

# MLP323 CONSTITUTIONAL LAW

## EXAM NOTES

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# TOPIC 1: INTRODUCTION TO AUSTRALIAN CONSTITUTIONAL LAW

Constitutional law focuses on public power, including its sources, organisation, limitations and exercise.

The Australian Constitution serves as the nation's fundamental law and primary source of public power. It allocates and distributes this power among various arms and levels of government, ensuring that public power is both controlled and limited by law and democratic principles. The High Court, through judicial review, plays a crucial role in ensuring that government actions comply with the Constitution, representing the intersection of law and politics.

Analysing the constitutionality of actions taken by Parliament and the Executive involves more than just legal scrutiny; it requires an understanding of historical, legal, political, social, and economic factors. Successful study of constitutional law necessitates a comprehensive grasp of these multifaceted issues and their resolutions.

## Fundamentals of Australian Constitutionalism

The following concepts are essential to the Australian system, helping demonstrate the intricate relationships and inevitable tensions between the three branches of government (parliament, executive, and judiciary) at both the state and Commonwealth levels in their exercise of public power.

### Federalism

Federalism in Australia involves the division of public power between two levels of government: state and Commonwealth. Each state retains its own constitution and government structures (legislative, executive, and judicial)

**Historical Context:** Inspired by the US Constitution, Australian federalism was adopted to address concerns over trade and defense among the colonies in the 1890s. Key motivations included economic prosperity through free trade (enshrined in Section 92 of the Constitution) and collective security under the British Empire.

#### **KEY FEATURES OF AUSTRALIAN FEDERALISM:**

- Division of Powers:
  - Concurrent Powers
  - Exclusive Powers
  - Conflict Resolution
- Judicial Review
- Bicameral Parliament
- State Constitutions and Local Governments
- Intergovernmental Cooperation

#### **The Rule of Law and Federalism**

- Protection of Rights: Federalism ensures that power is divided and balanced, which helps protect individual rights and prevent abuse of power.
- Judicial Oversight: The High Court's role in interpreting the Constitution maintains the rule of law by ensuring that both state and Commonwealth actions are lawful.

## The Doctrine of Separation of Powers

- Parliament (Legislative) – *makes laws*
- Executive – *administers laws*
- Judiciary – *interprets laws in case of legal uncertainty or ambiguity*

Doctrine of Separation of Powers –

- Aims to preserve individual liberty by preventing the concentration of power and potential tyranny.
- This divides government power into three separate, independent institutions.
- Ensures no overlapping of functions or cross-membership among these institutions.
- Important for creating checks and balances to dilute power and prevent any one branch from having all the power
- Upholds the rule of law by maintaining these checks and balances

**Australia’s Commonwealth Level:**

Australian Constitution	
<b>Chapter I</b>	Establishes and organises the parliament
<b>Chapter II</b>	Defines the Executive
<b>Chapter III</b>	Outlines the Judiciary

**Section 64** – Requires Commonwealth Ministers (Executive members) to be drawn from and accountable to the parliament

- This results in a responsible government but means only a partial separation of powers between Parliament and the Executive

**State Level**

- State Constitutions do not recognize a formal separation of powers.
  - o Resemble UK’s constitutional arrangements where legislative power is not limited by a written constitution
- Sections 106 and 107 of the Australian Constitution
  - o Subject State Constitutions to the Australian Constitution
  - o Allow appeals from state courts to the High Court

Benefits of Separation of Powers	Challenges of separation of powers
<ul style="list-style-type: none"> <li>▪ Dilutes power and creates checks and balances</li> <li>▪ Prevents concentration of power in one branch</li> <li>▪ Upholds the rule of law</li> </ul>	<ul style="list-style-type: none"> <li>▪ Determining where to draw the line between the powers of each branch (e.g., what constitutes judicial power vs executive power)</li> <li>▪ Explored further in topic 8</li> </ul>

*The commonwealth does not have a strict separation of powers because the executive government is drawn from the parliament, meaning the executive sits within the legislative branch.*

## Responsible Government

A responsible government means that executive actions are carried out by ministers who are members of Parliament, ensuring continuous accountability to the legislative body and the people.

Implicitly recognized in the Australian Constitution.

<b>Section 64</b>	<p>The Governor-General may appoint officers to administer such departments of State of the Commonwealth as the Governor-General in Council may establish.</p> <p>Such officers shall hold office during the pleasure of the Governor-General. They shall be members of the Federal Executive Council and shall be the Queen's Ministers of State for the Commonwealth.</p> <p><b>Ministers to sit in Parliament</b> After the first general election no Minister of State shall hold office for a longer period than three months unless he is or becomes a senator or a member of the House of Representatives.</p>
<b>Section 61</b>	<p>The executive power of the Commonwealth is vested in the Queen and is exercisable by the Governor-General as the Queen's representative and extends to the execution and maintenance of this Constitution, and of the laws of the Commonwealth.</p>
<b>Section 83</b>	<p>No money shall be drawn from the Treasury of the Commonwealth except under appropriation made by law.</p> <p>But until the expiration of one month after the first meeting of the Parliament the Governor-General in Council may draw from the Treasury and expend such moneys as may be necessary for the maintenance of any department transferred to the Commonwealth and for the holding of the first elections for the Parliament.]</p>

#### Key Concepts

**(s 64) Accountability** – Government ministers are accountable to Parliament and, through it, to the people.

**(s 61) Governance** – Though the executive power is vested in the Governor-General, the practical governance is carried out by ministers who are also parliament members.

