→**Section 44** provides disqualified if:

1. Allegiance to foreign power: **s 44(i)**
2. Attained by treason or 'convicted and under sentence' for offence punishable by 1 years jail or more: **s 44(ii)**

- note: 1+ years of jail = max potential penalty, not actual penalty term given (treason is a common law offence and if found guilty, permanently disqualified from parliament. Once served penalty for crime of 1 year offence, able to re-join parliament)

3. Undischarged bankrupt: **s 44(iii)** — applying to sitting and being elected
4. Holds office for profit under Crown: **s 44(iv)** (can't be Cth public servant or state board etc)
5. Direct or indirect pecuniary interest in any agreement with Cth Public Service**: s 44(v)**

Sykes v Cleary (1992)

Facts:

- A by-election was held in the federal seat of Wills after the resignation of the sitting member.
- Phil Cleary, an independent candidate and Victorian state school teacher, won the election.
- At the time of nomination and polling, Cleary was on leave without pay, resigning only after the poll but before the declaration.

- Two other candidates (Kardamitsis and Delacretaz) were challenged for holding dual citizenship with Greece and Switzerland respectively.

Issues:
- Whether Cleary was disqualified under s 44(iv) of the Constitution for holding an "office of profit under the Crown."
- Whether Kardamitsis and Delacretaz were disqualified under s 44(i) for being citizens or owing allegiance to a foreign power.

Held:
1. Cleary – s 44(iv):

→A public school teacher is an "office of profit under the Crown", even when on leave without pay.
→The section is intended to:
- Prevent conflicts of interest between the Executive and Parliament.
- Ensure Parliament remains independent of the Crown (aligned with Westminster principles).
- Disqualification occurs at the time of nomination, not just at election or declaration.
- Because Cleary had not resigned before nominating, he was disqualified.

2. Kardamitsis and Delacretaz – s 44(i):

- Dual citizenship alone does not automatically disqualify a person.
- The test: whether the person has taken "all reasonable steps" to renounce their foreign citizenship.
- Neither candidate had taken such steps — they had not contacted their respective governments to renounce.
- As a result, both were disqualified for failing to take reasonable actions to sever foreign allegiance.

Principles:
- s 44(iv) captures state government employees; leave without pay does not remove disqualification.
- s 44(i) requires proactive steps to renounce foreign citizenship — subject to the laws of the foreign state.
- The case affirms the strict application of s 44 but introduces a reasonableness test for dual citizenship cases.

Outcome:
- All three challenged candidates were disqualified.
- A new by-election for the House of Representatives seat of Wills was required.

Reasonable steps test

→What constitutes reasonable steps would take into account the following:
1) Requirements of foreign law
2) Individual situations
3) extent of individual's connection with foreign state

Note: in this case they did not take reasonable steps and were disqualified.

<u>‘Foreign Power’: s 44(i)</u>

<u>***Sue v Hill (1999)***</u>

Facts:

→Heather Hill, a candidate for the Senate representing One Nation, was elected to the Senate in Queensland.

→At the time of her nomination, Hill was an Australian citizen (since 1988) but had not renounced her British citizenship.

→Hill held a British passport at the time of nomination.

→Sue, a voter in Queensland, challenged Hill’s eligibility under **s 44(i**) of the Constitution, which disqualifies a person who is under any acknowledgment of allegiance, obedience or adherence to a foreign power.

Issues:

→Whether the UK constituted a foreign power under **s 44(i)** of the Australian Constitution.

→Whether holding British citizenship alongside Australian citizenship disqualified Hill from being elected to the Australian Parliament.

Held:

→The UK is a "foreign power" for the purposes of s 44(i).

→This was due to Australia’s legal independence from the UK following the *Australia Acts 1986 (Cth and UK),* which severed remaining constitutional ties.

→As Hill had not renounced her British citizenship, she owed allegiance to a foreign power and was disqualified under s 44(i).

Legal Principles:

→Meaning of “foreign power” evolves over time; must be interpreted considering current constitutional and legal arrangements.

→The Australia Acts 1986 marked the point at which the UK ceased to have legislative, executive or judicial authority over Australia.

→A dual citizen is disqualified unless they have taken <u>all reasonable steps</u> to renounce their foreign allegiance (per the reasoning in Sykes v Cleary).

Significance:

→This case confirmed that the UK is no longer part of the Australian constitutional structure.

→Reaffirmed that dual citizenship can disqualify a person from Parliament under s 44(i), even where the second citizenship is with the UK.

→Demonstrated the dynamic interpretation of the Constitution in line with Australia’s evolving legal independence.

Outcome:

→Heather Hill was disqualified from taking her seat in the Senate.

→A recount was ordered to determine the next eligible candidate.

Re Canavan (2017) 263 CLR 284

Facts:

→The case concerned the eligibility of seven sitting members and senators under s 44(i) of the Australian Constitution, which disqualifies anyone who: "... is under any acknowledgment of allegiance, obedience or adherence to a foreign power, or is a subject or a citizen... of a foreign power."

→The seven politicians were:

1. Senator Matt Canavan – possible Italian citizenship
2. Senator Scott Ludlam – New Zealand citizen
3. Senator Larissa Waters – Canadian citizen
4. Senator Malcolm Roberts – UK citizen
5. Barnaby Joyce MP – New Zealand citizen
6. Senator Fiona Nash – UK citizen
7. Senator Nick Xenophon – British Overseas Citizen (BOC)

→All were Australian citizens by birth, but it was revealed post-election that each may also have been a dual citizen, automatically or unknowingly.

Legal Issues:

→Does a candidate's knowledge of their foreign citizenship status affect disqualification under s 44(i)?

→Must a person take reasonable steps to renounce foreign citizenship to avoid disqualification?

→Are those born in Australia but who inherited foreign citizenship by descent disqualified if they have not renounced it?

Held:

→s 44(i) operates irrespective of a candidate's knowledge or intent. The section is objective and peremptory in its application.

→A person is disqualified if they hold dual citizenship at the time of nomination, regardless of whether:

- they knew of it,
- they were negligent, or
- they tried to renounce it but failed.

→The only exception is where a person has taken all steps reasonably required by the foreign law to renounce the foreign citizenship, but renunciation was legally impossible (per Sykes v Cleary).

Reasoning:

→Knowledge is irrelevant: The Constitution does not make disqualification contingent on awareness, belief, or ability to discover foreign citizenship. It simply asks whether the disqualifying status exists.

→"[S]ection 44(i) does not disqualify only those who have not made reasonable efforts to conform to its requirements..." – [311]

→There is no spectrum of culpability recognised in s 44(i); whether a person had a "faint inkling" or was completely unaware of dual citizenship does not matter.

→The "reasonable steps" test is only relevant where a person has actively attempted to renounce their foreign citizenship in accordance with foreign law but was prevented from doing so through no fault of their own.
→The temporal point of assessment is nomination day, not election day or declaration of the poll (consistent with *Sykes v Cleary*).

Outcomes for Each Politician:
→Disqualified under s 44(i): Ludlam, Waters, Roberts, Joyce, Nash – all held dual citizenship at nomination and had not renounced.
→Not disqualified:

- Xenophon – although a British Overseas Citizen, this status did not amount to citizenship of a foreign power with allegiance, as it granted no right to enter or reside in the UK.
- Canavan – the court was not satisfied that he was actually an Italian citizen under Italian law, so he was not disqualified.

Significance:
→The decision confirms the strict operation of s 44(i):

- Strict liability: No fault or intent required.
- Objective test: Citizenship status, not belief or knowledge, determines disqualification.
- Reinforced the importance of renouncing foreign citizenship prior to nomination.
- Led to numerous disqualifications and subsequent by-elections or recounts in federal parliament.

Key Takeaways:
→s 44(i) disqualification is determined at the time of nomination.
→Dual citizens must take all necessary legal steps to renounce foreign citizenship or risk disqualification.
→The High Court affirmed that Parliament must be free of foreign influence, even inadvertently acquired through descent.

Re Webster

→'agreement' s 44(iv) (direct or indirect pecuniary interest) — only referred to (continuing) contract where Crown had opportunity to influence i.e. contract not complete cf separate contracts for sale of goods
→not intended to impose a strict test re conflicts of interest but only prevent undue influence.
→control of House and refusal to refer under s 47 and Commonwealth Electoral Act 1918: see e.g. of Warren Entsch [7.4.10].

Qualifications For Membership: Victorian Parliament

→Constitution Act 1975 (Vic):
→**s 36, s 29** re prohibition on membership of both houses (cf Aus Constitution **s 43**)
→**Section 44**: Enrolment and entitled to vote re electors must be:

1) Australian citizen.
2) 18 years old.
3) not serving a sentence of 5 years or more.

1) not of unsound mind.
2) residence in Victoria.

- sub-s 44(2) re exclusion of judges, members of Cth Parliament etc.
- sub-s 44(3) re criminal priors.
  - convicted or found guilty.
  - indictable offence.
  - punishable on first conviction by at least 5 years jail — can never run for Cth parliament.
  - committed over the age of 18 under law of Vic or any part of British Cth.
    - Mass murder American can serve on Vic parliament, but not Nelson Mandela as he is part of Cth (SA).
    - e.g. shoplifter permanently disqualified but US mass murdered not.

→**Section 45**: Avoidance of election of disqualified person by Court of Disputed Returns
→**Section 46:** Vacation of seat if ceases to be qualified e.g. John Pesutto risk of bankruptcy.
→**Section 47**: Member of Victorian Parliament elected to Federal Parliament
→**Section 48:** Deals with qualification of who can vote in Victorian parliament elections (both houses)
→**Section 61A** re relief from defaults. Can absolve someone and let them run for parliament, despite criminal offence.

