

**AUSTRALIAN
PUBLIC LAW
SUMMARY**



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Contents

Topic 1: Foundations to Public Law	8
Introduction	8
From Where Does the Constitution Derive Its Validity?	8
Judicial Review: Consistency with a Democratic System?.....	9
Advantages of Judicial Review	9
Is Judicial Review Democratic?	10
Judicial Review Operates Within the Constitutional Limits	10
Judicial Review in Revolution (Coup d'Etat).....	10
Separation of Powers	12
Topic 2: English Constitutional History	14
Magna Carta ('The Great Charter').....	14
The Star Chamber.....	14
Parliament.....	15
The Theory of Limited Government.....	16
Responsible and Representative Government.....	16
Topic 3: The Westminster System	17
The Rule of Law	17
What is the Rule of Law?	17
Criticisms of the Rule of Law.....	17
Is the Rule of Law Applied in Australia?.....	18
Topic 4: From Penal Colony to Popular Sovereignty.....	19
Path to Federation	19
Human Rights under the Australian Constitution	20
Path to 'Real Independence'	21
Limitations on Colonies' Law Making Powers after 1901	21
Elimination of the Limitations on Colonies' Law Making Powers after 1901.....	22
Popular Sovereignty	23
Is the Australian Constitution a 'People's Document'?	24
Topic 5: The Australian Federal System	26

The Concept of Federation	26
Australia’s Federal System	26
The Federalism Debate	28
Topic 6: Indigenous People and Sovereignty	30
Introduction	30
Aborigines in the Constitution and Voting Rights	30
<i>Mabo</i> and Indigenous Law	31
<i>Yorta Yorta Case</i> (2002) 214 CLR 422	34
Criticism of the <i>Mabo</i> decision.....	35
Indigenous Sovereignty and Self Determination.....	36
The Position of Indigenous Sovereignty after <i>Mabo</i>	36
What is Self Determination and Sovereignty?	37
Status of Self Determination for Aborigines	38
Treaties.....	39
Topic 7: Federal Parliament	41
Right to Vote?.....	41
Voting Rights in the Constitution	41
Voting Rights in <i>Commonwealth Electoral Act 1918</i> (Cth)	41
Is Compulsory Voting Permitted Under the Constitution?	41
Can Australians Enrol to Vote in Elections Online?.....	42
Is s 41 of the Constitution (Guaranteeing a Right to Vote in Federal Elections for Anyone Entitled to Vote for Lower House of a State Parliament) a ‘Transitional’ Provision?.....	42
Eligibility for Election.....	43
There Are Three Main Bases for Disqualification from Election	44
Disputing the Validity of an Election.....	45
Topic 8: State Constitution – State Legislative Power	47
“Peace, Welfare and Good Government”	47
Deep Common Law Rights	48
Manner and Form Requirements	49
Topic 9: The Executive	52
Sources and Scope of Executive Power: Prerogative Powers	52

Executive May Exercise	52
What are Prerogative Powers	52
An Illustration of the Scope of Prerogative Power in Australia and the Extent to Which They Are Displaced by Statute: <i>Ruddock v Vadarlis (Tampa Case) (2001) 183 ALR 1</i>	53
Responsible Government and the Control of the Executive	54
What Is Responsible Government?	54
Major Components of Responsible Government	54
There are Problems with the Concept of ‘Responsible Government’	55
Four Major Problems with Responsible Government in Australia (Hughes and Emy)	55
Ways in Which the Executive Can Be Dismissed	56
Parliament	56
The Senate	56
Illustrations of Limitation of Responsible Government	57
Constitutional Conventions	58
What Are Constitutional Conventions?	58
Why Do Constitutional Conventions Exist and Where Do They Come From?	59
Why Are Conventions Obeyed?	59
How Do We Know What the Constitutional Conventions Are?	59
The Governor- General (GG)	60
Appointment and Dismissal	60
Role of the GG	60
Powers of GG	61
Topic 10: Judicial Power	64
Separation of Federal Judicial Power	64
<i>R v Kirby; Ex parte Boilermakers’ Society of Australia (The Boilermaker’s Case) 94 CLR 254</i>	64
Criticism of the <i>Boilermakers’ Case</i>	65
Defining Judicial Power	65
Exception to the <i>Boilermakers’ Case</i> : Persona Designata	67
Persona Designate Principle:	67