**(s 83) Power and Money** – The Executive has the power to govern, but Parliament holds the financial resources needed for governance.

#### Responsible Government is an 'Efficient Secret':

- Walter Bagehot described responsible government as the “efficient secret”, highlighting that it allows for efficient governance by ensuring that the executive drawn from the Parliament can effectively pass laws.
- This efficiency is contingent on the composition of Parliament and the political landscape

#### Responsible government is 'Protection of Rights':

- Robert Menzies argued that responsible government is the ultimate guarantee of justice and individual rights, opposing the need for a constitutional Bill of Rights
- Menzies believed that Parliament's accountability to the people, through elections, ensures the protection of rights.
- However, there's a debate on the desirability of a Bill of Rights, given Australia's unique position as a democracy without one.

## Judicial Review

Judicial Review is the power that allows courts to review and determine the constitutionality of legislative, executive, or administrative actions.

Role of the High Court

- Strike down Commonwealth or State laws if they are unconstitutional
- Serves as the ultimate guardian of the Australian Constitution
- Laws struck down by the High Court are considered **void ab initio** (void from the beginning)

#### Power and Responsibility

- The High Court's ability to invalidate unconstitutional legislation makes it a powerful institution in the Australian government.
- This power involves significant responsibility, as it can override the decisions of a democratically elected legislature.
- The community must have confidence that this power is exercised appropriately and for its intended purpose.
- Judicial review is seen as a natural consequence of federalism, ensuring the division of powers between the Commonwealth and State parliaments is maintained.
- **Section 109. Inconsistency of Laws** – When a law of the State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of inconsistency, be invalid.

#### Conditions for Judicial Review

- Purpose: Judicial review is exercised to ensure that laws and actions comply with the Constitution.
- Confidence: The community must trust that the High Court uses its power responsibly and in accordance with constitutional principles.

#### Criticisms of Judicial Review

- It is undemocratic or counter-majoritarian because unelected judges can strike down laws passed by a democratically elected parliament.

### Parliamentary Sovereignty vs. Parliamentary Supremacy

	PARLIAMENTARY SOVEREIGNTY	PARLIAMENTARY SUPREMACY
<b>Definition</b>	British Parliament can pass any law whatsoever, irrespective of the subject matter, and there is no power of judicial review in the UK	In Australia, both the Commonwealth and State Parliaments are <u>supreme but not sovereign</u> . Do not have unrestricted legislative power because their powers are subject to the constitution
<b>Political Remedy</b>	Remedy for bad laws is political; voters can vote out the government if they don't like the laws being passed	For a sovereign parliament, the political remedy for undesirable laws is voting out the parliament.
<b>Legal Remedy</b>		The legal remedy is judicial review, where courts can strike down unconstitutional laws.

#### PARLIAMENTARY SOVEREIGNTY (DICEY'S THEORY):

- British Parliament can make or unmake any law without limitation. No person or body can override or set aside its laws.
- **Absolute Power:** Example: Even an extreme law, like requiring all blue-eyed babies to be killed, would be constitutional under parliamentary sovereignty.

- **Remedy for Unpalatable Laws:** Political, not legal. The people can vote for a government through democratic processes.

## PARLIAMENTARY SOVEREIGNTY IN AUSTRALIA:

Commonwealth and State Parliaments:

- Do not have unrestricted legislative power.
- **Sections 51 and 52** of the Australian Constitution:
  - Outline the subject matters for Commonwealth legislation.
- **Section 109:**
  - State laws are subject to Commonwealth laws in areas of overlap.
- States can legislate on any subject not mentioned in Section 51, possessing residuary legislative power.

\*Supreme over other arms of Government

- Parliament is the most powerful of the three arms government (executive, legislative, judiciary) and can legislate to change the state of the law, including overturning judicial decisions, as long as it is within constitutional limits.

Judicial Review:

- The High Court can strike down unconstitutional Commonwealth or state laws, unlike the House of Lords.
- 

## PARLIAMENTARY SUPREMACY IN AUSTRALIA:

Supreme Over Other Government Arms:

- As long as the law is constitutional, Parliament can abrogate judicial decisions.
- **The Executive is accountable to Parliament**, and no area of executive action is beyond legislative reach.

Democratic Mandate:

- Parliament's supremacy is consistent with its democratic authority.

## Rule of Law

Common Understanding of the Rule of Law

- **Binding law:** the law binds everyone within a jurisdiction, including the government and its officials. No one is above the law
- **Equality and Accessibility:** Equality before the law, public knowledge of legal rights, and access to courts.
- **Fair Law-Making Process:** Laws should be made in a fair, efficient, and accessible manner.

Albert Venn Dicey's Modern Understanding of the Rule of Law

- **All persons are equal in the eyes of and before the law.**

- Absence of arbitrary government decision-making - rule of law ensures all are equal under the law and prevents arbitrary exercise of power
- Example: no person can be deprived of liberty without an independent court determining a breach of the law.