- House of Parliament can pass a resolution overruling disqualification.
- must be in all circumstances a trifling nature and be an accident.
- must not have a mens rea to use s 61A.

→ These sections are likely protected under section 18 restrictive procedures of the Victorian constitution, likely requiring a referendum.

Commonwealth Electoral & Voting Systems

House Of Representatives: **s 24, 29**
Two issues:

1) allocation of members as between states
2) distribution of electorates within each state given single member electorates

→Re allocation, s 24 provides:

- 'The number of people chosen for each state shall be in proportion to their respective numbers of people'; (Electoral commission has to keep up to date with population and alternation to electorates). By the people implies freedom of political speech and right to vote — recognised by HCAs
- 'Until Parliament otherwise provides' formula for allocation using a 'quota' (includes allocation of remainder) (Politicians cannot extend electorate to areas of support)
- Nothing re distribution in Constitution except prohibition on electorates extending beyond boundary of one state (Consti s 29)

Voting equality

→It has been questioned whether **s 24** with its words "directly chosen by the people" implies a concept of quantitative equality. This was discussed in McKinlay — argued that the phrase 'directly closed by the people' implied the constitutional requirement of one vote one value.

McKinlay v Commonwealth (1975) 135 CLR 1

Facts:

→Challenge to the allocation and distribution of seats in the HoR under:

- Representation Act 1905 (Cth) – provided a formula for seat allocation based on population (using census data), but Parliament had to approve any changes.
- Commonwealth Electoral Act 1918 (Cth) – allowed for up to 10% variation in voter population between electorates.

→The plaintiffs argued:

- That s 24 of the Constitution required allocation and redistribution of seats based strictly on current population statistics, not subject to parliamentary discretion or delay.
- That "directly chosen by the people" in s 24 implied a "one vote one value" principle (drawing on US case Wesberry v Sanders).
- By the 1974 election, some electoral divisions (e.g. in Queensland) had population disparities of up to 2:1.

Issues:

→Whether s 24 required automatic reallocation of seats based on updated census data (i.e. whether allocation was self-executing).

→Whether "directly chosen by the people" implied the constitutional requirement of equal electoral value (i.e. one vote one value).

Held:

→Allocation of Seats

- The Representation Act provisions requiring parliamentary approval were invalid.
- s 24 requires the number of members to be proportional to population, which implies mandatory and regular reallocation of seats every three years.
- Allocation must be based on current statistics and cannot be left to Parliament's discretion.

→Distribution of Seats ("One Vote One Value")

- The Commonwealth Electoral Act 1918 allowing a 10% variation was valid.
- The Court rejected the argument that "directly chosen by the people" means "one vote one value":
  - Gibbs J: Adopted a literalist approach—s 24 doesn't imply equality of voting power. At the time of drafting, many could not vote, so equality was not inherent.
  - Stephen J: Recognised s 24 implies some degree of equality, but not strict "one vote one value".
  - McTiernan, Jacobs & Mason JJ: Suggested that grossly disproportionate variations might invalidate a distribution, but that threshold was not reached here.

Significance:

→6:1 majority (Murphy J dissenting) held:

- s 24 requires direct, popular elections, but does not require one vote one value.
- Electoral divisions can vary in size, provided those variations are not grossly disproportionate.

→Upheld the validity of the electoral system, while ensuring that seat allocation must align with population every electoral cycle.
→Confirmed that "directly chosen by the people" does not impose a standard of perfect equality, but may be breached by extreme malapportionment.

Post-McKinlay Developments

→*McKellar v Commonwealth (1977):* Struck down the remainder clause in the Representation Act as invalid.
→The allocation and distribution of seats is now governed by the Commonwealth Electoral Act 1918.

- Allocation is based on proportional population using census data.
- Distribution involves drawing electorate boundaries and is managed by independent electoral commissions.
- 10% variation in enrolment is permitted; aim is for 2% variation after 3 years and 6 months.

→Monthly reviews occur under s 58; redistribution triggered by:

- Seat number changes,
- Malapportionment beyond 10%,
- Passage of 7 years since last redistribution.

→Electoral Commissions (e.g. AEC, VEC) are independent, with protections like 10-year tenure and removal only for misconduct.

→Key Provisions & References

- Constitution **s 24**: HoR to be "directly chosen by the people", number of members "in proportion to population".
- **Commonwealth Electoral Act 1918 (Cth):** Seat distribution and 10% variation rules.
- Vic Constitution ss 94F, 94G: State-level electoral arrangements.
- s 268(1)(c): Compulsory full preferential voting requirement.

Legislative Procedures

Overview: types of legislative procedures:

1) **Standard legislative procedures (Commonwealth and State)**
2) **Royal Assent (Commonwealth and state)**
3) **Commonwealth alternative legislative procedures: s 57; PMA Case (1975); Territory Senators No 1 (1975)**
4) **Commonwealth restrictive procedures: s 128**
5) **Commonwealth special procedures: ss 53, 54, 55; Air Caledonie (1988); Fringe Benefits Case (1987); Mutual Pools (1987)**
6) **Victorian restricted procedures**
7) **Victorian special procedures**

1) Standard Legislative Procedures (Cth And State)

→Modelled on UK parliament ('standing orders'; but tensions between:

- traditional non justifiability of parliamentary procedures ('intra mural'): e.g. British Rail v Picken (UK) [7.8.7]; and
- judicial review re constitutionality & inflexible written constitution (US)

→Initiation of a bill:
- either house
- any member e.g. private member's bill
- 1st, 2nd and 3rd readings of bills [7.8.7]

1. **First Reading –** Bill introduced, long title read, copies distributed. (Formality, no debate).
2. **Second Reading –** Minister delivers speech on purpose and principles (recorded in Hansard). Debate on general principles, then vote.
3. **Committee Stage –** Clause-by-clause consideration. Amendments may be proposed and debated.
4. **Third Reading –** Final form of bill considered. Short debate (if any), then vote. Bill passes the house.
5. **Other House –** Same process repeated. If amended, returns to originating house for agreement.
6. **Royal Assent –** Governor-General (Cth) or Governor (state) formally approves bill into law (by convention, always granted).
   - Standard procedure requires majority of members present when voting taken.
   - Quorum (requirement of certain number of people to be present before bill can pass). Min needed (parliament doors are locked when vote):
     - s 22 re Senate quorum (at least 1/3)
     - s 39 re House of Representatives quorum (at least 1/3)
   - Constitution Act 1975 (Vic) ss 32 (1/3 re Legislative Council), s 40 (20 re Assembly)
   - Note: Casting or deliberative votes of speaker and president

2) Royal Assent

→Crown is element of parliament (The Queen):
- Australian Constitution: **s 1**
- Victorian Constitution: **s 15**

→Hence, GG needs to assent to legislation. Otherwise will be dismissed, must follow advice of minister.

→Not a '**reserve power**' (see Winterton):
- Even if GG convinced legislation is illegal or unconstitutional, GG still must assent to and in this way assent is a 'rubber stamp'.
- Bagehot ('advice, warn and consult') once said that the only powers GG has is to advise, warn and consult if they are concerned about something.
- Refusal to assent would be grounds for dismissing the GG however because these rules are based on conventions and not in the Constitution the remedy is political and not judicial.
- GG is only there to advice, warn and consult, not proper to withhold assent.

Note: Normally assent is a formality, but some argue that Crown entitled to refuse to assent on the advice of the ministry. However, this would arguably be contrary to the institution of representative democracy we have.

Withholding assent: s 58

→Intended to deal with inaccuracies — enables GG to withhold assent in order to deal with inaccuracies which may have crept into legislation.

- Used 14 times

→GG cannot assent to part of legislation as it may dramatically alter the character of the bill - must assent to all.

→Reservation for assent by Queen (can send back to parliament with suggestion of slight amendment of typo).

→ **s 58, s 74** re Cth non 'inter se' matters

- s 74: All appeals from HC abolished by Privy Council (Appeals from the High Court) Act 1975 (Cth)
- **s 58**: Power of reservation under s 58 dead letter (copied from colonial constitution). Designed to fix 'typos' in legislation, by passing back to parliament to fix typo. Not used since 1986. Crown cannot assent to part of legislation, has to consent to the whole of legislation.

→ re States:

- restriction of laws which had to be reserved for Queen's assent in Australian States Constitution Act 1907 (Imp) — **abolished by Australia Acts s 9**
- no state legislation needs to be reserved for consent of the Queen.

Disallowance:

→disallowance is the power to reserve any legislation the Queen wants within 1 year of being made by parliament**: s 58** = Abolished by Australia Act **s 8**

→not used in colonies since 1860s — abolition in states by Australia Acts **s 8**

→Commonwealth s 59 — 'dead letter' — abolished in states by Australia Acts s 8

3) Commonwealth Alternative Legislative Procedures: S 57

→Contained in **s 57** constitution: 57 Disagreement between the Houses:

"If the HoR passes any proposed law, and the Senate rejects or fails to pass it, or passes it with amendments to which the HoR will not agree, and if after an interval of three months the HoR, in the same or the next session, again passes the proposed law with or without any amendments which have been made, suggested, or agreed to by the Senate, and the Senate rejects or fails to pass it, or passes it with amendments to which the HoR will not agree, the GG may dissolve the Senate and the HoR simultaneously. But such dissolution shall not take place within six months before the date of the expiry of HoR by effluxion of time.

