

The Australian Constitution

David Thomson, OAM

Study Design & Constitution

What does the Study Design say about the Constitution?

The Australian Constitution establishes Australia's parliamentary system and provides mechanisms to ensure that parliament does not make laws beyond its powers. In this area of study students examine the relationship between the Australian people and the Australian Constitution and the ways in which the Australian Constitution acts as a check on parliament in law-making. Students investigate the involvement of the Australian people in the referendum process and the role of the High Court in acting as the guardian of the Australian Constitution.

Unit 4 AOS 1

Unit 4

Area of study 1: Outcome 1

On completion of this unit the student should be able to discuss the ability of parliament and courts to make law and evaluate the means by which the Australian Constitution acts as a check on parliament in law-making.

To achieve this outcome the student will draw on key knowledge and key skills outlined in Area of Study 1.

Key knowledge

- Parliament and the Australian Constitution
- the roles of the Crown and the Houses of Parliament (Victorian and Commonwealth) in law-making
- the law-making powers of the state and Commonwealth parliaments, including exclusive, concurrent and residual powers
- the significance of section 109 of the Australian Constitution
- one High Court case which has had an impact on state and Commonwealth law-making powers
- factors that affect the ability of parliament to make law, including:
 - the bicameral structure of parliament
 - international pressures
 - the representative nature of parliament
- the means by which the Australian Constitution acts as a check on parliament in law-making, including:
 - the role of the High Court in protecting the principle of representative government
 - the express protection of rights

Unit 4 AOS 2

Unit 4

Area of study 2: Outcome 2

On completion of this unit the student should be able to explain the reasons for law reform and constitutional reform, discuss the ability of individuals to change the Australian Constitution and influence a change in the law, and evaluate the ability of law reform bodies to influence a change in the law.

Key knowledge

Constitutional reform

- reasons for constitutional reform
- the requirement for the approval of the Commonwealth Houses of Parliament and a double majority in a referendum
- factors affecting the success of a referendum
- the significance of the 1967 referendum about First Nations people and the 2023 referendum about an Aboriginal and Torres Strait Islander Voice.

Some thoughts

Some thoughts on the nature of the Constitution

The Australian Constitution is a compromise between central and regional power. Its purpose was to link colonies into a federation. The colonial structures of the state parliaments were left alone. Powers were altered but structures were not. Operational federalism in Australia is “more like a marble cake than a layer cake”. Defense, racial exclusivity and economics were the major forces promoting federation. The “marble cake” analogy is most clearly exemplified in shared (concurrent) powers e.g. industrial relations. This is particularly important in relation to moves to de-regulate the labour market.

The Commonwealth Constitution is fairly inflexible compared with the Victorian Constitution which is relatively flexible and can be altered by an Act of Parliament. In contrast, alterations to the Commonwealth Constitution require an Act of Parliament and a referendum. Only eight out of 43 attempts to alter the Commonwealth Constitution have been successful.

- Three times simultaneous election proposals have been defeated. In 1977, 62% of the population voted in favour but only in three states did they vote in favour, therefore the proposal failed. To be successful, a referendum proposal must be carried by a majority of voters and a majority of states (the double majority requirement).
- Without bi-partisan support (Labor and non-Labor together) a referendum proposal is unlikely to be successful.
- Twenty-three referendum proposals were designed to increase central power and only two succeeded. In comparison, there have been 19 “housekeeping” proposals and six have passed e.g. the mandatory retirement of federal judges at age 70. Voters are clearly less likely to support proposals to increase Commonwealth power.

Can the Constitution be changed?

The wording of the Constitution can only be changed by a referendum, the division of power can also be altered by High Court interpretation or by a voluntary transfer of power.

Referendums

Changing the Constitution by referendum

There is only one way in which the wording of the Constitution can be altered and that is by referendum as set out in s 128 of the Constitution itself. The process usually commences with legislation. A Bill for a referendum will be introduced in the House of Representatives. When that Bill is then passed by the Senate, the question is put to the people in a form which requires a “Yes” or “No” response. More than one question can be put to the people at the same time, each requiring a separate answer.

If the referendum receives the support of the majority of voters across the whole of Australia and is supported by the majority of voters in four of the six states, the Constitution will then be altered accordingly. The alteration may insert new words into the Constitution or delete words from the Constitution.

The 1967 referendum

The Constitution, in s 51 (xxvi), originally gave the Commonwealth Parliament power to make laws with respect to the people of any race “other than the aboriginal people in any State”. In 1967, the referendum proposal was that these words be deleted and that Section 127, which prevented Aboriginal people from being counted in the population, be completely deleted. When the votes were counted, 90.77% of people voted “Yes” and all six states also voted “Yes”. Thus, the two sections of the Constitution were altered. The double majority had been achieved. The Commonwealth Parliament could now make special laws for people of all races as a specific (and concurrent) power.