The Australian Constitution implicitly recognizes the rule of law in Clause 5

### 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.

Section 75 of the Constitution – Original Jurisdiction of the High Court

- Provides the High Court with original jurisdiction in any actions against officers of the Commonwealth
- Ensures the executive actions can be reviewed by the courts, reinforcing that the executive is not above the law

### *Australian Communist Party v The Commonwealth of Australia (1951)*

- Justice Dixon confirmed that the rule of law is one of the principles on which the Australian constitution is drafted

A contemporary illustration is the Robodebt scheme — under which the Commonwealth used automated income-averaging to raise unlawful welfare debts — and the subsequent Robodebt Royal Commission (Final Report delivered July 2023). The scheme demonstrated the rule of law in operation: executive action that lacked a proper legal basis was ultimately found unlawful, reinforcing that the executive is not above the law and must act within statutory authority.

## A brief chronology of events that have shaped the Australian constitutional landscape

1066	William (the Duke of Normandy) conquers England. Declares the old system of Anglo-Saxon local customary law courts will continue to exist. The King begins to 'hold court' throughout England which leads in time to the creation of the common law courts—Court of Common Pleas, Court of Chancery and the King's Bench.
1199	King John assumes the English throne.
1215	Signing of the Magna Carta by King John. It is significant for limiting the arbitrary exercise of royal power and has come to represent the birth of what we now call the rule of law. It provided that no person could be arbitrarily arrested or imprisoned by the Monarch. Trial by ordeal is outlawed.
1265	The first assembly called a 'Parliament' summoned by Simon de Montfort.
1295	Model Parliament is summoned by King Edward. House of Commons and House of Lords.
1500	Birth of Equity: Chancellor (usually a religious man) begins to hear petitions claiming of injustice suffered at the hands of the common law courts.
1530	King Henry VIII begins battle with the papacy. As a consequence, the importance and activity of the Parliament grows rapidly. During his reign more than 700 statutes passed, doubling the size of the existing statute book.

1600 (early)	Clash between Lord Ellesmere (Chancellor) and Sir Edward Coke (Chief Justice of the King's Bench) with the result that in the event of a conflict between common law and equity, equity will prevail.
1607	Case of Prohibitions: judges determine that the King should not be personally involved in common law court cases.
1610	King James I, outlines to Parliament his theory; the 'Divine Right of Kings'.
1611	Case of Proclamations: judges hold that the King could not create new crimes by proclamation.
1628	Parliament produces the Petition of Right: it cited the Magna Carta and circumscribed royal power by denying the Crown power to levy charges upon, imprison or punish anyone without due process of law.
1642	English Civil War—battle between the Crown and Parliament.
1646	Parliamentary forces led by Oliver Cromwell are victorious. Parliament is recognised as the supreme law-maker in England.
1649	Trial and beheading of King Charles I.
1660	Cromwell dies. Parliament asks Charles II to assume the throne.
1688	Glorious Revolution. Parliament deposes James II and passes the Bill of Rights. William and Mary of Orange assume the throne on terms set out in the Bill of Rights. These include that the Crown cannot suspend the law, only Parliament can impose taxes and parliamentary debates cannot be called into question by the Crown.
1701	Act of Settlement: establishes the independence of the judiciary; judges to serve during good behaviour and can only be removed by a request from both houses of parliament.
1776	American Declaration of Independence.
1787	US Constitution adopted by the convention of American States.
1788	First Fleet arrive in Australia.
1828	Australian Courts Act—Official date of reception of all English laws and statutes in NSW & Van Diemens Land (including Vic & Qld); WA—1829, SA—1836, ACT & NT—1911. Increased the size of the Legislative Council and constrained the power of the Governor.
1842	Australian Constitutions Act (UK) passed—first step towards representative government in Australia. Increased the size of the Legislative Council and two-thirds to be elected. Colonies given power to draft their own Constitutions.
1855	Victorian Constitution is passed
1865	Colonial Laws Validity Act—passed as a consequence of Benjamin Boothby invalidating as many colonial laws as possible on the grounds that they offended fundamental principles of English Law.
1890s	Move towards federation spurred on by defence and trade concerns among the colonies. Constitutional Conventions held in Adelaide (1891), Sydney and Melbourne (1897 & 1898).
1901	Australian Constitution is proclaimed
1926	Declaration of Balfour
1931	Statute of Westminster (UK)
1942	<i>Statute of Westminster Adoption Act</i> (Cth)
1986	Australia Acts
1999	Referendum on the Australian Republic fails
2023	Referendum on an Aboriginal and Torres Strait Islander Voice to Parliament fails (14 October 2023) — no national majority and no majority in any State.

## 1215: Significance of the Magna Carta / Great Charter

Significance of Constitutionalism:

- The Magna Carta is considered a foundational symbol of constitutionalism.
- Represents one of the first examples of a written constitution or something resembling it.

Tension leading to Magna Carta

- King John's oppressive rule created significant tensions
- Issues include unfair taxes and arbitrary power of the crown
- Discontent among the barons led to the demand for the Magna Carta

King Subject to Law

- Magna Carta established that the **king was not above the law**
- This principle was put in writing for the first time in history

### **Impact in Relation to the Australian Constitution**

Influence on Legal Systems:

- The principles of the Magna Carta influenced the development of common law, which in turn impacted the legal systems of former British colonies, including Australia.