If after such dissolution the HoR again passes the proposed law, with or without any amendments which have been made, suggested, or agreed to by the Senate, and the Senate rejects or fails to pass it, or passes it with amendments to which the HoR will not agree, the GG may convene a joint sitting of the members of the Senate and of the HoR.

The members present at the joint sitting may deliberate and shall vote together upon the proposed law as last proposed by the HoR, and upon amendments, if any, which have been made therein by one House and not agreed to by the other, and any such amendments which are affirmed by an absolute majority of the total number of the members of the Senate and HoR shall be taken to have been carried, and if the proposed law, with the amendments, if any, so carried is affirmed by an absolute majority of the total number of the members of the

Senate and HoR, it shall be taken to have been duly passed by both Houses of the Parliament, and shall be presented to the GG for the Queen's assent."

Deadlock provision s57

Alternative legislative procedure steps (**s 57**):

- Not automatic triggering of the steps, requires intentional triggering.

Step 1	House of Reps passes the Bill
Step 2	Senate rejects or 'fails to pass' the Bill or passes it with unacceptable amendments
Step 3	3 months later (after Senate step) HoRs passes Bill again
Step 4	Repeat Step 2
Step 5	G-G dissolves both Houses and an election is carried out. Double dissolution. - This requires the Prime Minister to instruct / advise the GG to dissolve both houses. - Likely does not occur unless prime minister think it's politically advantageous. What is the political environment / context?
Step 6	New Parliament — HoR's passes the Bill again
Step 7	Repeat Step 2
Step 8	G-G convenes joint sitting of all members of both Houses
Step 9	Bill is passed by an absolute majority of the joint sitting (twice as many HoRs as Senators)[1]
Step 10	If passed, G-G assents to the Bill a

Note: constitutional nexus that exists between HoR and Senate — Constitution provides that HoR's will have twice as many members as Senate

→Every step has its own political issue, not a streamline procedure.

→Government unlikely to want a double dissolution, as they might lose election. Only would want dissolution if they definitely would win.

→A deadlock can be resolved in other ways by amendments or winning dissolution election with bigger majority. Then may be able to pass bill thorough without need for joint sitting.

[1] absolute majority = more than half of everyone in house passes it.

Political dimension re s 57:

→ Advice to GG re double dissolution ('step 5') cf 1975, 2008-9:

- GG's independent judgement at step 5
- outcome of election at step 5
- abandonment of 'Australia Card' legislation post 1987 double dissolution election
- GG has independent power to dissolve parliament. GG has to be convinced serious need for dissolution.

Dominance of Lower house

→ House of Reps initiation

→ Numbers at joint sitting (absolute majority & remember nexus) (HoR intention will prevail, have more numbers.)

→Joint sitting is a one off, that only deals with bills that have been through 7 steps (of dead lock).

→Other ordinary bills continue as normal: s 57 is ineffective for money bills, as government would run out of money before completing all 10 steps.

Joint sitting (step 8) as 'one off'

→ Joint sitting can only consider those bills which have passed through steps 1-7.

→ Parliament reverts to bicameral legislature pre- and post-joint sitting.

→ Only one joint sitting (6 & 7 August 1974) & absolute majority.

→ Cumbersome and ineffective re money bills (cf 1900).

Cormack v Cope (1974) (double dissolution)

→An injunction cannot be obtained as a remedy, instead a judicial declaration of the legislation's invalidity after it has been enacted.

→Refusal to issue injunction to prevent joint sitting — determined 3 months have to pass indicated proper remedy was to challenge subsequent legislation.

→Government can hang onto double dissolution and trigger when they like.

Issue: Challenge to the validity of the Petroleum and Minerals Authority Act 1973 (Cth) and the constitutional use of s 57 (double dissolution trigger).

Background

→s 57 addresses whether a joint sitting convened under Section 57 can deliberate and vote on more than one proposed law and whether the Governor-General's proclamations related to the joint sitting were valid.

Key Issues

→**Scope of Joint Sitting**:

- Whether Section 57 allows deliberation and voting on multiple proposed laws at a joint sitting or is confined to a single proposed law.
- Whether the Governor-General's proclamation directing deliberation and voting on six proposed laws exceeded constitutional authority.

→**Validity of Proclamation**:

- Whether the Governor-General's inclusion of unnecessary material in the proclamation invalidates the joint sitting.
- Whether the Petroleum and Minerals Authority Bill 1973 met the constitutional requirements for inclusion in the joint sitting.

Court's Findings:

Multiple Proposed Laws:

- The Court unanimously held that s 57 operates distributivity, allowing deliberation and voting on multiple proposed laws at a joint sitting, provided each proposed law meets the constitutional requirements.
- The singular language of "any proposed law" in s 57 does not limit the joint sitting to one proposed law.

Governor-General's Proclamation:

- The Governor-General's power under Section 57 is limited to convening a joint sitting; it does not extend to directing the business of the sitting or specifying which proposed laws must be deliberated and voted upon.
- The inclusion of unnecessary material in the proclamation, such as directions to deliberate and vote on specific proposed laws, was deemed surplusage and did not affect the validity of the proclamation.

Petroleum and Minerals Authority Bill 1973:

- The Court found that the requisite three-month interval between the Senate's rejection and the House of Representatives' second passage of the Bill had not elapsed, making it likely that the Bill did not meet the requirements of Section 57.
- However, the Court declined to grant interlocutory relief, noting that the validity of the Bill could be challenged after the legislative process was completed.

Conclusion

- The Court refused to intervene in the legislative process at the interlocutory stage, emphasising that challenges to the validity of laws passed at a joint sitting should be made after the completion of the legislative process.
- It upheld the principle that Section 57 allows deliberation and voting on multiple proposed laws at a joint sitting, provided constitutional conditions are met.

Outcome: The motions for injunctions were dismissed, and the Court declined to grant interlocutory relief. The questions referred to the Full Court were answered in the negative.

PMA Case (1975) – HCA

Facts:

- The PMA Bill was introduced and passed by the House of Representatives in December 1973.
- The Senate adjourned without voting on the bill.
- The House passed the bill again on 8 April 1974.
- The Senate then voted to defer consideration, rather than reject it.
- The Governor-General relied on s 57 of the Constitution to call a double dissolution.
- A joint sitting later passed the bill into law.

Legal Issues:

- Is s 57 justiciable by the High Court?
- Did the Senate “fail to pass” the bill on 13 Dec 1973?
- Can the individual comments of senators be used to interpret a “failure to pass”?
- When does the 3-month interval required by s 57 begin?
- Are the procedural requirements in s 57 mandatory or directory?

Held:

- s 57 is justiciable and mandatory: The majority held the High Court can review compliance with constitutional procedures, as s 57 creates binding legal rules.
- The high court is the guardian of the Constitution and has obligation to ensure the constitution is followed.
- Barwick CJ: Parliament must follow constitutional procedures; courts have a role in ensuring this.
- McTiernan J (dissent): Considered s 57 too political to be justiciable.
- Senate did not "fail to pass" the bill in Dec 1973.
- Mere adjournment or deferral does not amount to failure to pass: A “failure to pass” requires inaction over a reasonable period, depending on the nature of the bill.
- The Senate is a co-equal chamber, not a subordinate one.
- Individual comments by senators are irrelevant, only the actions of the Senate as a body are considered.
- The 3-month period before the second passage of the bill must occur after the Senate first fails to pass or rejects it. Here, the high court established that the three months had not elapsed after any such failure, so the trigger was invalid.

1. Non-Justiciability:

   Commonwealth's Argument: The court cannot inquire into the law-making processes of Parliament, and the Governor-General's assent to the Bill is conclusive.
   Court's Decision: Rejected. The court held that it has jurisdiction to determine whether the requirements of section 57 were satisfied. Section 57 imposes conditions on the extraordinary law-making process, and the court, as the guardian of the Constitution, has the duty to ensure compliance with these conditions.

2. Words of Section 57:

   Commonwealth's Argument: The provisions of section 57 are directory, not mandatory, and failure to comply does not invalidate the law.
   Court's Decision: Rejected. The court held that the provisions of section 57 are mandatory. The section prescribes specific conditions for the exercise of the extraordinary law-making power, and failure to comply with these conditions results in invalidity.

3. Interval of Three Months:

Commonwealth's Argument: The interval of three months should be measured from the first passage of the Bill by the House of Representatives, not from the Senate's rejection or failure to pass the Bill.
Court's Decision: Rejected. The court held that the three-month interval begins from the Senate's rejection, failure to pass, or passage with amendments unacceptable to the House. The purpose of the interval is to allow time for reconciliation of differences between the two Houses, and it cannot begin before the deadlock occurs.

4. Failure to pass of the Senate on 13 December 1973:

   Commonwealth's Argument: The Senate failed to pass the Bill on 13 December 1973 because it adjourned the debate on the second reading.
   Court's Decision: Rejected. The court held that the Senate did not fail to pass the Bill on 13 December 1973. The adjournment of the debate was a reasonable exercise of the Senate's deliberative processes, and the Senate must be allowed a reasonable time to consider a Bill before it can be said to have failed to pass it.
   →"Failure to pass" occurs when the Senate does not pass a Bill within a reasonable time, not simply due to delay or adjournment.