The 2023 referendum

The 1967 referendum changed the Constitution to give the Commonwealth Parliament the power to legislate in relation to people of the Aboriginal race. In 2023, a referendum was held to alter the Constitution to recognize the First Peoples of Australia by establishing an Aboriginal and Torres Strait Islander Voice to Parliament. Despite considerable advertising in support of the change, it was not carried as 60% of the population voted against the change.

The High Court's approach to interpreting the Constitution

It is the role of the High Court to interpret the Constitution. Sir Owen Dixon (a Justice of the High Court from 4 February 1929 to 17 April 1952, and Chief Justice from 18 April 1952 to 13 April 1964) took the view that the correct approach was one of “strict and complete legalism” one in which the court takes no account of anything other than legal argument – the law and precedent. (Dixon did not actually practice this. See the *Engineers Case* 1920). Although the High Court of Australia is not, unlike the United States Supreme Court, involved in the political arena, a move towards “judicial realism” has occurred over the past 30 years. Justice Lionel Murphy played a role in this change and this is best seen in relation to the external affairs power and implied rights.

A system of judicial review exists in Australia. A good example of this is the *Communist Party Dissolution Act 1950* which was struck down by the High Court as being contrary to the provisions of the Constitution.

High Court

Terminology

The Division of Powers is not the same as the Separation of Powers.

The Division of Powers refers to the split of powers of the Commonwealth and State parliaments as set out in the constitution:

- Specific – Powers written in the Constitution stated as Exclusive and Concurrent powers
- Exclusive – Powers which can be exercised only by the Commonwealth Parliament
- Concurrent – Powers which can be exercised by both the Commonwealth Parliament and State Parliaments but if there is inconsistency the Commonwealth law will prevail (See s 109 of the Constitution)
- Residual – Powers which can be exercised only by the State Parliaments

The Separation of Powers refers to a principle of the Australian parliamentary system and is a feature of democratic government. The powers of government are:

- Legislative – the parliament's power to make laws
- Executive – the ministry and departments' power to administer the laws
- Judicial – the courts' power to interpret and apply the laws

Each of these three arms of government should be separated from and independent of each other.

High Court cases interpreting the Constitution

High Court constitutional cases are useful as examples in a number of sections of the Study Design. Probably the most important reason to study constitutional cases is that they may show how the High Court can alter the division of powers between the Commonwealth and the states. High Court cases may set precedents which will bind all other courts in Australia. Constitutional cases also illustrate the process of statutory interpretation.

Victoria v The Commonwealth (1926)

Known as the Roads Case, this matter involved interpretation of Section 96 of the Constitution which allows the Commonwealth to “grant financial assistance to any State on such terms and conditions as it sees fit”. In 1926, the Victorian Government claimed that the Commonwealth could not use Section 96 to grant money to States on condition that the money be used to construct roads nominated by the Commonwealth. Victoria argued that since the Commonwealth had no power over road construction, any Act specifying such conditions was implying a power to the Commonwealth which it did not possess. The High Court rejected Victoria’s claim and declared that the Commonwealth Act, *The Federal Roads Act 1926*, authorising the grant was valid. The Commonwealth, therefore, gained considerable control over road construction despite that not being a specific power. The case illustrated how the Commonwealth may make inroads into the States’ residual powers by using “tied grants” under Section 96 of the Constitution.

Cases

R v Brislan (1935)

This was a case involving Dulcie Brislan who was prosecuted for refusing to purchase a broadcast listeners license. The High Court ruled that the Commonwealth Parliament had the power to impose and collect license fees. The Court ruled that wireless (radio) came under Section 51 (v) of the Constitution which gave the Commonwealth power to legislate on “Postal, telephonic, telegraphic and other like services”.

The judgment in Brislan widened the scope of Section 51 (v), expanded the Commonwealth's power in relation to electronic communication and set a precedent that led to the Commonwealth controlling television, satellite

communication, the internet – and things we haven't even thought of yet. See *Jones v The Commonwealth (1965)*.

Koowarta v Bjelke-Petersen (1982); State of Queensland v The Commonwealth (1982)

This case revolved around the validity of the *Commonwealth's Racial Discrimination Act 1975* which was passed as a result of the Commonwealth being a signatory to the 1965 International Convention on the Elimination of All Forms of Racial Discrimination.

In this matter, an Aboriginal tribal group and other Aboriginal people claimed that contrary to ss 9 and 12 of the *Racial Discrimination Act (Cth)* the Lands Minister of Queensland had refused to transfer Crown land to them.

The reason given was that there was a Queensland policy not to allow large areas of land to be given over for Aboriginal development in isolation. Section 9 of the Act makes it unlawful to do any act which discriminates “on the ground of race, colour, descent or national or ethnic origin”. Section 12 makes it unlawful to deal with land, housing, or other accommodation in circumstances where people are treated less favourably than other persons by reason of race, colour or national or ethnic origin.

