

1B OVERVIEW OF THE AUSTRALIAN SYSTEM OF PUBLIC LAW

A structural overview of the Australian system of public law

Australia: A Constitutional Hybrid

- The Australian Constitution represents a hybrid of adopted ideas. The essence of the Westminster system of representative and responsible government within the framework of a constitutional monarchy. The ideas of federalism, separation of powers and judicial review from the USA
- Constitutional monarchy is a façade. In practice, the Queen and the GG have little of the original power conferred originally by s 59 of the constitution. By convention, they act on the advice of Ministers and the Prime Minister.
- Responsible government means that the executive arm of government is responsible to Parliament for its actions.
- The Parliament is the central means by which a chain of command is consolidated from the people to the crown. The ministry controls the Crown, the ministry is controlled by Parliament and the people control Parliament.
- The unifying theme of the elements borrowed from the USA is the need to protect the people against the power of the government.
- Separation of powers: the allocation of different and controlling powers to the Judicial, Legislative and Executive branches of power.
- Federalism: Allocates government powers (especially legislative powers) among different political and territorial units.
- This leads to a system of checks and balances.
- To simplify the systems of the USA and Britain as the above is misleading. Both systems have basic rules that establish chains of command and limit their power. For example, a constitutional monarchy instils power in the monarch in accordance with the rules of the Constitution.
- Defining what a constitution is has also undergone change.
- There has been a shift from defining the constitution as a document that sets up the institutions of government, to a definition that the constitution both sets up the institutions of a government with concern to the relationship of people to them. Also the constitution expresses political values to which a particular society lays claim.
- Even when a political system is based on a written constitution, much of its workings still depend on unwritten understandings, developed as a matter of practical convenience or reflecting fundamental beliefs about how a government ought to be conducted.
- These understandings are referred to as ‘constitutional conventions’.
- The Australian Constitution is set out in s 9 of the *Commonwealth of Australia Constitution Act 1900*. It is complemented by the *Statute of Westminster 1931* (Imp)

and the *Australia Act 1986* (Cth) and is supplemented by the common law and unwritten conventions.

- Each Australian state also has its own written constitution supplemented by conventions and common law.
- Constitutions are either 'rigid' or 'flexible'. A flexible constitution is one that can be changed by parliament in a way that a normal law would be introduced. A rigid constitution requires a special process for it to be changed.
- For example, in Australia constitutional amendments are initiated by the Commonwealth Parliament but must be passed by a referendum that satisfies the conditions laid out in s 128. By contrast, the constitutions of the Australian states are for the most part flexible.

Separation of Powers

- When judicial review is relied upon to enforce limits to governmental and legislative powers, it follows that the courts must be independent of the government and the legislature. Similarly, when judicial review is required to enforce and distribute power between the State and federal levels of government the judiciary must be independent of both governments.
- Under the Westminster system, there is no strict separation between the legislative and executive branches of government. There is often the confusion using labels.
- 'The government' exercises executive power.
- 'The Parliament' exercises legislative power.
- The first three chapters of the Australian Constitution are headed respectively 'The Parliament', 'The Executive Government' and 'The Judicature'. Evident in this is that the framers of the Constitution were most influenced by the American version of the separation of powers.
- However, they were influenced by the Westminster system and the doctrine of responsible government.
- The separation of powers idea is very old. It is evident in the writings of Aristotle came to prominence in the 18th century by the likes of Charles Louis de Secondat and Baron de Montesquieu.

Baron de Montesquieu, The Spirit of the Laws (transl Thomas Nugent Hafner Press, 1949).

- 'There would be an end of everything, were the same man or the same body, whether nobles or of the people, to exercise those three powers, that of enacting laws, that of exercising public resolutions, and of trying the causes of individuals.'

Owen Hood Phillips and Paul Jackson, Constitutional and Administrative Law (Sweet and Maxwell, 7th ed, 1978).

- 'The executive or administrative function is the general and detailed carrying on of government according to law, including the framing of policy and the choice

of manner in which the law may be made to render that policy possible...It now involves the provision and administration or regulation of a vast system of social services...'

Jeffrey Goldsworthy, 'Australia: Devotion to Legalism' in Jeffrey Goldsworthy (ed), Interpreting Constitutions: A Comparative Study (OUP, 2007), pp. 106-110.

- The authority of the United Kingdom Parliament to change Australian law was not formally terminated until the Australia Act was passed in 1986.
- The authority and legitimacy of the Constitution was due both to the authority of the United Kingdom Parliament but also to it having been agreed upon by a majority of the voters of each colony.
- Currently there is no Constitutional recognition of Aboriginal Australians. Despite the granting of Native Title, the High Court declined to disturb the basic legal premise that the British Crown inherited full sovereignty of the land and its inhabitants.
- Despite the intent to distribute legislative, executive and judicial powers between the state and federal levels, in practice the Australian constitution has led to a much more centralist interpretation, in line with the Canadian Constitution.
- The Constitution is vague and misleading about outlining the relationship of the Executive to the legislative.
- The Constitution has powers given to it directly from the states. Most of the Parliament's powers are not withdrawn from state parliaments and are therefore exercised 'concurrently' with the states.
- Chapter III deals with the federal judicature. It has been interpreted as prohibiting both the vesting of federal judicial power in any non-judicial body, and the vesting of non-judicial power in federal courts.
- The C. does not include extensive provisions for the protection of individual rights.
- Federation resulted not from armed rebellion against tyranny, but through calm debate. Utilitarianism, rather than natural rights, has emerged as the main ideology.
- C. framers also feared that judicial interpretations of individual rights could have unpredictable and undesirable consequences.

George Williams, 'Judicial Review' in Michael Coper, Tony Blackshield and George Williams (eds), The Oxford Companion to the High Court of Australia (OUP, 2001), pp. 376-378.

- Judicial review involves assessing governmental action for consistency with the Constitution. If a law is inconsistent. It can be made invalid.
 - Can judicial review totally abolish or law or just 'read it down' in line with the Constitution.
- This allows the HC to safeguard against arbitrary power, which ensures the rule of law is upheld. It also allows the HC to safeguard fundamental human rights.
- This judicial review contrasts with that exercised by courts in assessing administrative law against statutes and common law.
- A controversial question is whether common law rights are so fundamental or 'deeply rooted' as to be beyond interference by the exercise of legislative power,