The High Court held that:
- The Senate is entitled to proper deliberation, including debate and inquiry.
- A reasonable time depends on factors like urgency, complexity, and importance of the Bill.
- Adjournments or delays do not automatically amount to failure; context matters.
- There is no need to show fault or refusal — inaction or delay may suffice.
- In the PMA case, the Senate's adjournment in December 1973 was not a failure to pass; it was a reasonable part of its deliberative process.

Outcome:
- The PMA Act 1973 was invalid – not validly enacted through a lawful s 57 process.
- However, the double dissolution, election, and summoning of Parliament were still valid.
- **s 12 and s 32 (regarding election writs) operate independently of s 57.**
- **Thus, the joint sitting occurred validly even though the Act passed was not valid.**

Effect of High Court's jurisprudence

→Unclear whether double dissolution only re deadlock.
→Political effect — extremely difficult to work out when 'fail to pass' occurs but timing critical.
→ unclear effect on lawfulness of dissolution + unclear whether G-G's proclamation should refer to Bills and whether affects business of joint sitting.

Territory Senators' (No 1) (1975)

→ 1st passed (Step 1) 30/5/73 — Rejected (Step 2) 7/6/73; Passed 2nd time (Step 3) 27/8/73 —Rejected by Senate 2nd time (Step 4) 14/11/73
→Double dissolution 11th/04/1974 (Step 5) — Argued too great interval between steps 4 & 5 ("stockpiling") - rejecting by the senate for the second time and GG calling a dissolution.

→Held — Majority: no time limit. Can stockpile and pass as many bills as they want to when joint sitting. Just political remedy.
→ Stockpiling means the government can bank up rejected bills, wait for the right political timing, then call a double dissolution and joint sitting to push them through. The High Court confirmed this is constitutional — the safeguard is political, not illegal.
→Political effect? Notion now of stockpiling, that government early on in its term will put up rejected bills, then will sit on bills and wait until end of term to see if high in polls and then will rush called to call an election.
→If votes are evenly divided in house of reps, speaker can vote one way to achieve majority. In senate, president has a deliberate vote.

Background:
→This case arose from the Whitlam Government's use of the double dissolution mechanism under s 57 to resolve legislative deadlocks between the HoR and the Senate. The High Court of Australia examined the validity of the double dissolution and subsequent joint sitting, focusing on procedural compliance with Section 57.
→The Whitlam Government faced repeated Senate rejections of several proposed laws, including the Commonwealth Electoral Bill (No 2) 1973, Representation Bill 1973, and Senate (Representation of Territories) Bill 1973.
→After the Senate rejected these bills for the second time, the GG dissolved both Houses of Parliament on 11 April 1974, citing the deadlock as grounds for the double dissolution.
→Following the election, the Senate again rejected the bills, prompting the GG to convene a joint sitting on 6 August 1974, where the bills were affirmed by an absolute majority.

Key Issues:
→Temporal Connection Between Senate Rejection and Double Dissolution:
- The plaintiffs argued that Section 57 implied a requirement for the double dissolution to occur "without undue delay" after the Senate's second rejection of a proposed law.
- The High Court rejected this argument, holding that Section 57 does not impose a strict temporal limitation beyond the explicit provisions in the section (e.g., the three-month interval and prohibition on dissolution within six months of the House's expiry). The Court emphasised that the power to dissolve was discretionary and could be exercised at any time during the life of the Parliament.

Effect of Prorogation:
- The plaintiffs contended that the prorogation of Parliament on 14 February 1974 negated the earlier events qualifying the bills for a double dissolution.
- The Court held that prorogation did not affect the validity of the double dissolution process under Section 57. The legislative history of the bills remained intact, and the Governor-General retained the power to dissolve both Houses.

Validity of the Joint Sitting:
- The plaintiffs argued that the Governor-General's proclamation convening the joint sitting was invalid because it included a bill (Petroleum and Minerals Authority Bill 1973) that did not meet Section 57 requirements.

- The Court determined that the reference to the invalid bill was surplusage and did not affect the validity of the proclamation or the joint sitting. The other bills were properly affirmed.
- The High Court can review whether constitutional procedures for passing laws were followed.

Outcome: The High Court upheld the validity of the double dissolution and joint sitting, confirming that the Commonwealth Electoral Act (No 2) 1973, Representation Act 1973, and Senate (Representation of Territories) Act 1973 were duly passed under Section 57. However, the Court invalidated the Petroleum and Minerals Authority Act 1973 due to non-compliance with the three-month interval requirement.

- The provision struck down is treated as **unconstitutional** and has no legal force.
- The law is regarded as though it never validly existed from the start ("void ab initio"), though in practice the Court often manages consequences carefully.

Significance: This case clarified the scope and procedural requirements of Section 57, affirming the Governor-General's discretion in dissolving Parliament and convening joint sittings. It also underscored the importance of adhering to constitutional processes while allowing flexibility in resolving legislative deadlocks.

4) Commonwealth Restrictive Procedures: S 128

→Consists of **s 128** re amending constitution, referendum provision.

- Majority of the states and elector's required.
- 'frozen continent': *Sawer*
- Popular sovereignty

→**s 128** only way of amending Constitution but numerous provisions empower Commonwealth Parliament to legislate to alter the law which applies 'until Parliament otherwise provides' **s 34**

- If Commonwealth parliament legislates (means): not a constitutional amendment, Australian Constitution not altered simply parliament exercising its legislative powers consistently with the constitution confirmed by **s 51(xxxvi)**
- *Bolan v Hudges (1988)*: High Court asserted power to invalidate alteration if s 128 not complied with.

→Features include:

- Parliamentary initiation
- Absolute majority
- Passage by one house
- Referendum & double majority
- Role of Territories (1977 referendum)
- State boundaries or representation e.g. **s 24**

→Current issues:

- Requirements = double majority (hard to accomplish; 8/45 successful)
- Preamble re aboriginal people
- Republic
- Local government

- Repeal of 'race' power
- Note: s 128 can be used to amend itself e.g. 1977

5) Commonwealth Special Procedures: ss 53, 54, 55

→Money bills include:

- **Tax bills i.e. raising revenue**
- **Appropriation bills i.e. authorising expenditure of money**
- **s 83** re appropriation ('by law')
- Authorisation of Parliament required to raise taxes or spend money: Petition of Right (1627) and Glorious Bill of Rights (1688) re tax (no bill of rights as founding father believe rights protected by parliament, government, common law courts and responsible government. Also constitution Bill of rights would be invalidated policies at the time such as the 'White Australia Policy')

Importance of money to governments

→Underpinning conventions of responsible government (money is like oxygen to governments, cannot survive without it)

→Ministers must be elected to and sit in parliament. In order for money to be secured, they are answerable and accountable to parliament

→ Dominance of Lower House (and Senate obstructionism?)

→ If government has majority in lower house, convention is that senate will let appropriation bills pass.

→ Senate as 'State's house' (s 13) cf House of Reps as popular chamber (s 24).

→ Power of Senate & compromise re large and small states.

→ Once money is raised through taxation, it is not available for government expenditure until the parliament has enacted further legislation authorising the government to spend the money. (Appropriation)

→The Senate cannot amend money bills but can send back to the house of reps suggesting amendments: s 53. The senate can't stop the funding of the government and thus supply to the crown and the ability of the government to carry out general services.

Section 53: Senate - Money bills

→**Section 53**: not justiciable as it deals with 'proposed laws'. Powers of the Houses in respect of legislation

- Proposed laws appropriating revenue or moneys, or imposing taxation, shall not originate in the Senate. But a proposed law shall not be taken to appropriate revenue or moneys, or to impose taxation, by reason only of its containing provisions for the imposition or appropriation of fines or other pecuniary penalties, or for the demand or payment or appropriation of fees for licences, or fees for services under the proposed law.

- The Senate may not amend proposed laws imposing taxation, or proposed laws appropriating revenue or moneys for the ordinary annual services of the Government. The Senate may not amend any proposed law so as to increase any proposed charge or burden on the people.

- The Senate may at any stage return to the HoR any proposed law which the Senate may not amend, requesting, by message, the omission or amendment of any items or provisions therein. And the HoR may, if it thinks fit, make any of such omissions or amendments, with or without modifications.

- Except as provided in this section, the Senate shall have equal power with the HoR in respect of all proposed laws.

→Generally speaking the Senate is a 'co equal' power of House but there are some exceptions which lie in s 53.

Qualifications

5. Initiations of money bills (i.e. appropriation & tax bills) (senate may not amend appropriation bills)
6. Amendment of tax bills and appropriation bills for 'ordinary annual services of government' but subject to right of Senate to return bill (also deferral); e.g. 'blocking supply' (1975)

→The Senate is unable to initiate or amend money bills for the 'ordinary annual services of government' but has the power to reject a money bill or ordinary annual services of government refer to 'spending money on matters of settled policy where no new development of capital expenditure is involved'.
→Senate may not amend any proposed law to increase any proposed charge or burden on the people. e.g. Clerk of Senate's advice re PUP Senators amendment to Carbon Tax Repeal Bill on 10 July 2014.

Section 54 Appropriation Bills Cth Constitution

→ Senate can send bills back to HoR with suggestions of amendments. If government cannot get tax bills through, cannot govern strong convention though, that senate will pass appropriation bills if government has majority in lower house. Still possible for senators to edit appropriation bills. Only political remedy though, not enforceable by the court.
→Any time money comes out of treasury, an appropriation law must be made: an 'Appropriation Act': s 54
→The unconstitutional practice of attaching ("tacking on") unrelated provisions or policy measures to an appropriation bill. Under **s 54**, a law appropriating money for the ordinary annual services of government must deal only with such appropriations. This rule prevents governments from forcing the Senate to accept unrelated measures it otherwise has the power to amend or reject.