**Rule of Law:**

- The concept that the government is subject to the law, a core principle in the Magna Carta, is a fundamental aspect of the Australian Constitution.

## 1295: Birth of Bicameral Parliament

First Bicameral Parliament

- In 1265 – first parliament in the UK was formed
- By 1295, a bicameral (two-house) Parliament was established.

Structure

- House of Commons: Represented common people
- House of Lords: Comprised nobles and clergy

Function

- Provided a forum for debate and discussion
- Represented the people in the development of English law

Legacy

- The UK continues to maintain a bicameral system, though the composition has evolved.

### **Impact in Relation to the Australian Constitution**

Influence on Parliamentary Systems:

- The concept of a bicameral parliament was adopted by many former British colonies, including Australia

Australian Parliament

- Australia's federal Parliament follows the bicameral system
  - House of Representatives: represents the people
  - Senate: represents States and territories
- Representation and Debate
  - The bicameral system ensures representation of different interests and provides a platform for debate and discussion.
- Development of law
  - Influences the legislative process in Australia, ensuring laws are thoroughly examined and debated

## Significance for Judiciary of Case of Prohibitions (1607) and Case of Proclamations (1611)

### Case of Prohibitions (1607)

- **Issue:** King James I was deciding legal cases himself, bypassing the courts
- **Decision:** Sir Edward Coke ruled that cases must be tried before the courts.
  - **Famous Quote:** “the King ought not to be under any man but under God and the law”
- **Significance:**
  - Established that the judiciary is separate from the executive
  - Reinforced the principle of the rule of law and separation of powers.
  - Prevented the arbitrary use of power by the monarch

### Case of Proclamation (1611)

- **Issue:** King James I was attempting to change laws and create new offences by his own decrees, bypassing Parliament
- **Decision:** Sir Edward Coke ruled that the King lacked authority to alter the common law or create new offences without Parliament’s consent
- **Significance:**
  - Reinforced that legislative power resides with Parliament, not the monarch.
  - Emphasized the rule of law and the necessity for laws to be passed through proper legislative processes

### Importance in Relation to the Australian Constitution

- Separation of Powers:
  - Both cases are foundational in establishing the separation of powers, a principle that is integral to the Australian Constitution.
  - In Australia, the judiciary is independent of the executive and the legislature.
- Rule of Law:
  - The principle that everyone, including the government, is subject to the law is a core aspect of the Australian legal system.
- Judicial Independence:
  - These cases highlight the importance of an independent judiciary, which is crucial in Australia for upholding the Constitution and protecting individual rights.
- Parliamentary Sovereignty:
  - Reinforces the idea that legislative authority lies with Parliament, not with the executive, aligning with the structure of the Australian government.

## Impact the English Civil War had on Australian Constitutionalism

**Conflict:** Between supporters of King Charles I (royalists) and supporters of Parliament (Parliamentarians)

### **Issues:**

- Discontent over economic policies
- Arbitrary use of power by the King, acting without Parliament’s permission

### Outcome of the English Civil War

- Parliamentary Victory
- King Charles I was executed in 1649
- Britain was a republic for 11 years under Oliver Cromwell as Lord Protector
- Charles II, son of Charles I, was invited back to the throne in 1660

### Significance of the Civil War

#### **Supremacy of Parliament**

- Established the principle that Parliament is supreme over the crown.

- Reinforced the idea that the monarch cannot rule without Parliament's consent

### **Constitutional Monarchy**

- Set the stage for a constitutional monarchy, where the monarch's powers are limited by law and balanced by an elected Parliament

### **Importance in Relation to the Australian Constitution**

#### **Parliamentary Supremacy:**

- The principle that Parliament is supreme is a cornerstone of the Australian constitutional framework.
- Ensures that the executive (government) is accountable to the legislature (Parliament).

#### **Limitation of Executive Power:**

- The Australian Constitution embodies the principle that the executive cannot act arbitrarily and must operate within the bounds of the law, similar to the lessons from the English Civil War.

#### **Rule of Law:**

- Reinforces the rule of law, ensuring that all actions by the government are subject to legal scrutiny.

#### **Checks and Balances:**

- Influences the system of checks and balances in the Australian government, ensuring that no single branch (executive, legislature, judiciary) has unchecked power.

## **Glorious Revolution: Bill of Rights (1688)**

**Conflict:** Discontent with King James II's rule and policies

### **Causes**

- Attempt to circumvent parliament using royal prerogative
- Religious tension (James II was Catholic; Parliament and much of the country were Protestant)

### **Outcome of the Glorious Revolution**

#### **Deposition of King James II:**

- Parliament invited William of Orange and his wife Mary (James II's Protestant daughter) to take the throne.
- William and Mary accepted, leading to the bloodless revolution (James II fled, considered to have abdicated).

#### **Condition for Ascension:**

- William and Mary were presented with the Declaration of Rights, which later became the Bill of Rights.

### **Significance of the Bill of Rights (1689)**

#### **Parliamentary Supremacy:**

- Cemented the position of Parliament over the Crown.
- Finalised the supremacy or sovereignty of Parliament in Britain.

