

# PUBLIC LAW AND STATUTORY INTERPRETATION

---

## TOPIC 1: INTRODUCTION TO AUSTRALIAN GOVERNMENT

### 1.1 Fundamental Concepts and Institutions

#### a) What is public law?

- *Public law* regulates the relationship between the state and individuals (vertical relationship). Whereas, *private law* regulates the interaction of individuals (horizontal relationship).
- Public law concerns how the institutions of states operate to govern the people residing in their territory
- Particularly interested in holding the government accountable to the people (expect them to act responsibly, morally etc.)

#### b) What is the rule of law?

- No one is above the law and the law binds the state. The Law is supreme.
- The Government must exercise power within legal limits (no arbitrary government action → can only act if legally authorized to do so).
- Guarantees equality and ensure accountability
- *Independent* Judiciary reviews the actions of the Executive and Legislature. Check that the two branches are operating within legal limits.
- Cf: 'Rule by law'- government uses the law as a tool for its own purposes, without accountability or adherence to its limits.
- **What does the rule of law require?**
  - o Due process (procedural fairness)
  - o Transparency (clear, accessible and open)
  - o Stability (laws should not be able to change arbitrarily)
  - o Consistency (treating like cases alike)
  - o Compatibility with fundamental rights and liberties
  - o Prospectively (Parliament can and sometimes do enact retrospective laws – but known as detrimental to the rule of law)

---

## TOPIC 2: PARLIAMENT

### 2.1 The powers of Australia's Parliaments

#### a) Parliamentary sovereignty and plenary legislative power

##### - The English system of public law:

- **Magna Carta 1215**: document, which limited the powers of the king, particularly over taxation, which could only be levied under the *Magna Carta* after receiving the 'general consent of realm'. It also contained some due process guarantees, requiring that no free man could be punished except by lawful judgment of his equals or by the law of the land.
- **The Great Council**: the noblemen and churchmen who were called upon by the Monarch to approve of particular decisions, generally those involving taxation. The summoning of the council became known as a meeting of Parliament. The council was the precursor to the House of Lords.
- **11<sup>th</sup>-13<sup>th</sup> centuries**: 'shire moots' started to appear, at which local matters were discussed by local noblemen, churchmen and other local representatives. Precursor to the Lower House.
- **14<sup>th</sup> century**: a legislature somewhat resembling its modern form had developed (development largely based on Monarch's need for money)
- **17<sup>th</sup> century**: House of Commons had gained rights to introduce money bills (for taxation and expenditure)
- **Tudor reign (1485-1603)**: wealthy and peaceful (no struggle between parliament and the Crown)
- **Stuart Kings**: cruel and rule was despotic and arbitrary. James I was a believer in the divine right of Kings and that his power to rule came from God alone and was supreme, accountable only to God. Two essential documents of public law in England emerged during this period: the Glorious Revolution in which the Stuart

---

## TOPIC 3: THE EXECUTIVE

### 3.1 What is the Executive? Elements and Functions

- a) The Crown: the executive power of the Commonwealth is vested in the Queen
- b) Queen's representative = Governor (state level) and Governor General (federal level) →

**S 61 Constitution:** 'The executive power of the Commonwealth is vested in the Queen and is exercisable by the Governor-General as the Queen's representative'.

- c) Prime Minister, Premiers, Cabinet and Ministers
  - Ministers are at the core of the Executive. One of the conventions of responsible government requires that the Queen and her representatives act on the advice of senior government Ministers (including the PM) → known as the Cabinet
  - Cabinet: make important policy decisions
    - o Characteristics: unanimity and secrecy of its decisions → guaranteed by constitutional convention known as 'collective responsibility' that requires Ministers to accept responsibility to Parliament collectively for the decisions of the Cabinet
- d) The public service; departments and officers
  - Executive's actions have the most direct influence over the individual sphere (has some impact on your life every day) → apply for a driver's licence, immigration department for a visa, speeding ticket from a police officer etc.
  - Today, many "public" functions are outsourced to the private sector
    - o E.g. carried out by private companies/individuals, under contract with the government
    - o Consider:
      - Private companies that provide transport, infrastructure and utilities
      - Private hospitals and other health services
      - Operation and security at detention centres
      - Even some private prisons!

## TOPIC 4: THE JUDICIARY

### 4.1 What/who is the judiciary and where do its powers come from?

#### a) The concept of a 'Chapter III' court

Courts created *by* or *under* Chapter III of the *Constitution*

<b>S 71</b>	<p><b>Judicial power and Courts</b></p> <p>‘The judicial power of the Commonwealth shall be vested in a Federal Supreme Court, to be called the <b>High Court of Australia</b>, and in such other <i>federal courts</i> as the <u>Parliament creates</u>, and in such other courts as it invests with federal jurisdiction...’</p> <p>High Court specifically mentioned in the Constitution (requires its existence) → created <i>by</i> the Constitution</p> <p>Other courts are left up to Parliament to create → created <i>under</i> the Constitution</p>
<b>S 72</b>	<p><b>Judges' appointment, tenure, and remuneration</b></p> <p>The Justices of the High Court and of the other courts created by the Parliament:</p> <p>(i) shall be appointed by the Governor-General in Council (<i>remember they take the advice of the PM</i>);</p> <p>(ii) shall not be removed except by the Governor-General in Council, on an address from both Houses of the Parliament in the same session, praying for such removal on the ground of <b>proved misbehaviour or incapacity</b>;</p> <p>(iii) shall receive such remuneration as the Parliament may fix; but the remuneration shall not be diminished during their continuance in office (<i>pay can't be increased or decreased</i>).</p> <p><b>The appointment of a Justice of the High Court shall be for a term expiring upon his attaining the age of <i>seventy years</i>, and a person shall not be appointed as a Justice of the High Court if he has attained that age.</b></p>
<b>S 73</b>	<p><b>Appellate jurisdiction of High Court</b></p> <p>The High Court shall have jurisdiction, with such exceptions and subject to such regulations as the Parliament prescribes, to hear and determine appeals from all judgments, decrees, orders, and sentences</p>
<b>S 75</b>	<p><b>Original jurisdiction of High Court</b></p> <p>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</p> <p>Jurisdiction conferred on the High Court by the <i>Constitution</i> cannot be altered or removed (without changing the <i>Constitution</i>)</p> <p>However, courts made <i>under</i> statute can be changed. Their jurisdiction can be changed, they can be removed, they can add courts etc. Parliament can do what they please with them! As long as they don't violate s.72</p>

---

## TOPIC 5: STATUTORY INTERPRETATION

### 5.1 Why do Courts need to Interpret Statutes? Causes of Interpretive Problems

- Statutory interpretation is *pervasive*
  - In all areas of law
  - ‘Statutory universe’: French CJ
  - Every area of the law, is regulated by statute
  - Every aspect our lives is regulated by a statute
- Statutory interpretation is *constitutionally significant*
  - ‘In Australian law the inhibition on the adoption of a purposive construction that departs too far from the statutory text has an added dimension because too great a departure may violate the separation of powers in the Constitution.’ French CJ, Crennan and Bell JJ in *Taylor* (2014) HCA 9 at [40]
- How this fits in with the first half of PLSI
  - Principles of public law determine how the courts can/should interpret statutes
- **ALRM Revision:**
  - Text, context, purpose, presumptions, prior judicial interpretation and extrinsic materials