Vic Upper House - Money Bills / Blocking Appropriation Bills

→Council can block appropriation bill by rejecting them or returning with unacceptable suggested amendments: **s 62 Vic Consti**
→s 65(5)/(4): if council doesn't pass appropriation bills within a month, the assembly can then just pass rejected appropriation bill direct to governor for royal assent.

Anti-Tacking Provision

→Anti-tacking purpose is to prevent HoR from getting bills through senate purely because they are from the HoR.
→ Tacking = adding unrelated/non-financial provisions into financial legislation (because HoR is dominant over senate in relation to this category of legislation) — provides a

requirement to prevent abuse of this dominance by HoR by 'sneaking' non-financial provisions into financial legislation and claiming the senate cannot amend it.
→ 'proposed laws' (ss 53, 54) cf 'laws'
→ **s 53**, **s 54** non justiciable whereas **s 55** is justiciable.
→ s 53: does not oblige senate to pass financial legislation, it can return the proposed laws to the HoR with suggested amendments so can be highly obstructive.

Note: There is no legal authority re appropriation bill for '<u>ordinary annual services of government</u>' — conventional view is that it involves government expenditure on matters of settled policy where no new development or capital expenditure involved [2.9.23]: cf Constitution Act 1975 (Vic) s 65(2).

<u>Section 55 Taxation Commonwealth Constitution</u>

→Contrary to ss 53 and 54, it refers to 'laws'. Hence, it is justiciable.

> →<u>Laws imposing taxation shall deal only with the imposition of taxation, and any provision therein dealing with any other matter shall be of no effect.</u>
> →Laws imposing taxation, except laws imposing duties of customs or of excise, shall deal with one subject of taxation only; but laws imposing duties of customs shall deal with duties of customs only, and laws imposing duties of excise shall deal with duties of excise only.

→It has two limbs:
1) <u>Laws imposing taxation shall deal only with imposition of taxation</u> — restricts parliament from getting to second limb (see below).
2) Any provision dealing with any other matter (something other than taxation) <u>shall be of no effect</u> —consequence of a breach will be that the law is invalid.

Note: s 55's purpose was to prevent exploitation of s 53 because if s 55 didn't exist government could make a law and 'tack on' a tax so Senate couldn't amend it.
- Air Caledonie case says when its an amending provision you don't get to 2nd limb (see below)

<u>Air Caledonie International v Commonwealth (1988) 165 CLR 462</u>

Facts:
→The Commonwealth passed the Migration Amendment Act 1987 (Cth) which inserted s 34A into the Migration Act 1958 (Cth).
→Section 34A required airlines to collect an "arrival fee" from incoming passengers, including Australian citizens, to be paid to the Commonwealth.
→The Commonwealth argued this was a fee for services (e.g., customs checks), not a tax.
→The court defines a tax in relation to Section 53 as a compulsory exaction of money by a public authority for public purposes, enforceable by law, and not a payment for services rendered. Latham CJ in *Matthews v Chicory Marketing Board (Vic) (1938).*

Issue:
→Whether the Migration Amendment Act 1987 imposed a tax in breach of s 55 of the Constitution, which requires that laws imposing taxation deal only with taxation.

→Key Constitutional Provision: Section 55:

- First limb: A law imposing taxation must deal only with taxation.
- Second limb: Any provision dealing with any other matter shall be of no effect.

Arguments:
→The Commonwealth contended:

- The amending Act dealt only with taxation, not migration.
- Section 34A was a fee for service, not a tax.
- There was no breach of s 55 (i.e., no tacking of unrelated provisions).

Held:
→Section 34A imposed a tax, at least with respect to Australian citizens.

- The Amending Act did not merely deal with taxation. When viewed as part of the statute book, the amended Migration Act now dealt with both migration and taxation — violating the first limb of s 55.
- The High Court took the view that the Amending Act was invalid from the outset due to the breach of the first limb. As a result, the invalid tax provision never became part of the Migration Act.

→This interpretation avoided invoking the second limb, which would have potentially invalidated the entire Migration Act 1958 except for the tax provision.
→The Court described this approach as a "creative invocation" of s 55 — effectively preventing Parliament from inserting tax provisions into non-tax legislation.
→The court suggests that Section 53 of the Constitution restricts the Senate by limiting its powers in relation to proposed laws that appropriate revenue or impose taxation. Specifically:

- Origin of Proposed Laws: The Senate cannot originate proposed laws that appropriate revenue or impose taxation. These must originate in the House of Representatives.
- Amendment of Proposed Laws: The Senate is prohibited from amending proposed laws that appropriate revenue or impose taxation.

Significance:
→Reinforced the strict separation between tax and non-tax laws under s 55.
→Demonstrated the High Court's willingness to invalidate an amending act to preserve the validity of the principal act.
→Highlighted tension with the anti-tacking purpose of s 55, since the Court's reasoning didn't strictly address tacking but instead pre-emptively struck down the offending amendment.
→Note exception: s 55 does not require separation of taxation and taxation assessment/administrative laws. Can have in one act everything that deals with tax, rate, who it applies to etc:

→*Permanent Trustee Australia Ltd v Commissioner for State Revenue (2004)*:Anti-tacking purpose of s 55 does not require separation of provisions dealing with assessment, collection and recovery of tax.

“Deal only with imposition of taxation”

Air Caledonie

→Does ‘dealing with the imposition of taxation’ include provisions for the machinery of tax assessment and collection e.g. appointment of tax commissioner, making of returns and assessments, tax appeals, tax penalties etc?

→Isaac J’s view: That laws dealing with machinery of the taxation assessment and collection were not laws ‘dealing with the imposition of taxation’ — s 55 required a separate act for tax assessment (cf imposition) e.g. Tax Act cf Tax Assessment Act

→Anti-tacking purpose of s 55 does not require separation of provisions dealing with assessment, collection and recovery of tax.

→Are all laws ‘dealing with the imposition of taxation’?

“One subject of taxation only”

State Chamber of Commerce and Industry v Commonwealth (1987)

→Fringe Benefits Tax Act 1986 dealt with fringe benefits paid by private employers and also other fringe benefits by public servants including those who were not employees.

→ non-compliance with 2nd para of s 55 — invalidity of entire law, but, “s 55 not directed to categories of taxes referred to by economists and lawyers; rather it is concerned with political relations… categories of taxation based on common understanding and general conceptions”

→ deference to Parliament

→ 2nd para ‘*laws imposing duties of excise shall deal with duties of excise only’*

→ constitution makes requirement that laws of excise must only deal with excise. ‘The stream cannot rise higher than its source’

“Laws imposing duties of excise shall deal with duties of excise only”

Mutual Pools & Staff v Commissioner of Taxation (1987)

→Sales Tax Act (No 1) 1930 imposed sales tax on goods

→Deemed swimming pools constructed on site to be manufactured goods

→Argued excise is a tax on goods + Sales Tax Act in application to swimming pools invalid because swimming pool not goods — not excise

Held:

- Excise tax is on goods
- Swimming pool not goods despite deeming provision (‘Parliament cannot bring legislation within power by deeming facts to be as they are not or by deeming things to have a character which they do not bear’)
- Breach of 2nd para of s 55 re laws imposing tax invalidates whole act
- Re excise analogy is with 1st paragraph — any other subject is impermissible
- Provisions of Sales Tax Act that deal with swimming pools have no effect

6) Victorian Alternative Legislative Procedures

→Constitution Act 1975 (Vic): **Section 16**: Limitation on Vic include exclusive powers of Cth, Territorial limitations and superiority of Cth constitution (**s 109** Consti), otherwise Vic has general grant of power.

→**Division 9A:**

- “disputed Bill”: s 65A (note primacy of Assembly)
- “dispute resolution committee”: s 65B esp sub-s (3), (4) & s 65C
- then either “Deadlocked bill” or consideration of “Dispute resolution” (s 65D) for 30 days
- if deadlock bill = early election: s 65E, s 8
- if disputed bill (s 65A) = joint sitting: s 65G
- s 65A: any bill that the assembly passes and not passed by council within 2 months becomes a disputed bill)
- note political issues (like s 57) & untested

→**Process (cannot be used for appropriation bills)**

1) Bill not passed within 2 months or sent back to lower house with unacceptable amendments.
2) Dispute resolution committee is then formed, mxi of council and legislative members (12 members, 7 from assembly, 5 from council).
3) If agreement/resolution can be made by committee (they have 30 days to agree), bill sent back to parliament to be passed. If then cannot be passed, then deadlock. If agreement cannot be made, bill moves to deadlock: s 65D/E
4) Premier of day can withdraw bill or advice Governor to dissolve both houses of parliament. Council gets dissolved as soon as assembly gets dissolved.
5) Once both houses are re-elected, government can again present the bill to parliament (government may even get voted out), original or in revised form put forward by resolution committee. If council does not pass within 2 months of being passed by assembly (becomes disputed bill), governor on advice of Premier then calls joint sitting of both houses of parliament (for disputed bill).
6) Joint sitting of both houses, will need a majority +1 to pass the bill

Note: If not followed cannot be challenged in court as long as have speaker certificate.

7) State Restrictive Legislative Procedures

→State constitution is just legislation and can be changed generally by legislation. Cth legislation sits above state legislation and thus can use act by Cth to entrench parts of the state constitution (**s 109**). With Cth laws overriding all state laws to extent of inconsistencies.
→State parliaments think some sections of state constitution are more important and thus want to make more difficult to change. Especially more than just default simple majority.
→Thus States put in restrictive procedures that make harder to change than just a simple majority.