#### **Key Provisions:**

- The Crown cannot suspend laws passed by Parliament.
- The Crown cannot levy taxes without an Act of Parliament.
- Enshrined freedom of speech in Parliament (parliamentary privilege)

### **Importance in Relation to the Australian Constitution**

#### **Parliamentary Sovereignty:**

- The principle of parliamentary sovereignty established by the Bill of Rights is fundamental to the Australian Constitution.
- Ensures that Parliament is the supreme law-making body.

#### **Limitation of Executive Power:**

- The Bill of Rights' restrictions on royal prerogative influence the limitations placed on the executive government in Australia.
- For example, the executive cannot appropriate money without parliamentary authorization.

**Parliamentary Privilege:**

- The concept of freedom of speech in Parliament, originating from the Bill of Rights, continues to protect parliamentary debate in Australia.
- Section 49 of the Australian Constitution = Privileges of Houses

## Act of Settlement (1701)

### 1855: Victorian Constitution

\*Act of the British Parliament establishing a constitution for the Colony of Victoria

- **Establishment of Parliament:** Introduced a bicameral Parliament consisting of the Legislative Council and the Legislative Assembly.
- **Inherited British Law:** Victoria inherited British law but gained its own Parliament with the authority to create local laws.
- **Role of British Parliament:** The British Parliament granted Victoria the power to establish its own institutions of government.
- **Limitations on Legislative Power:** Victorian Parliament could modify inherited English law to suit local circumstances but could not repeal British Acts or legislate in a manner repugnant to English statutes.

#### **Importance in Relation to the Australian Constitution**

**State Constitution Precedent:**

- The Victorian Constitution Act of 1855 set a precedent for colonial constitutions in Australia, influencing subsequent state constitutional developments.

**Parliamentary Structure:**

- Established the framework for bicameral legislatures in Australian states, akin to the federal Parliament structure under the Australian Constitution.

**Legal Interpretation:**

- Raised questions about the relationship between British and colonial laws, laying groundwork for discussions on legal sovereignty and interpretation that influenced the drafting of the Australian Constitution.

**Constitutional Evolution:**

- The Act's provisions and challenges in interpretation contributed to the evolution of constitutional principles in Australia, particularly in defining legislative powers and judicial review.

## 1865: Colonial Laws Validity Act and The Bizarre South Australian Judge Benjamin Boothby

This act clarified the legislative power of the colonies but allowed the UK Parliament to legislate for the colonies if expressly stated. If a colonial law was inconsistent with a UK law, the UK law would prevail.

### **Judge Benjamin Boothby:**

- South Australian Supreme Court judge known for striking down laws passed by the colonial legislature.
- Justified his actions by claiming these laws were incompatible with fundamental principles of English law.
- Loyalist to the Crown and English legal principles

### **Impact of Boothby's Judgements**

Legal Confusion!

- Created uncertainty and confusion in the colonies regarding the extent to which colonial legislatures could pass laws
- Question the computability of colonial laws with British law, leading to instability in legislative processes.

### **Colonial Laws Validity Act of 1865**

Section 2 'Colonial laws when void for repugnancy'

- Any colonial law is void or inoperative if it is repugnant to an Act of the UK Parliament that applies to the colony

Section 3 'Colonial law when not void for repugnancy'

- In the absence of a direct conflict, no colonial law will be invalidated due to repugnancy.

### **Clarity and Autonomy:**

- Provided clearer guidelines for colonial legislatures, reducing the uncertainty caused by judges like Boothby.
- Empowered colonial legislatures to pass laws tailored to their local circumstances without undue interference from UK law, unless explicitly stated otherwise.

### **Legal Precedence:**

- Established a clear hierarchy and interaction between UK and colonial laws, setting a precedent for legislative processes in British colonies

### **Importance in Relation to the Australian Constitution**

#### **Foundation for Legislative Independence:**

- The Act marked a significant step towards legislative independence for Australian colonies, influencing the development of their own legal and constitutional frameworks.

#### **Precursor to Federation:**

- The principles of legislative clarity and autonomy embodied in the Act contributed to the broader push for Australian Federation, where colonies sought greater self-governance.

#### **Influence on Judicial Review:**

- Highlighted the role of judicial review in maintaining the balance between colonial and British laws, shaping the judicial processes that continue in the Australian legal system.

#### **Framework for State-Federal Relations:**

- The Act's provisions regarding the relationship between UK and colonial laws provided a model for understanding the interplay between state and federal laws in Australia.

## 1890s: What Forces drove the movement towards federation?

### **Pre-Federation: Individual Colonies**

- Operated independently with their own governments, laws, defense forces, railways, and postage systems

- This independence led to inefficiencies and incompatibilities across colonies

### **Key Forces Driving Federation**

#### **1: Inefficiency and Economic Benefits**

- Growing frustration with the inefficiency of separate colonies
- Federation promised more productive trade and tax systems.

#### **2: Defense Concerns**

- Reliance on the British Defense Force and vulnerability to external threats
- Need for a unified, centrally controlled defense system due to the presence of other European naval powers in the Pacific

#### **3: Emerging National Identity**

- Increasing sense of a common Australian identity among the colonies
- Shift from a British identity to a desire for a distinct national identity.

#### **4: Self-interest and Practical Governance:**

- Recognition that a federated system would be a more efficient way to manage colonial affairs
- Colonies' self-interest in improving their governance structures and overall efficiency

### **Constitutional Conventions**

#### **Purpose:**

- Series of meetings in the 1890s where representatives from each colony debated and drafted the proposed constitution.