Criticism of Persona Designata Principle: <i>Hilton v Wells (1985)</i> (Mason and Deane JJ dissent) ..	69
Principle: Incompatibility Doctrine: <i>Grollo v Palmer (1995)</i> 184 CLR 348	69
What Are ‘Human Rights’?	71
Problem with Defining Human Rights:.....	71
Elements of Human Rights.....	71
Are Human Rights Universal?	72
Sources of Human Rights in Australia	72
Bill of Rights.....	74
What ‘Type’ of Bill of Rights Should Australia Have?	75
Australia’s Attempts at a Bill of Rights.....	76
Other Issues Raised by a Bill of Rights	77
Topic 11: Citizenship	78
Australian Citizenship.....	78
Requirements of Citizenship.....	78
A Person Can Become an Australian Citizen Through the Following Means:	78
The Concept of Citizenship	79
Topic 12: Constitutional Change	80
S 128 Constitution: Referendum Mechanism	80
The Process	80
Australia’s Referendum History:.....	80
Possible Problems Causing the Failure of Referenda.....	81
Change the Referendum Mechanism?	82
Republic.....	83
Australia: Constitutional Monarchy	83
Republicanism: What Does It Mean?.....	84
An Australian Republic: The Options	84
Government’s Decision on the Committee’s Findings.....	86
The 1999 Republic Referendum.....	86

Table of Cases

Cases

Attorney General (NSW) v Trethowan (1931) 44 CLR 395	50
<i>Attorney General v De Keyser's Hotel</i> (1920) AC 508	53
<i>Attorney-General (WA) v Marquet</i> (2003) 218 CLR 545	23
<i>British Railways Board v Pickin</i> (1974) AC 765	48
<i>Building Construction Employees & Builders' Labourers Federation of NSW v Minister of Industrial Relationships (BLF Case)</i> (1986) NSWLR 372	47
Coe (1979) 24 ALR 118	36
Coe v Commonwealth (No 2) (1993) 118 ALR 193	36
<i>Commonwealth v Kreglinger & Fernau Ltd (Skin Wool Case)</i> (1926) 37 CLR 393.....	21
<i>Dr Bonham's Case</i> (1609) 8 Co Rep 107a.....	16
Drake v Minister for Immigration and Ethnic Affairs (1979) 46 FLR 409	68
<i>Durham Holdings Pty Ltd v NSW</i> (2001) 205 CLR 399.....	48
Egan v Chadwick (1999) 46 NSWLR 563	57
Egan v Willis (1998) 195 CLR 424	57
Entick v Carrington (1765) 19 St Tr 10	16
<i>Fraser v State Services Commission</i> (1984) 1 NZLR 16.....	47
<i>GetUp Ltd v Electoral Commissioner</i> [2010] FCA 869	42
<i>Grollo v Palmer</i> (1995) 184 CLR 348	67, 69
<i>Hilton v Wells</i> (1985) 157 CLR 57	67
<i>Hwang v Commonwealth</i> (2005) 222 ALR 83.....	78
<i>Judd v McKeon</i> (1926) 38 CLR 380	41
King v Jones (1972) 128 CLR 221	42
<i>Langer v Commonwealth</i> (1996) 186 CLR 302.....	41
Mabo v Queensland (No 2) (1992) 175 CLR 1	31
<i>Madzimbamuto v Lardner-Burke</i> (1969) 1 AC 645.....	11

<i>Marbury v Madison</i> 5 US (1 Cranch) 137 (1803)	10
<i>Milirrpum v Nabalco Pty Ltd (Gove Land Rights Case)</i> (1971) 17 FLR 141	31
<i>Mokotso v HM King Moshoeshoe II</i> (1989) LRC (Const) 24	11
<i>R v Joske; Ex parte Australian Building Construction Employees & Builders' Labourers' Federation</i> (1974), 130 CLR 87	65
<i>R v Kirby; Ex parte Boilermakers' Society of Australia (The Boilermaker's Case)</i> 94 CLR 254.....	64
<i>R v Pearson; Ex parte Sipka</i> (1983) 152 CLR 254	41, 43
<i>Re Webster</i> (1975) 132 CLR 270.....	44
<i>Re Woods</i> (1988) 167 CLR 145.....	44
<i>Republic of Fiji v Prasad</i> (2001) 2 LRC 743	11
<i>Skyles v Cleary</i> (1992) 176 CLR 77	44
<i>Sommersett's Case</i> (1772) 20 St Tr 1	16
<i>Sue v Hill</i> (1999) 199 CLR 462	22, 44
<i>Talga v MBC International Ltd</i> (1976) 133 CLR 622.....	66
<i>Trethowan v Peden</i> (1930) 31 SR (NSW) 183	50
<i>Union Steamship Co of Aust Pty Ltd v King</i> (1988) 166 CLR 1.....	47
<i>Walker v NSW</i> (1994) 182 CLR 45	37
<i>Yorta Yorta Case</i> (2002) 214 CLR 422	34

Sample

Topic 1: Foundations to Public Law

Introduction

- **Constitution Classifications**
 - o **Flexible Constitution:** A Constitution, which can be changed like an ordinary statute.
 - o **Rigid Constitution:** A Constitution which cannot be changed the same way as an ordinary law, rather through some set of procedure or process, like a referendum.