→**Three types of restrictive procedures**:

1. Referendum
2. Special majority (3/5 of total members of Vic Parliament)
3. Absolute majority (50% +1 total house)

Formula for restricting

→Restrictive procedure must be an entrenched section and itself. Then also must be protected by Australia Act ie s 15. If section does not entrench itself, extra requirement can just be legislated away with simple majority and then parliament can go back to using simple majority on that section.

- Must restrict section
- Must restrict itself
- Must be appropriate manner and form to be recognised under Australia Act s 6 — be a law concerning the 'constitution, powers or procedure of the Parliament' — does the substance or main point of subsequent act affect parliament or constitution?
- If all satisfied, parliament must follow restrictive procedure (e.g. referendum). As now restricted by Cth legislation.

Note: Commonwealth parliament cannot enact restrictive procedures because:

- no specific 'restrictive procedure' head of power
- incompatible with plenary grants of legislative powers under, e.g. s 51, and s 128
- with exception of s 51(xxxviii) e.g. Australia Act 1986 (Cth) s 15
    - Australia Act can only be amended with concurrence of the Parliaments of all the states.

→Sovereign Parliament (e.g. UK)

- Plenary power & absence of written constitution; 'rule of recognition', simple majority sufficient.
- Sovereign parliament cannot bind itself.

→Colonial / State Parliaments

- Legislative powers conferred by Constitution Acts (Imp) of 1850s — not truly sovereign parliaments.
- Constraints including: inconsistent/repugnancy + extraterritoriality.
- "subordinate" parliaments but exercised (near) plenary power — i.e. 'peace, order and good government of X' (e.g. McCawley v R) within sovereign territory (cf Cth Parliament & s 51).
- Colonial Laws Validity Act 1865 (Imp) s 5 + Australia Act 1986 (Cth & UK) s 6; see also s 2(2).

Exam Q response guide:

1. Identify the issue: Ask if the Act is valid given a restrictive procedure requirement.
2. State basal position: By default, state constitutions can be amended by ordinary legislation (Australia Act s 2).
3. Identify the procedure: Check if the section imposes a referendum, special majority, or absolute majority and self-entrenches.
    a. Step 1 test: Determine if it is a valid "manner and form" under s 6 (not too onerous per *West Lakes*).
    b. Step 2 test: Determine if the new law concerns the constitution, powers, or procedure of Parliament (cf *Marquet*).
4. Apply s 6: If both tests are satisfied, the restrictive procedure is legally binding and must be followed.
5. Check complications: Consider self-entrenchment, repeal by simple majority, or invalid extra-parliamentary requirements.
6. Conclude: State whether the Act is valid or invalid, citing s 6, *Marquet*, and *West Lakes*.

Australia Act 1986 (Cth)

→Basal Position (**s 2**): **Section 2**: 'It is hereby declared and enacted that the legislative powers of the Parliament of each state include all the legislative powers that the Parliament of the United Kingdom might have exercised before the commencement of this Act for the peace, order and good government of that State …'
→**Section 2(1)** of the Australia Act 1986 (Cth) confirms that State Parliaments have plenary powers, like the UK Parliament once had—i.e. they cannot bind future parliaments.
→This means one parliament cannot restrict or control the legislative freedom of a future parliament.

→**Australia Act s 2(2):** provides State parliaments with plenary legislative power. Hence, they cannot bind future parliaments.
→state parliaments exercise plenary legislative power and cannot bind themselves ('**basal position'**)

- This section confirms the plenary (full) power of state parliaments, including Victoria, to pass laws just like any other ordinary statute—even with extra-territorial effect.
- It reinforces that, by default (or "basal position"), a state constitution can be changed by ordinary legislation (simple majority).
- There is no entrenched hierarchy like in the Commonwealth Constitution unless a valid exception applies.

→ **s 6 of The Australia Act**: is a limited exceptions so that if a provision falls within the boundaries of s 6 it can bind a State Parliament or future parliaments.

→Despite **section 2**, **section 6** allows for an important exception:

- A State law concerning the constitution, powers, or procedure of Parliament is invalid if not enacted in the required "manner and form" as set out by a law of that same Parliament.
- This allows parliaments to impose certain procedural requirements (like special majorities) for valid passage of future laws that affect Parliament itself.

How to determine if scenario falls into s 6 exception:

1) Is the restrictive procedure a valid 'manner and form' restrictive procedure? (see: *West Lakes*).
    a. If no, revert to basal position. If yes —

2) Is the subsequent Act a law concerning the 'constitution, powers or procedure of the Parliament'? e.g. *Dog Act (Amendment) Act 2008 (Vic)*; *Marquet*.
    a. If no, revert to basal position. If yes, then falls within s 6 exception:
        - Manner and form provision is legally effective and binding
        - subsequent bill has no legal effect unless manner and form provision complied with.

→Complications:

- Need for self-entrenchment e.g. Cat Act 2007 (Vic) & Cat Act (Amendment) Act 2008 (Vic)
- Focus on substance of subsequent law re 'constitution, powers and procedure of Parliament'

→**Step 1**: Is the restrictive procedure a valid 'manner and form' restrictive procedure? If not, revert to basal position: *WestLakes*

- Look at the legislation to see if there is a restrictive procedure such as, special majority, absolute majority or referendum, meaning it is an entrenched provision.
- Per *Westlakes*: Is there an onerous restrictive procedure such as a 90% voting requirement?

→ A manner and form provision must fall within one of these three areas to be valid under **Australia Act s 6**. If it does, it can legally bind future Parliaments procedurally—but not substantively: (*Gerard Carney*)

1. **Laws Respecting the Constitution of Parliament**: These laws alter the fundamental structure of Parliament. Examples include laws that:
   - Abolish a House (e.g. upper house).
   - Restore a previously abolished House.
   - Remove the Queen (or her representative, e.g. the Governor) as a component of Parliament.
   - Change the process of royal assent.
   - Alter electoral districts (i.e. how Parliament is elected).
   - Change the number of seats in Parliament.
   - Change the voting system (e.g. from first-past-the-post to proportional representation).
   - Change the length of a parliamentary term.
   - Alter the relationship between the two Houses (e.g. power to block supply).

2. **Laws Respecting the Powers of Parliament**: These laws relate to what Parliament is empowered to do. Valid examples include:
   - Laws that impose, repeal, or amend manner and form provisions themselves.
   - Laws that define or protect parliamentary privilege.
   - Laws that govern how deadlocks between Houses are resolved (e.g. joint sittings, double dissolutions).

3. **Laws Respecting the Procedure of Parliament**: These laws govern the internal workings and processes of Parliament. Examples include:
   - Standing Orders (rules about how business is conducted).
   - The role or powers of the Speaker.
   - Quorum requirements (minimum number of members needed for valid sittings or votes).

Westlakes (S.A. Supreme Court, 1980)

→Agreement was made between company (West Lakes) and premier for this waste sight. Agreement could only be altered by parliament if the company agreed: **s 16(4)**

- *West Lakes Development Act 1969 (SA) s 16* re Ministerial variation of planning code only with consent in writing of West Lakes Ltd.

→Agreement proposed to be changed by parliament (Bill overriding s 16 re floodlights at sports ground) and West Lakes sought an injunction to prevent it passing.

→**Held** (King CJ):

- There is a point where a special majority provision (e.g. Ranasinghe & 2/3rds) would appear to be an attempt to deprive parliament of its powers rather than to prescribe the manner/form of their exercise.
- Thus extremely onerous restrictive procedure would not be a valid manner and form provision.
- Further, the extra parliamentary requirement is akin to a renunciation of the parliament's substantive lawmaking power and is inconsistent with their plenary powers and is an invalid delegation of parliamentary power.

→**Step 2**: If step 1 is met, is the subsequent provision a law concerning the 'constitution, powers or procedure of the parliament'? — refer to **s 6** Aus Act and *Marquet*.

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

Facts:

- First bill sought to repeal Electoral Distribution Act 1947 (WA). Section 13 purported to stop parliament amending law other than by way of absolute majority. Second bill (Electoral Distribution Repeal Bill 2001 (WA)) sought to change number of members in legislative council.
- The court considered Section 13 which required that any Bill to amend the Act must be passed by an absolute majority of members in both Houses of Parliament.
- The court also examined whether Section 13 was binding under Section 6 of the Australia Act.

→Restrictive Procedure Attached to the Law: Section 13 imposed a restrictive procedure requiring an absolute majority for amendments. This was intended to entrench the provisions of the Act and ensure that changes to electoral boundaries or related matters were carefully considered.

Held:

→The High Court of Australia held that Section 13 of the Electoral Distribution Act 1947 (WA) was binding and valid under Section 6 of the Australia Act 1986. The court determined that:

→Section 13's Restrictive Procedure & s 6 Australia Act:

- Section 13 required that any Bill to amend the Electoral Distribution Act must be passed by an absolute majority of members in both houses (Legislative Council & Assembly).
- The court held that this provision was a valid "manner and form" requirement because it related to the "constitution, powers, or procedure" of the Parliament, as defined under Section 6 of the Australia Act.