#### **Significance:**

- Creation of a model for a federal system of government.
- Drawing inspiration from the British system and the United States, particularly the concept of federalism and judicial review by a Supreme Court (High Court).

### **The Path to Federation**

#### **Drafting the Constitution:**

- Debates and drafting took several years, incorporating elements from both British and American systems.

#### **British Parliament Approval:**

- The proposed constitution was taken to London and passed by the British Parliament as the Commonwealth of Australia Constitution Act 1900.

### **Significance in Relation to the Australian Constitution**

#### **No Bill of Rights:**

- The Constitution focused on pragmatic governance improvements rather than rights protection.
- Unlike the U.S. Constitution, it was not born out of a revolution or struggle against oppression.

#### **Legal and Governmental Structure:**

- Established a framework for unified governance, economic management, and collective defense.
- Ensured a system of judicial review through the High Court, safeguarding the balance of power within the federation.

## **1901: Australian Constitution Proclaimed**

\*January 1<sup>st</sup>, 1901 – The Commonwealth of Australia was established as a federated entity, uniting the previously separated colonies under a single federal constitution

### **Colonial Laws Validity Act**

Despite the establishment of the Commonwealth Constitution, the Colonial Laws Validity Act of 1865 remained applicable.

Provision:

- The British Parliament can still make laws for the colonies, including the newly formed Commonwealth of Australia.
- This power is contingent on the British law expressly stating its application to the colony.

Impact:

- The legal framework established by the Colonial Laws Validity Act continues to influence Australian law until further legislative changes are made.

### Significance of Australian Constitution Proclaimed

#### **Legal Continuity and Transition:**

- The proclamation of the Australian Constitution marked a transition from colonial governance to a federated national structure.
- It preserved existing state constitutions while establishing a new federal legal framework.

#### **Federal Structure:**

- Introduced a dual system of government with specific powers allocated to the Commonwealth and residual powers retained by the states.
- Ensured a unified approach to governance while respecting the autonomy of individual states.

#### **Territorial Administration:**

- Defined the legal status and governance of territories, distinguishing them from states.
- Established the Commonwealth's role in legislating for territories.

#### **Ongoing British Influence:**

- Highlighted the continued influence of British legislation on Australian the Colonial Laws Validity Act.
- Illustrated the gradual evolution of Australian legal independence from British legislative control.

### Significance of being s 9 in the Australian Constitution Act 1900 (UK)

**Section 9:** This section contains the Australian Constitution, making it an integral part of the British Act of Parliament that established the Commonwealth of Australia

‘The Constitution of the Commonwealth shall be as follows:’...

**British Parliamentary Sovereignty:** Historically, the British Parliament had the authority to legislate on any matter, including repealing laws it had previously enacted.

#### Key Points from the Lecture

##### **Parliamentary Sovereignty:**

- The British Parliament can theoretically make and unmake any law, including those affecting Australia.
- However, political realities make it highly unlikely that the British Parliament would attempt to repeal the Australian Constitution.

##### **Australian Independence and Popular Sovereignty:**

- Despite its origins in a British Act, the Australian Constitution is now seen as deriving its authority from the Australian people.
- The High Court of Australia has affirmed that the constitutional basis of Australia is rooted in the sovereignty of the Australian people, not the British Parliament.

##### **High Court's Stance:**

- The High Court of Australia has made remarks indicating that Australia's constitutional authority is now self-derived.
- Case references like **Marquet** illustrate the High Court's view that Australia is an independent nation with its own legal foundations.

##### **Australia Acts 1986:**

- These acts severed the remaining legal ties with the UK, affirming Australia's complete legislative independence.

- The abolition of appeals to the Privy Council further entrenched the High Court of Australia as the final judicial authority.

### Importance in Relation to the Australian Constitution

#### **Legal Continuity and Independence:**

- The inclusion of the Australian Constitution within a British Act of Parliament marks the legal beginning of the Commonwealth of Australia.
- Over time, Australia has transitioned from a colony to an independent nation, with the Constitution now symbolizing this sovereignty.

#### **Symbolic Significance:**

- Section 9 represents the formalization of the Australian Constitution by the British Parliament, a crucial step in Australia's legal and political evolution.
- The transition to popular sovereignty signifies Australia's journey to full independence, where the authority of the Constitution is now derived from the will of the Australian people.

#### **Modern Constitutional Framework:**

- The High Court's recognition of Australia's sovereignty ensures that the Constitution is interpreted and upheld based on Australian principles and values.
- The Australia Acts 1986 underscore this independence, removing any residual British legislative control.

### Why no Bill of Rights?

- The Australian Constitution does not include a Bill of Rights.
- The Constitution was designed to address practical governance and efficiency issues rather than to enshrine individual rights.
- Unlike the US Constitution, the Australian Constitution emerged from a pragmatic process rather than a revolutionary struggle, hence the absence of a Bill of Rights.

### States: significant of s 106? Territories: significance of s 122?

#### **Section 106: Preservation of State Constitutions**

State constitution remain in effect as they were prior to federation

- States retain their powers as granted by their own constitutions.
- State constitutions are subject to additional restrictions imposed by the Commonwealth Constitution.
- The Commonwealth Constitution outlines specific powers in Sections 51 and 52, leaving all residual powers to the states.

