

CONSTITUTIONAL LAW

SUMMARY



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INTRODUCTION

Constitutional law is the study of the law governing the *interaction* between the organs of government and between the government and the people.

It is important to understand that Australian Constitutional law is made up of a number of sources, including:

- the Commonwealth Constitution;
- the Statute of Westminster;
- the Australia Act;
- The Constitution Acts of the various States;
- Commonwealth and State legislation which deal with constitutional matters,
- constitutional conventions; and
- the courts.

However, for the purposes of this document, our focus will concern the operation of the **Commonwealth of Australia Constitution (“the Constitution”)**, which is the primary source of Australia's Constitutional law.

OVERVIEW OF THE CONSTITUTION

Prior to federation in 1901, Australia was comprised of a number of English colonies. In the late 1800's the political leaders of these colonies formed a notional agreement to federate under a new constitution. A number of conferences known as constitutional conventions were held throughout the 1890's to deliberate on the structure and content of the proposed constitution. A consensus draft emerged in 1898 which was ratified by the electors in each colony, demonstrating its popular support. The draft constitution was presented as a bill to the British Imperial Parliament in 1900 and passed as the *Commonwealth of Australia Constitution Act 1900* (Imp).

Legally, Australia was still a colony of Britain as a result of the *Colonial Laws Validity Act 1865* (Imp) until the passage of the *Statute of Westminster 1931* (Imp), adopted in Australia via the *Statute of Westminster Adoption Act 1942* (Cth). However, this only applied to the Dominions as a whole, not to the Australian States. This state of affairs was finally put to an end when the *Australia Act 1986* was passed by both the British and Australian Commonwealth Parliaments and effectively marked the termination of the UK power to legislate for Australia and was the final stage of Australia's constitutional relationship with the UK.

The Constitution reflects the circumstances of its formation. It is concerned with establishing a federal system of government which balances power between the federal (or Commonwealth) government and the state governments (local governments are not recognised in the Constitution). Over time, judgements of the High Court have tended to increase federal government power at the expense of the states. As the drafters of the constitution were concerned with balancing the rights and responsibilities of the new federal government against those of the existing colonies cum states, the Constitution provides limited rights for individuals.

The Constitution can only be amended in accordance with Chapter VIII. In particular, s 128 which requires an amendment to be passed with an absolute majority in both houses of the

federal parliament and the approval in a referendum of the proposed amendment by a majority of electors nationwide, and a majority in a majority of states (known as the double majority requirement). This is an onerous standard and, consequently, there have been very few successful amendments (8/44) to the Constitution.

As noted above, the Constitution is concerned with dividing power between the federal government and the state governments. The federal government may only exercise power where specifically provided for in the Constitution, whereas the state governments enjoy plenary power (ie a general grant of legislative power). Most of the federal government's powers are listed within Section 51 of The Constitution. In all, this section contains 39 specific heads of power for which the Federal (or Commonwealth) parliament has the power to make legislation. In addition the Commonwealth government has exclusive powers in Section 52. These powers are *exclusive* because only the Commonwealth (not the State and territory parliaments) may legislate in respect of those matters. Under the Constitution the Commonwealth government also has implied powers that will be examined.

Due to the structure of Australia's federal constitution, many constitutional cases in Australia are disputes over the extent and validity of the power of the federal government. Only the High Court can consider cases deciding on constitutional disputes. In order to determine whether a particular legislative or executive act of the federal government is within the power provided by the Constitution, the High Court must *characterise* the law or act. The process of characterisation is discussed in further detail below. At this stage it is important to note that this is not a simple application of the text of the constitution to the facts of the case, as happens in other legal contexts where a statute is applied to the fact. Instead, there are a number of other factors which may influence the High Court's decision, including:

- the fact that the Constitution was drafted over a century ago, has been subject to limited amendment, and must be adapted to current circumstances (eg the power to legislate to previous telecommunication technologies such as postal, telegraphic, telephonic, and other like services has been interpreted to include the power to legislate to later technologies, like radio and television: *Jones v Commonwealth* [No 2] (1965) 112 CLR 206);
- the original meaning or the intent of the drafters of the Constitution. The High Court occasionally makes reference to the records of the debates of the drafters of the constitutional founders at the constitutional conventions;
- important understandings of the Australian system of government which are not stated in the written text of the Constitution, eg the relationship between the legal head (the Governor-General) and the political head (the Prime Minister) of the executive government. These informal understandings are, perhaps confusingly, known as constitutional conventions. They should *not* be confused with the other sense of 'constitutional convention', being the conferences where the draft constitution was debated; and
- constitutional principles from similar jurisdictions, typically the USA, Canada, the UK and New Zealand.

FUNDAMENTALS OF AUSTRALIAN CONSTITUTIONALISM

Below are a number of fundamental concepts that you will frequently encounter in the study of Constitutional Law.

FEDERALISM

A federal system of government involves public power being divided between the State and the Commonwealth government (the territories are not included but exist by virtue of section 122).

The Founding Fathers of Australia took inspiration from the United States Constitution when they decided to incorporate a federal system of government.

THE SEPARATION OF POWERS

The separation of powers involves a tri-partite division between the three arms of government: **legislature, executive and the judiciary**

Its purpose is to prevent the concentration of power in one body which may allow them to abuse their power.

It is inferred from the text of the Constitution as Chapter I establishes the legislature, Chapter II the executive and Chapter III the judiciary

However, there is some overlap between the legislature and executive arms because Ministers (executive) are also members of Parliament (legislature).

RESPONSIBLE GOVERNMENT

Responsible government comprises a set of rules designed to ensure that the government is answerable to the legislature and is only able to lead the country if it has the majority in the House of Representatives. It generally comprises the following features:

- The Executive is responsible to the parliament
 - The Executive carries out the business of government but requires money to do so which is controlled by the Parliament. In return, the executive is accountable to the legislature.
- The Parliament is accountable to the people
 - Citizens can vote government out at election time.
- Executive Ministers are responsible to the Parliament
 - Ministers are responsible to the parliament for the actions of their departments and may be called onto resign if they cannot effectively account for the actions of their department.



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