→The court held that the failure to comply with Section 13 rendered the Bills invalid.
→Prorogation Issue: The court also addressed whether the prorogation of Parliament affected the validity of the Bills. It held that prorogation did not prevent the Bills from being presented for Royal Assent, provided they were otherwise lawful.
→Final Decision: The High Court dismissed the appeals, upholding the decision of the Full Court of the Supreme Court of Western Australia. It concluded that the Bills were invalid because they did not comply with the manner and form requirements of Section 13 of the Electoral Distribution Act.

Principles from the Case:

1. Meaning of "Constitution, Powers or Procedure" (s 6):
- Manner and form requirements must be complied with if the new law:
    - Alters electoral boundaries or voting structures.
    - Changes parliamentary composition (e.g. number of MPs, representation).
    - Amends deadlock resolution, quorum, or voting systems.

2. Parliamentary Sovereignty is Limited in Australia:
- Australian State Parliaments are not sovereign in the pure Diceyan sense.
- Instead, they are derivative or subordinate legislatures (from colonial foundations).
- UK Parliament once could limit them via Colonial Laws Validity Act 1865.
- Now, Australia Act s 6 operates as a new source of constraint on State legislative procedure.

3. Judicial Role in Enforcing Validity:
- Courts must ensure State laws comply with valid manner and form requirements.
- They are not just political conventions—they have legal force.
- Constitutionality now derives from Australian legal sources, not UK legal theory.

4. Australia Act Is Valid Law of the Commonwealth:
- Passed under s 51(xxxviii) of the Constitution (States' referral of power).
- Provides lawful basis for manner and form requirements in Australia.

Relevance of Colonial Laws Validity Act 1865 (Imp)

→more than 'constitution of parliament'

→re 'constitution of parliament' refers to 'nature and composition'

- bicameralism and representative character
- 'constitution of the parliament extends to features which go to give it, and its houses, a representative character'
    - e.g. change from proportional representation to first past the post voting — cf qualification of members re one office: *Clydesdale v Hughes (1934)*

Victorian Constitution Act 1975 (Vic)

→**Section 18** (2003 amendment): Restrictive procedure can be contained in any Act but in 2003 a number were inserted in *Constitution Act 1975 (Vic)*:

- **s 18(1)**: basal position i.e. Constitution Act 1975 (Vic) = Dog Act (Vic)
- **s 18(1b)**: paras (a) to (p) re referendum restrictive procedure; e.g. —
    - (b) re Upper House
    - (j) re local government
    - (l) re DPP
- s 18(2): paras (a) to (g) re special majority restrictive procedure: see s 18(1A)
- s 18(2AA): absolute majority restrictive procedure

→Implied repeal: when law is changed without expressly stating it is a repeal. Law invalid to the extent of the inconsistency.

Effectiveness?

→Some effective but many do not relate to '<u>constitution, powers and procedures of parliament', therefore ineffective</u>

- The effectiveness of a state restrictive procedure becomes an issue when state parliaments seek to amend or repeal an Act which provides that it may only be altered in a prescribed form.
- The restrictive procedure in the Act must fulfil the first requirement of an effective restrictive procedure, that is, it <u>must be a valid manner and form provision</u>.
- If the proposed law is not a law concerning the '<u>constitution powers or procedure of the parliament</u>' then the restrictive procedure will be ineffective and the parliament can legislate effectively without complying with the restrictive procedure.
- But the restrictive procedure in the principal act must be a valid manner and form restrictive procedure, and the law seeking to amend the principal act must be a law concerning the constitution, powers or procedures of the parliament if the restrictive procedure is to be effective.
    - Otherwise the amending act will effectively amend the principal Act. Remember the basal position: parliament cannot bind itself.

Constitution Act 1975 (Vic): s 85 re Supreme Court

→Section 85 re Unlimited jurisdiction of Victorian Supreme Court: protected by absolute majority—

- s 18(2A); and
- s 85(5):
    - history: 1991 and dispute over outset clauses (see example)
    - direct amendment or repeal of s 85(1) (see example I); or
    - express reference to s 85 & express statement of intention to repeal, alter or vary (see example II)
    - Note: ineffective on Marquet analysis but effective according to Vic SC in City of Collingwood (Nos 1&2); BHP v Dagi (1990s)

8) Victorian Special Procedures

Found in Part II, Division 9 of the *Victorian Constitution* — Distinction between 'Appropriation Bills' and 'Annual Appropriation Bill'.

'Appropriation bills'

→Defined as 'a bill for appropriating any part of the consolidated revenue fund or for imposing any duty, rate, rent, return or impost': **s 62(1)** — i.e. 'money bills'

→Must originate in Assembly

→Can be rejected but not altered by Council: s 62(2)

→Not an appropriation bill just because it imposes a fine: s 64(1)

→Council may suggest amendments at:

→Committee stage (between 2nd and 3rd reading)

→During third reading

'Annual appropriation bill'

→ Annual appropriation for 'ordinary annual services of government': s 65(1)

→ Ordinary annual services of government include:

- building acquisition

- capital expenditure
- new services: s 65(2)
- can only deal with appropriation: s 65(3)

→if council rejects or fails to pass Annual Appropriation bill or proposes unacceptable amendments after one month can be presented for assent — Legislative Council can no longer block supply
→ deadlock procedure (Div 9A) cannot be used re Annual Appropriation Bill: s 65A(3)

Whitlam Dismissal (1975)

Background

→Whitlam Government elected (Labor): 21 Dec 1972, ending 23 years of conservative rule.
→Launched an ambitious legislative program, which was often blocked by a hostile Senate.

Key Legislative & Constitutional Events

→Senate obstructionism → Parliament prorogued before 1974.
→Double dissolution election under s 57 held 18 May 1974; Whitlam returned.
→Joint Sitting (6–7 August 1974): Passed 6 Acts including:

- Senate (Representation of Territories) Act 1973 (Cth)
- Petroleum and Minerals Authority Act 1973 (Cth) (see *PMA Case* (s 57))

→Key Cases

- *PMA Case*: clarified "failure to pass" under s 57.
- *Territory Senators Cases (No. 1 and 2)*:
    - Dealt with ss 7, 122, and 57.
    - Raised questions about stare decisis in the High Court.

→Supply Crisis

- October 1975: Senate blocked Appropriation Bills No. 1 & 2 (1975–76) (ordinary annual services of government).
- Opposition demanded Whitlam call an early/general election in exchange for supply.
- Created a political deadlock and constitutional crisis.

→ Whitlam refused to call early election.
→Attempted temporary financial measures after 11 November.
→Called a half-Senate election for 1 July 1976.
→Coalition pressure weakened near end of November.

Role of the Governor-General (Sir John Kerr)

→Secret meetings with Sir Garfield Barwick (Chief Justice) and Sir Anthony Mason.
→Raised concerns re: separation of powers and judicial independence.
→Dismissal of Whitlam – 11 November 1975

- Kerr invoked "reserve powers" under s 64.
- Appointed Malcolm Fraser as caretaker PM on three conditions:
- No new policies.
- Secure supply.
- Advise a double dissolution election under s 57.
- Malcolm Fraser won in a landslide (fourth double dissolution election).

Legal & Constitutional Principles

→Senate's Power over Supply
→Section 53:
- Senate cannot initiate money bills.
- Cannot amend bills for ordinary annual services.
- But it can block supply — this was central to the crisis.
- Responsible Government.

→Australian responsible government ≠ UK model.
- Kerr & Barwick's view: government responsible to both Houses because of control over supply.

→Critics argue:
- This misreads s 53 and undermines convention.
- Government is only formed in House of Representatives, not Senate.

Judicial Involvement & s 57 Justiciability

→Mason & Barwick's involvement with GG Kerr undermined judicial independence.
→Raises issues of justiciability of s 57 — especially in light of the PMA Case, where procedural compliance with s 57 was judicially reviewed.
→Involvement of sitting High Court judges in advising the GG blurs lines between legal advice and political action.
→The Queen's refusal to intervene emphasised the autonomy of the Governor-General and Australian Executive.

Flaws in the Kerr/Barwick Interpretation

→Kerr's reliance on s 53 to justify dismissal ignored established constitutional conventions.
→Misconceived the relationship between constitutional text and convention:
- s 53 limits Senate powers over money bills but does not empower it to force government resignation.
- s 57 assumes government may continue even without Senate confidence.

Constitutional Design and Conventions

→Compromise in s 53 was only workable if conventions were followed — i.e. government must be formed in the House of Representatives.
→Lower House primacy is long-standing:
- Well-established by 1900.
- Supported by Walter Bagehot and UK conventions since 1832.

→Conventions reflect:
- Government is not responsible to the Senate.
- Denial of supply or confidence by the Senate should not trigger dismissal.

Convention Debates and Drafting Intent

→During 1890s Convention Debates, it was clearly understood that:
→Executive is responsible to the Lower House only.
→Making the government responsible to both Houses was seen as impractical and unworkable.
→This is reflected in the drafting of:
- s 53: Senate cannot initiate money bills.
- s 57: Crisis resolution presumes Lower House primacy.

Mason's Critique of Kerr's Conduct

→Kerr failed to consult transparently with his ministers.
→Secret meetings with Mason and Barwick breached the modern understanding of the Governor-General's impartial role.
→If Kerr could not follow ministerial advice, he should have resigned.
→It was not open to the GG to act on his own view of the public interest over that of an elected government.
→Mason's critique supports the view that the dismissal broke with constitutional convention and that judicial involvement compromised the separation of powers. The legitimacy of Kerr's actions rests more on textual literalism than a holistic understanding of constitutional law and convention

The Judiciary: Commonwealth Chapter iii

Section 71

→**s 71** Judicial power and Courts: The judicial power of the Commonwealth shall be vested in a Federal Supreme Court, to be called the High Court of Australia, and in such other federal courts as the Parliament creates, and in such other courts as it invests with federal jurisdiction. The High Court shall consist of a Chief Justice, and so many other Justices, not less than two, as the Parliament prescribes.