Example: The 1855 Victorian Constitution, created by an act of British Parliament, continues to be valid post-federation.

#### **Section 122: Government of Territories**

The Commonwealth Parliament has the power to make laws for the government of any territory surrounded by a state.

- Territories like the Northern Territory (NT) and the Australian Capital Territory (ACT) exist due to acts of the Commonwealth Parliament.
- Their powers are derived from and regulated by Commonwealth legislation.
- This is in contrast to states, which derive their powers from their own constitutions.

### 1931: Statute of Westminster – Legal Effect? Not enacted domestically until 1942: why?

Even after the Australian Constitution came into effect in 1901, the UK Parliament retained the power to legislate for Australia. This only ended with the Statute of Westminster and the Statute of Westminster Adoption Act.

- Passed by the British Parliament at the request of the Dominions, including Australia.
- Defined the status of the Dominions, clarifying that they were independent countries.
- The Governor-General acts as a representative of the Crown, not the British government.

#### **Key Sections:**

- **Section 2:** Repeals the Colonial Laws Validity Act as it relates to the Commonwealth.
- **Section 4:** UK Parliament cannot legislate for a Dominion unless requested and consented by the Dominion.
- **Section 10:** Provisions of the Statute apply only when adopted by the Dominion.

#### **Not Enacted Domestically Until 1942: Why?**

##### **Delayed Adoption in Australia**

- The Statute of Westminster was passed in 1931 but not adopted by Australia until 1942.
- Reasons for Delay:
  - Political factors and a strong allegiance to the UK.
  - By 1942, during World War II, there was a growing sense of Australian nationhood and independence.
  - Internal political consensus emerged in favor of adopting the Statute.

##### **Statute of Westminster Adoption Act 1942:**

- Adopted the Statute retrospectively from September 3, 1939.
- No more imperial legislation for the Commonwealth from this date.
- Applied only to the Commonwealth, not to the states.

#### **Importance in Regard to the Australia Constitution**

##### **Legal Independence**

- Marked a significant step towards Australian legal independence from British legislative control.
- Repealed the Colonial Laws Validity Act, freeing the Commonwealth from British legislative supremacy.
- Established that the UK could only legislate for Australia with its consent.

##### **Federal Structure**

- Highlighted the distinction between the Commonwealth and state powers.
- While the Commonwealth gained legislative independence, the states remained bound by the Colonial Laws Validity Act until 1986.

##### **Ongoing British Influence**

- Illustrated the gradual process of legal independence from Britain.
- The Statute of Westminster Adoption Act was a milestone in this process, but the full independence of state laws was achieved later with the Australia Acts of 1986.

##### **Impact on State Legislation**

- States continued to be subject to British laws that applied to the whole empire.
- The Colonial Laws Validity Act could invalidate state legislation if it was repugnant to British laws.
- This created legal confusion and highlighted the need for further reform.

##### **Final Step of Legal Independence**

- The Australia Acts (1986) addressed the limitations of the Statute of Westminster.
- Freed the states from the Colonial Laws Validity Act.
- Ensured that no British legislation could override state laws, completing Australia's journey to full legislative independence.

## 1986: Australia Acts – Legal Effects? (“The States’ Statute of Westminster”)

These acts completely severed the legal relationship with the UK, ending the application of colonial laws to the states. The Australia Acts applied prospectively, meaning no UK law passed after the commencement of these acts could extend to Australia or its states and territories.

### Constitutional Basis for the Australia Acts

#### **Section 51(xxxviii) of the Commonwealth Constitution:**

- Allows the Commonwealth Parliament to legislate at the request or concurrence of the parliaments of all states directly concerned.
- Enabled the states to request the Commonwealth to pass legislation similar to the Statute of Westminster, removing the application of the Colonial Laws Validity Act to the states.

Two Acts Passed by the Commonwealth Parliament:

- **Substantive Australia Act:** Enacted the changes requested by the states.
- **Request to the UK Parliament:** Asked the UK Parliament to pass the same law, removing their legislative power over Australia.

### Key Provisions and Legal Effects of the Australia Acts

#### **Termination of UK Legislative Power:**

- The Australia Acts ended the UK Parliament’s power to legislate for Australia, even with consent and request provisions.
- The same legislation was passed by both the UK and Commonwealth Parliaments to ensure mutual termination of power.

#### **State Legislative Powers (Section 2-1):**

- States were granted full power to make laws with extra-territorial operation.
- This provision reinforced the legislative autonomy of the states.

#### **Abolishment of the Colonial Laws Validity Act:**

- The Colonial Laws Validity Act no longer applied to the states.
- States gained independence from British legislative control.

Termination of Appeals to the Privy Council (Section 11):

- The Australia Acts ended the possibility of appealing State Supreme Court decisions to the Privy Council.
- The High Court of Australia became the final court of appeal.

#### **Entrenchment of the Australia Acts (Section 15):**

- The Acts were entrenched into law, making it difficult for future Parliaments to repeal them.
- This provision gave the Australia Acts a quasi-constitutional status, solidifying their importance in Australian law.