The majority of judges held that all that was required to be within the power of Section 51 (xxix) – the external affairs power – was a Commonwealth signature and ratification of an international convention. Once this was done, as it had been in 1965, the Commonwealth was free to make domestic legislation such as the *Racial Discrimination Act*. The legislation was therefore valid and applied to the Queensland Government.

The judgment in Koowarta widened the external affairs power such that if Australia signs an international treaty in exercise of the external affairs power and then legislates on the matter of that treaty then that Commonwealth legislation will be valid. See *Commonwealth v State of Tasmania (1983) (Tasmanian Dams Case)*.

For other cases involving use of the external affairs power, see *The King v Burgess; ex parte Henry (1936)* and *Tasmania v The Commonwealth (1983)*.

Cases(Cont.)

Australian Capital Television Pty Ltd v The Commonwealth (No 2) (1992)

Australian Capital Television Pty Ltd challenged the validity of changes to the Broadcasting Act 1942 effected by the Political Broadcasts and Disclosure Act 1991. The 1991 legislation-imposed bans on radio and television advertising for federal, state and local government elections.

The High Court held that the 1991 legislation was invalid as there was an implied right of freedom of communication on political matters.

The High Court determined that ss 7 and 24 of the Constitution, which state that the Senate and House of Representatives are to be elected by the people, requires the voters to be able to be fully informed about the issues.

Justice McHugh stated, "The right of freedom of communication derived from ss 7 and 24 of the Commonwealth Constitution. . . is a paramount right given for the limited purpose of enabling the people of the Commonwealth to choose their representatives in the Federal Parliament. Such power as the Commonwealth has is subject to and not superior to the right of freedom of communication which ss 7 and 24 confer".

Theophanous v Herald and Weekly Times Limited (1994)

In this case, it was held that the implied right was a good defense to an action in defamation.

Lange v Australian Broadcasting Corporation (1997)

In this case, the High Court restricted the application of the implied right to Australian political situations and affirmed that the implied right was not a general guarantee of free speech.

Coleman v Power (2004)

The High Court held that the implied right protected a protester who was charged with offensive behaviour for distributing leaflets regarding police corruption which contained the words, "Kiss my arse, you slimy lying bastards".

Attorney-General for South Australia v Corporation of the City of Adelaide & Ors (2013)

The High Court upheld the validity of a by-law that restricted preaching, canvassing, haranguing and handing out printed matter in the Rundle Street Mall and found that preventing obstruction in the use of roads was a legitimate basis on which to limit the freedom of political communication and that the by-law was drafted in such a manner that was appropriate and adapted to achieving this aim in a manner compatible with representative democracy. The offenders were preaching about religious and political matters.

Cases(Cont.)

Comcare v Banerji (2019)

The High Court unanimously held that the implied right did not protect a member of the Australian Public Service who, contrary to the Australian Public Service Code of Conduct, posted online articles of a political nature and was subsequently dismissed from the Service for failing to act in an apolitical, impartial and professional manner.

Liberty Works Inc. v Commonwealth of Australia (2021)

An application was made to the High Court which claimed that the *Foreign Interference Transparency Scheme Act 2018* (Cth) limited the implied freedom of political communication.

The majority ruled that it did not.

Justice Steward, while agreeing with the majority as to the outcome of the case, and on the application of the structured proportionality approach, expressed serious reservations as to whether the implied freedom really exists as a necessary implication of the text and structure of the Constitution.

There is a possibility that this reasoning opens the door to a future challenge to the existence of the implied freedom. In the meantime though, what is clear from *Liberty Works* is that how the High Court should approach the implied freedom will remain a subject of significant debate.

Voluntary Surrender of Power

Voluntary Surrender of Power

On rare occasions, states have agreed to a voluntary surrender of powers to the Commonwealth. This may be done under the provisions of Section 51 (xxxvii) of the Constitution: "Matters referred to the Parliament of the Commonwealth by the Parliament or Parliaments of any State or States, but so that the law shall extend only to States by whose Parliaments the matter is referred, or which afterwards adopts the law".

The process requires the state to legislate to surrender power and the Commonwealth to legislate to exercise the surrendered power.

Voluntary surrender is not a common occurrence, but it did take place, beginning in 1986 when the Victorian Parliament referred its power over children from de facto relationships (where parents are not married) to the Commonwealth Parliament. The Commonwealth Parliament amended the Family Law Act to give the Family Court of Australia jurisdiction to deal with matters affecting all children where previously it could only hear matters relating to children whose parents were married. In 2004, the same process gave the Family Court the jurisdiction to deal with matters relating to the division of property and other financial matters which can arise when a de facto relationship ends.

As a result, a uniform, single jurisdiction was created throughout Australia.

The Division of Powers

THE CONSTITUTION DIVIDES LAW-MAKING POWERS BETWEEN THE COMMONWEALTH AND THE STATES