→The judicial power of the Cth shall be vested in HCA, in other fed courts parliament makes, and in such other courts as it invests with federal jurisdiction. HCA shall have Chief Justice, and justices, not less than two, as parliament describes.

→Vesting of Cth judicial power in:

- High Court (power vested in constitution and cannot be changed unless by referendum, but other courts can be modified by parliament)
- Federal Courts created by Cth Parliament; (federal subject matters listed in s 51 are determined in federal courts. Everything not listed in s 51 dealt with in state courts e.g. intellectual property) (can be removed by statute); and
- State Courts
- cf ss 1, 61— implication of separation of powers

→Section 71 therefore guarantees existence of the High Court + states that there must be a CJ and at least 2 other justices.

The High Court

→Performs the role of dealing with constitutional matters, a constitutional court, as seen in the *PMA* case and is 'the guardian' of the constitution.
→Shapes constitution through its interpretation of it and keeps the constitution alive as a 'living instrument' government, seen in ***Territorial Senatory*** case.
→Constitutional matters which arise in litigation in other Aus courts may be removed by the HC is the 'federal supreme court'.
→Has the power to create and remove courts.
→Currently 7 HC judges (odd numbers to ensure majority). GG appoints HC judges, on advice of government of the day. Thus, Political influence. GG does not really get a say, has to act when asked by Government.
→s 71 requires at least 2 HC judges. Parliament can decide to add more etc

The High Court is more than just a constitutional court in a number of respects:

→Under **s 73** HC enjoys a constitutionally entrenched appellate jurisdiction from all courts in federal jurisdiction, involving a great deal of non-constitutional appellate litigations.

→Under **s 73** the High Court has a constitutionally entrenched appellate jurisdiction from the state supreme courts in matter of state jurisdiction. This also involves the High Court in a great deal of non-constitutional litigation and allows the High Court to determine the 'uniform Australian common law' as well as to hand down binding decisions on the interpretation of state legislation.

→Under **s 75(v)** the High Court has a constitutionally entrenched original jurisdiction where certain remedies are sought against an officer of the Commonwealth. This involves the High Court in the whole area of federal administrative law.

- Under **s 75** of the constitutionally entrenched original jurisdiction of the High Court also extends to a range of non-constitutional matters.

→**S 76** allows the Cth Parliament to vest the HC with additional non-constitutional jurisdiction.

Section 72

→ Judicial appointment and removal

- 'proved misbehaviour & incapacity' (e.g. Lionel Murphy). Judges office can't be removed by government whim.
- Consistent with Acts of Settlement 1701.

→1977 referendum and mandatory retirement at 70 years of age.

Section 73— Appellate jurisdiction of High Court

→Allows appeals to the High Court from High Court, federal courts, courts exercising federal jurisdiction and state supreme courts — possibility of unified common law.

→Can hear appeals from HCA in original jurisdiction, federal courts, courts exercising federal jurisdiction and state supreme courts.

→As the HCA is the final court of appeal for every state and federal court it unifies the common law — s 73 provides for a unified common law.

→ Guarantees existence of state supreme courts as it mentions state supreme courts in s 73, as courts from which appeals can be heard — 'appeals from all judgements… of the Supreme Court of any State".

- HC intended largely to take over caseload of Privy Council (UK).
- Possible to have separate systems of common law in each state but unlikely.
- In Aus, common law murder will apply everywhere if ruled by HC and common law still applies in that state.

→Note: existence of state Supreme Courts ensured by s 73.

Section 74

→Privy Council; inter se matters and certificate: *Australia Act 1986 (Cth) s 11*

→ When there is an inter se, HC is ultimate court of appeal (used to be HC could authorise Privy Council appeal).

→ *Aus Act 1986,* s 11 (before act, could appeal straight from state to PC)

→ Need a certificate to appeal from HC to PC from HC. HC said they would never issue a certificate. Thus HC is the highest court of appeal in Australia.

Section 75— Original jurisdiction

→**Section 75** provides the HCA original jurisdiction over matters concerning:

1) Any treaty;
2) Foreign relations;
3) Litigation involving the Cth;
4) Litigation between states; and
5) A writ of Mandamus or Prohibition or an injunction sought against an office of the Cth — if an officer of Cth does something that you think is illegal you can go to HCA and seek a writ. (Judicial Review).

→Original jurisdiction especially s 75(v)'officer of Commonwealth'

→ Original jurisdiction means HC can hear these cases on first instance. Most commonly, though, cases start in Federal court as by legislation (*s44 Judiciary Act*). To be changed, need referendum to change entrenched constitutional jurisdiction.

→ Includes matters: in relation to treaties; affecting counsels or representatives of other countries; person suing or being sued by Cth is a party; between states or residents of different states or between a state and a resident of another state and a writ of Mandamus or an injunction sought against an officer of the Cth; and disputes between states can go direct to the HC. The government is constrained by law.

→If Cth doing something against law, HC can enforce law against if someone comes to HC requesting so.

→ Australian HC can enforce law against officer of Commonwealth.

→In a contemporary sense very important because Migration Act has been drafted to prevent judicial review of migration decisions but people have got around that by using s 75(v)— as relevant Ministers are officers of the Commonwealth.

Constitutional 'Assumption' of rule of law: s 75

→Provides a constitutionally entrenched standard of judicial review of Cth executive action & is a textual re-enforcement of the rule of law.

→ The rule of law can also be seen in covering clause 5 of the constitution (Cth laws under the constitution shall be binding on courts, judges, people of every state and of every part of Cth), and also implicit in the separation of powers.

→ Judicial Review is also vital in a federal system where you have conflicts between state and federal bodies, requiring a robust independent body to adjudicate on these disputes.

→ Judicial review of legislation

- colonial doctrine of repugnancy
- assumption based on US practice
- absence of any express power to invalidate legislation based on constitutionality
- Marbury v Madison (1803) and assumption of its applicability; Federal system and necessity of judicial review?

→Judicial review of executive action:

- s 75(v)— make it constitutionally certain that law can be enforced against Cth executive states?
- covering clause 5 (any part of executive is an officer of the Cth)
    - means no government decision or conduct is beyond judicial review
    - make it constitutionally certain that law can be enforced against Cth executive

- A government can deprive federal courts of jurisdiction to hear immigration cases. Amend jurisdiction to suit political interests. A migration decision cannot be challenged in any high court of Australia.

Section 77

→Power of parliament to define the jurisdiction of courts other than HCA

- It can give and take jurisdiction away from federal courts as it is a creature of the parliament not the constitution (i.e. Cth constitution allows to define and remove jurisdiction of federal court, not including HC).
- It confirms Cth parliament can invest courts with federal jurisdiction (s 77(iii)) which was done under *Judiciary Act 1903*— leading to a partially integrated judicial system (appeal in matters of state jurisdiction to HC and also state courts can hear federal matters) reverse cannot be done (Waikim) — i.e. federal courts cannot be vested with state jurisdiction — Chapter III is an exhaustive statement of federal judicial power and this chapter does not authorise Fed courts to be invested with state jurisdiction.

The Judiciary: Victoria

Expressio unius = The expression of one thing is the exclusion of another.

→Fundamental principle that are not entrenched provisions:

1) **Section 75**— existence of Supreme Court
2) **Section 72(5)(B)**— appointment (Governor on advice of Executive Council) admission to practice
3) **Section 77**— removing judges: security of tenure and salary; removal under Part IIIAA

Part IIIAA

→Removal only on petition of both houses.

→s 87AAB(1) re removal on grounds of 'proven misbehaviour or incapacity' by special majority of both Houses & finding by Investigating Committee of retired judicial officers (panel of 7, forming 3)

Section 85— Jurisdiction of Vic State Supreme Court

→Anything as long as connected to Vic, e.g. car accident that occurred within Vic or taxpayer owes Vic government.

→Can be taken away by legislation

→**s 85(8)**: Legislation that confers jurisdiction on a court, tribunal or person of supreme court, does not mean takes away power from Supreme Court

- Any person off street could be made the court.
- Parliament can legislate to override court decision. No separation of powers entrenched in Vic constitution

Section 77(3)

→Gives power to parliament invest in any state court the power to hear federal matters

- Parliament has done that through Judiciary Act.
- Thus state courts can hear cases that have federal and state jurisdictions.
    - Would have to gov to court twice if not for Judiciary Act, once for state and then for federal.

Judiciary Act 1903 (Cth)

→ **s 39** and vesting of State Courts with Federal Jurisdiction except for s 39
→ **s 40** re removal of constitutional issue to HC (Where constitutional issue arises, can be seized and then brought to HC)
→Cross vesting of civil jurisdiction and invalidity: Wakim

Other matters

→In Australia there is one unified common law, achieved by a court hierarchy. The High Court is at the top. High Court has the ability to hear an appeal from any court in Victoria.
→Judiciary Act not a legal right to appeal to HC— have to get leave to appeal from HC (Go to HC and argue why they should hear case)

- however HC has to hear cases concerning State and Cth (as a right, must hear)

→When a constitutional issue arises and HC agrees, case can go straight to HC.

- e.g. case adjourned in magistrates, constitutional issue determined in HC and then case is returned to magistrates'