

2026 Constitutional Law Notes

Full Topic List:

Topic 1 – Fundamental Concepts, Institutions and Instruments

Topic 2 – State Legislative Power

Topic 3 – Manner and Form

Topic 4 – Executive Power of the Commonwealth

Topic 5 – Commonwealth Legislative Powers - General Principles

Topic 6 – The External Affairs Power

Topic 7 – The Corporations Power

Topic 8 – Spending

Topic 9 – Implied Intergovernmental Immunities

Topic 10 – The Separation of Powers

Topic 11 – Implied Political Freedoms

Topic 12 – Freedom of Interstate Trade and Commerce

Topic 13 – Inconsistency

Topic 1 – Fundamental Concepts, Institutions and Instruments

1. Parliamentary sovereignty

What is Parliamentary Sovereignty?

To understand this need to remember what do the three branches of government do. The legislature's prime function is obviously to make laws. The judiciary's function is to interpret and apply them. The function of the executive is to administer laws, put them into practise and deal with the general policy program.

English 19th century Jurist Dicey argued that parliamentary sovereignty is the dominant characteristic of British political institutions. More specifically he stated that *'Parliament's power to 'make or unmake any law whatever'; and further, that no person or body is recognised by the law of England as having a right to override or set aside the legislation of Parliament.'*

According to Dicey, parliamentary sovereignty implies that Parliament possesses the ultimate authority to make or repeal any law without any legal limitations. Dicey's definition emphasizes that no person or body, including courts or other branches of government, has the power to override or set aside the legislation passed by Parliament. This principle underpins the supremacy of parliamentary statutes in the UK, ensuring that laws made by Parliament are the highest form of legal authority in the land.

The concept of parliamentary sovereignty can be broken down into three key components. First, Parliament has the authority to legislate on any subject matter, regardless of its nature. This means that there are no legal restrictions on the scope of parliamentary law-making. Second, Parliament can repeal or amend any existing laws, demonstrating its ability to unmake laws just as easily as it can make them. Finally, the principle asserts that no individual or institution has the right to override or invalidate laws enacted by Parliament, reinforcing the idea that parliamentary statutes are the supreme laws of the UK.

Parliamentary Sovereignty in England

In the context of England, parliamentary sovereignty signifies that the Parliament is the ultimate legal authority. This principle emerged historically as a mechanism to prevent the monarchy from holding absolute power, ensuring that elected representatives in Parliament, rather than a monarch, have the final say in the legislative process. The absence of a single written constitution in the UK further accentuates the supremacy of parliamentary statutes, as there is no constitutional document that can limit or constrain Parliament's legislative powers. Consequently, parliamentary statutes are regarded as the highest form of law, and their authority cannot be challenged or overturned by any other body or individual.

2. Parliamentary sovereignty in Australia

Modified Parliamentary Sovereignty

Unlike the UK, Australia does not adhere to the concept of absolute parliamentary sovereignty. Instead, Australia's version of parliamentary sovereignty is modified and constrained by the Commonwealth Constitution. While the Parliament in the UK can legislate on any matter without legal restrictions, Australian parliaments are subject to several constitutional constraints that limit their legislative powers.

Constitutional Constraints on Australian Parliaments

The Commonwealth Constitution imposes specific limitations on both state and federal parliaments in Australia. These constraints ensure that the legislative powers are not absolute and are subject to certain rules and principles outlined in the Constitution.

Topic 6– The External Affairs Power

1. Section 51(xxix), Constitution

“The Parliament shall, subject to this Constitution, have power to make laws... with respect to external affairs.”

Section 51(xxix) of the Australian Constitution gives the Parliament power to make laws with respect to external affairs. The term “external affairs” itself, however, is not defined in the Constitution, which led to an extended period where the scope of this power was uncertain. The Commonwealth was bestowed with the power over external affairs, reflecting Australia’s transition to nationhood.

Before federation, the colonies did not have international legal personality (could not deal with international matters on their own), and matters of foreign affairs were handled by the British imperial government. Post-federation, the Commonwealth took over the responsibility of representing Australia on the international stage. There is no other country where states have international legal personality independent of the national government.

The external affairs power has become one of the most significant sources of the Commonwealth’s legislative authority. Some believe the Commonwealth’s power in relation to external affairs could still evolve or expand further, depending on global circumstances. Although this power is listed in Section 51, which is a concurrent power section, the states cannot act in relation to external affairs. Only the Commonwealth can represent Australia internationally because the states never developed international legal personality.