### Importance in Regard to the Australian Constitution

#### **Complete Legal Independence:**

- The Australia Acts marked the final step in Australia's legal independence from the UK.
- They terminated any remaining legislative power of the UK Parliament over Australia.

#### **Enhanced State Autonomy:**

- States gained full legislative powers, including extra-territorial jurisdiction.
- Freed states from the constraints of the Colonial Laws Validity Act.

#### **Final Court of Appeal:**

- The termination of appeals to the Privy Council established the High Court of Australia as the ultimate judicial authority.

#### **Quasi-Constitutional Status:**

- The entrenchment of the Australia Acts ensured their enduring impact on Australian governance.

Reinforced Australia's sovereignty and legal independence.

**Historical Continuity and Reform:**

- The Australia Acts built on the legal reforms initiated by the Statute of Westminster.
- They addressed the limitations of the Statute of Westminster by extending its principles to the states.

## Why are High Court decisions an important source of Australian Constitutionally law

**Interpretation of the Constitution:**

- High Court decisions are crucial as they interpret the Australian Constitution.
- By interpreting the Constitution, the High Court determines the limits and scope of powers of the Commonwealth and other governmental bodies.
- These interpretations clarify the meaning of various constitutional sections and provisions.

**Slow Change of Constitutional Wording:**

- The wording of the Australian Constitution rarely changes due to the difficulty in passing referendums.
- Since the Constitution's inception, there have been very few successful referendums.
- Recent example: A referendum failed earlier this year, illustrating the challenge in amending the Constitution through referendums.
  - *the referendum on an Aboriginal and Torres Strait Islander Voice to Parliament, held on 14 October 2023, was unsuccessful — failing to secure a national majority or a majority in any of the six States — illustrating the continuing difficulty of amending the Constitution by referendum.*

**High Court's Role in Constitutional Evolution:**

- High Court interpretations have significantly impacted the evolution of the Constitution.
- These decisions allow the Constitution to adapt to contemporary societal values and needs.
- Rather than formal amendments, judicial interpretations have been the primary mechanism for constitutional change.

**Case Law and Precedent:**

- High Court rulings set precedents that influence future legal interpretations and decisions.
- These precedents form a body of case law that guides the application of constitutional principles.

### Importance in Relation to the Australian Constitution

**Judicial Interpretation as a Dynamic Process:**

- High Court decisions ensure that the Constitution remains relevant and responsive to modern issues without needing frequent amendments.
- This dynamic process of interpretation allows the Constitution to evolve in line with societal changes and judicial understanding.

**Checks and Balances:**

- The High Court acts as a check on legislative and executive powers, ensuring that they operate within constitutional limits.
- This judicial oversight helps maintain the balance of power and protects individual rights.

**Legal Clarity and Stability:**

- High Court decisions provide clarity and stability in the application of constitutional law.
- By resolving ambiguities and disputes, the High Court helps ensure consistent and predictable legal outcomes.

**Guidance for Lower Courts and Legal Practitioners:**

- High Court rulings serve as authoritative guidance for lower courts and legal practitioners.
- These decisions help in understanding and applying constitutional principles across various legal contexts.

**Adaptation to Societal Values:**

- The High Court's ability to interpret the Constitution allows it to adapt to changing societal values and norms.
- This adaptability ensures that the Constitution remains a living document, reflective of contemporary standards and expectations.

Should understand:

- Colonial Laws Validity Act
- Statute of Westminster
- The Australia Acts

# TOPIC 2: PARLIAMENT AND LEGISLATIVE PROCEDURES

Section 1 (Constitution). Legislative Power — vested in a Federal Parliament consisting of the Queen, a Senate and a House of Representatives.

The blend of the Westminster parliamentary tradition and the federal system creates a unique legislative environment, reflecting historical influences and modern democratic principles. Through these procedures, Parliament ensures that government actions are accountable, transparent, and representative of the people's will.

## Section 1 The Constitution. Legislative Power

The legislative power of the Commonwealth shall be vested in a Federal Parliament, which shall consist of the Queen, a Senate, and a House of Representatives, and which is hereinafter called "The Parliament," or "The Parliament of the Commonwealth"

## The Structure of Parliament

The King and his vice-regal representatives play a ceremonial role in the Commonwealth and State Parliaments, exercising their powers on the advice of ministers who are responsible to parliament. While most Australian parliaments are bicameral, there are exceptions such as Queensland and the territories, which have unicameral systems.

### State Parliaments

**Queensland:** Originally had two houses but abolished its upper house in 1992. This was lawful and within the legislative competence of the Queensland Parliament

**Victoria's Historical Voting System:** Both the Legislative Assembly (Lower House) and Legislative Council (Upper House) previously used a preferential voting system, favouring major parties.

**CURRENT SYSTEM:** Victoria's voting system now mirrors the Commonwealth system

- **Legislative Assembly:** Elected using a preferential voting system.
- **Legislative Council:** Elected using a proportional voting system.

### Proportional Voting System

- Allows greater representation for minority parties and independents in the Legislative Council.

### Composition of Victorian Parliament

- **Section 15 of the Victorian Constitution:** Legislative power of the State is vested in the Parliament, consisting of Her Majesty, the Council, and the Assembly.
- **Legislative Council:** Upper House.
- **Legislative Assembly:** Lower House.
- **Governor:** The King's representative, with executive power vested in the governor.