- **Written and Unwritten Constitutions**
 - o **Written:** A Constitution is said to be written when the most important constitutional laws constituting the basis of the State are specifically enacted and specified in one formal document or a series of formal documents, which are binding on the courts, the Executive, the Legislature and the people.
 - o **Unwritten:** The basic laws are given the importance of a Constitution, but are not enacted as one formal set of fundamental constitutional laws (e.g. Israel).

- **Australia's Constitution**
 - o Rigid Constitution which can only be changed via a referendum.
 - o Contains both written and unwritten parts (i.e. the unwritten flexible conventions and common law interpretation of the Constitution complements its written component).
 - o Function: Establishes institutions that serve as the authoritative sources of law and gives them Legislative power. Often accompanied by explicit and implicit limitations on power.

From Where Does the Constitution Derive Its Validity?

There are numerous theories which attempt to explain *why* we obey the Constitution.

Kelsen¹	<p>Kelsen's Theory</p> <ul style="list-style-type: none"> • The entire legal order is a pyramid of norms which are derivative of the powers conferred by the Constitution. • The Constitution is the 'Grundnorm or basis norm'; its content is regarded as 'self-evident' and is presupposed from the highest norm, from which norms for human behaviour is logically deduced. • Legal norms are not valid because they have certain content but because of the way they are created, such that its content is <i>logically deducible</i> from a presupposed basic norm. <p>Problem with Kelsen's Theory</p>
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¹ Kelsen 'Pure Theory of Law' in Blackshield & Williams, *Australian constitutional Law & Theory: Commentary & Materials* (Federation Press, 2006), 5.

	<ul style="list-style-type: none"> • Kelsen seeks to construct a systematic framework for pure theory of law characterised by hierarchy and unity but in reality it is not so structured. • One needs to make a moral judgment to believe the Constitution is the Grundnorm (i.e. the one you should obey). There are still cultural and other influences that are simply masked by Kelsen's analysis that we simply obey it because it is an assumption. • Theory is too inert and has no consideration of the cultural framework, which contributes to the validity of the legal system.²
<p>Foucault³</p>	<p>Foucault's Theory</p> <ul style="list-style-type: none"> • Discourse can only ever be inconsistent and ruptured; only out of such discourse can ideas originate. Power comes from all sorts of discourses (e.g. cultural, political, economic). • Our culture is a law-bound culture; it is inherent in us to obey the law. Our actions reinforce the validity of the law. Cultural assumptions and the way society has shaped us leads to an unconscious conformity to the legal system. <p>Problem with Foucault's Theory: Lacks structure, in reality there is a need for some sort of structure for why we obey the law.</p>

Judicial Review: Consistency with a Democratic System?

In Australia the courts have the power to declare a statute *unconstitutional* and so invalid where the statute:

- Exceeds the powers recognised or conferred by the Constitution; OR
- Infringes some express or implied constitutional limitation.

This idea of 'judicial review' is essential to ensure Parliaments operate within their constitutional limits. The High Court has the final say over what is unconstitutional.

Advantages of Judicial Review

- The court would be the arm of government with the most expertise to interpret the Constitution and to determine whether a statute has violated the Constitution.
- The court is independent from Parliament and the Executive, hence enforcing the separation of powers and the checks and balances of power. The separation of powers, as set out in the Constitution, is necessary to limit the powers of Parliament and the Executive.
- The Judiciary is known for their ability to solve problems objectively and dispassionately.

² Foucault 'Politics and the study of discourse' in Blackshield & Williams, *Australian constitutional Law & Theory: Commentary & Materials* (Federation Press, 2006), 8.

³ Foucault above n 2.

Is Judicial Review Democratic?

Judicial review is democratic	Judicial review is <i>not</i> democratic
<ul style="list-style-type: none">• Judicial review is democratic because the Judiciary are independent of electoral and political pressures.• The Judiciary can only decide issues brought before them by the people and not as a result of their own initiatives.• The Judiciary are known to protect minorities from unfair majority.	<ul style="list-style-type: none">• Since judges are appointed by the Executive they may be sympathetic to the government in power and so separation of power in reality may not be pure.• The Judiciary is not elected and hence is not representative of the people's values.• The Judiciary is unaccountable and inaccessible.• Judicial review diminishes the concept of parliamentary sovereignty.

Judicial Review Operates Within the Constitutional Limits

Marbury v Madison 5 US (1 Cranch) 137 (1803), Marshall CJ (US Supreme Court):

- *Marbury* was the first case relating to judicial review and established its legitimacy.
- Held that the Constitution is superior to ordinary legislation, so an Act repugnant to the Constitution cannot become a law of the USA.
- The US Constitution not only organises the government and assigns different departments their respective powers, but also establishes certain limits not to be transcended by those departments.
- It is the court's duty to determine whether the rule in apparent conflict with the Constitution is a valid one. The Constitution is superior to any ordinary legislation; therefore a law repugnant to the Constitution is void.



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