2. Three aspects/categories of the External Affairs Power

There are three known categories/aspects under the external affairs power:

1. **Extraterritorial laws:** regulating matters outside Australia’s jurisdiction.
2. **Relations with other nations:** laws that deal with Australia’s foreign relations (traditional foreign affairs).
3. **Implementing international treaties:** implementing laws in line with international agreements.

The first two categories are broad and straightforward, but the third category becomes more complex and requires deeper examination.

3. Category 1 – Extraterritorial Laws

This refers to laws that regulate matters happening outside of Australia. The states also have some extraterritorial powers but must show a nexus (connection) between the matter being regulated and the state. Initially, a similar nexus was required for the Commonwealth, but after the Statute of Westminster Act in 1942, this requirement was no longer necessary. By 1991, the High Court conclusively resolved that the Commonwealth’s extraterritorial powers were plenary (wide-ranging) and no nexus was required, a decision most notably seen in cases such as *Polyukhovich v Commonwealth*.

In *Polyukhovich v Cth* (1991), the Commonwealth criminalized war crimes committed outside Australia retrospectively, where neither the perpetrator nor the victim had any connection to Australia at the time of the crime. Although Polyukhovich later migrated to Australia and was charged here, this law had no connection to Australia when the crimes were committed (because he did the crimes there). The only connection to Australia was the mere fact that he was in Aus when charged. The High Court reinforced that the Cth’s power with respect to extraterritorial matters was plenary / wide ranging and there was no nexus requirement. All that was required was ‘geographical externality’ which means that the event happened outside Australia. The court is largely suggesting that the law can be valid even without any connection to Australia whatsoever and therefore the Cth can largely legislate on almost anything they want overseas.

Topic 11– Implied Political Freedoms

The Implied Freedom of Political Communication (IFPC)

Apply the Implied Freedom of Political Communication (IFPC) test when a law restricts or penalizes speech, protests, publications, or symbolic actions that relate to government, politics, or public affairs at either the Commonwealth or State level. If the law burdens political communication, assess its legitimacy and proportionality using the three-step test to determine if it is constitutionally valid.

The implied freedom of political communication (IFPC) is a constitutional limitation on legislative power, preventing laws that impermissibly burden political communication. The High Court first recognized this implied freedom in *Australian Capital Television v Commonwealth (ACTV)* and *Nationwide News Pty Ltd v Wills*, finding that it arises from the text and structure of the Constitution. Specifically, sections 7, 24, 64, and 128 establish a system of representative and responsible government, and political communication is necessary for the proper functioning of that system.

Unlike an individual right (such as those found in human rights instruments), the IFPC is not a personal right held by individuals but rather a structural limit on legislative and executive power (*Lange v ABC*). This means that individuals cannot invoke it to demand free speech in the way that a personal right might allow; instead, it serves to protect the integrity of Australia's system of representative government. Effectively the IFPC operates as a restriction on legislative power, ensuring that laws do not unconstitutionally interfere with the system of representative government.

The IFPC applies not only to Commonwealth laws but also to State laws. This extension to the States arises from the necessary interconnection between federal and state politics (*Coleman v Power*). Given the integrated nature of Australian political discourse, virtually all political communication at the state level has some relevance to federal politics, meaning that State laws can also be challenged under the IFPC.

Testing the Validity of a Law that Burdens Political Communication

When determining whether a law is invalid for unconstitutionally restricting political communication, the *Lange* test is applied. This test was originally established in *Lange v ABC* and later refined in *Coleman v Power*, *McCloy v NSW*, and *Brown v Tasmania*.

Step 1: Does the Law Burden Political Communication?

- A law burdens political communication if it restricts or penalizes political speech in its terms, operation, or effect.
- The burden can be explicit (a law directly banning certain political communication) or practical (a law indirectly making political communication more difficult).

To determine whether the communication itself is political, courts look at:

- Whether the subject is a matter of political controversy (*Monis*).
- Whether the communication involves signs, symbols, gestures, or images conveying political ideas (*Levy*).

Examples of Political Communication

Courts have recognized the following as political communication:

- Political advertising (*ACTV*).
- Criticism of the Commonwealth Industrial Relations Commission (*Nationwide News*).