



The People and the Australian Constitution

Unit 4 Legal Studies 2024 - 2028



A close-up, slightly angled view of the Australian flag, focusing on the dark blue field with white stars. The stars are arranged in a pattern, with some showing more detail than others. The bottom left corner shows the red and white stripes of the flag. The background is a deep blue with a fine, woven texture.

The Australian Constitution establishes Australia's parliamentary system and provides mechanisms to ensure that parliament does not make laws beyond its powers.

In Unit 4 of Legal Studies, students examine the relationship between the Australian people and the Australian Constitution and the ways it acts as a check on parliament in law-making. Students also 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.

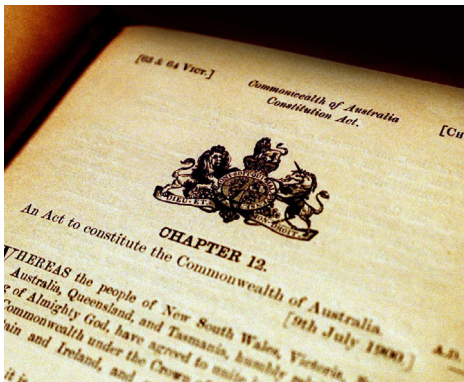
The Australian Constitution

The Australian Constitution was created as a compromise between central (Commonwealth) power and regional (state) power.

Its purpose was to unite the colonies into a federation, while allowing the existing state parliaments to continue operating. Although powers were redistributed between the Commonwealth and the states, the structures of the state governments were largely unchanged.

Australia's federal system is often described as a "marble cake" rather than a "layer cake", because powers frequently overlap rather than being clearly separated. This overlap is most obvious in concurrent powers, such as industrial relations.

The Commonwealth Constitution is relatively inflexible compared with the Victorian Constitution, which can be changed by an Act of Parliament. In contrast, changing the Commonwealth Constitution requires both an Act of Parliament and a successful referendum.



The Division of Powers

The Constitution divides law-making powers between the Commonwealth and the States.

The Division of Powers can only be changed in 3 ways:



A Referendum



High Court Interpretation



Voluntary Transfer

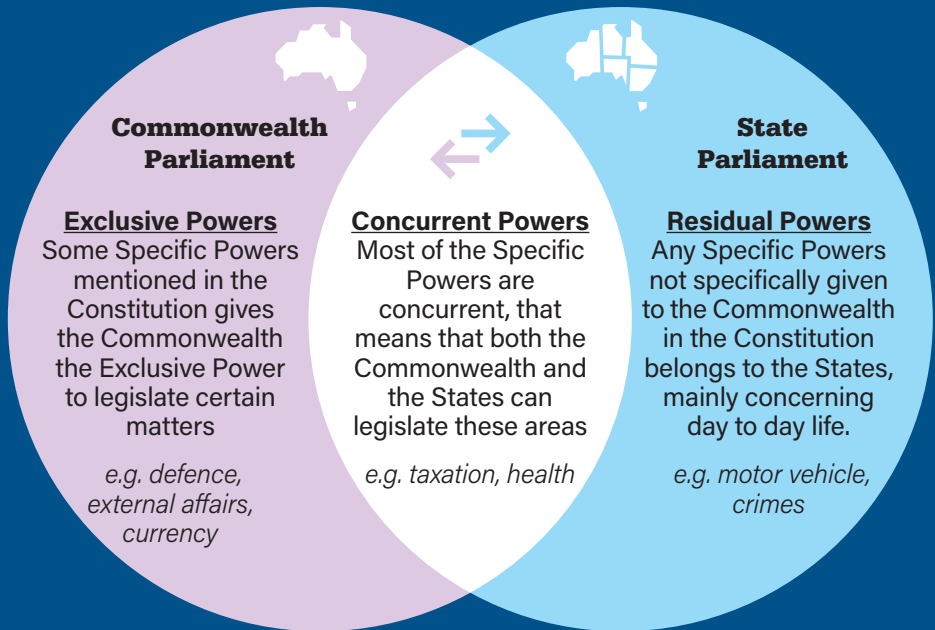
The Separation of Powers

A principle of the Australian parliamentary system and is a feature of democratic government.

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

The Constitution

Specific Powers are written in the Constitution for the authority to legislate particular matters. These powers are to ensure a balance federal and state law-making authority.



Section 109

When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid.

The **Executive** has power to administer the laws and manage the business of government.



Referendums

A referendum is a process by which Australian voters decide whether the Constitution should be changed by voting “Yes” or “No” on a proposed amendment. Sometimes, more than one question can be asked at the same time, with voters required to answer each question separately. If this happens, the Constitution is changed by adding, removing, or altering words.

The Parliament

A bill with the proposed change to the Constitution is introduced and passed (by absolute majority) by both houses of Parliament.



The People

Information is given to the people explaining the proposed change. All eligible voters vote either ‘Yes’ or ‘No’ in the referendum.

A double majority:

Majority of votes in the whole of Australia vote ‘Yes’ + Majority of states (4/6) vote ‘Yes’



The Governor-General

Royal assent is given. The Constitution is changed



Only

8/45

referendum attempts have succeeded, showing how difficult constitutional change is in Australia.

0/3

referendums to synchronise House and Senate elections succeeded, including in 1977 despite 62% national support.

2/23

referendum proposals aimed at increasing Commonwealth power have been successful.

6/19

referendums proposing minor or technical changes to the Constitution have been approved by voters.



The 1967 Referendum

Before 1967, section 51 (xxvi) allowed the Commonwealth to make laws for all races except Aboriginal people, and section 127 excluded Aboriginal people from the population count. The 1967 referendum proposed removing these provisions and was approved by 90.77% of voters and all six states, meeting the double majority. As a result, the Constitution was amended to give the Commonwealth Parliament power to make laws for Aboriginal people.



The 2023 Referendum

The 1967 referendum allowed the Commonwealth to make laws relating to Aboriginal people. In 2023, another referendum was held to change the Constitution to recognise the First Peoples of Australia by creating an Aboriginal and Torres Strait Islander Voice to Parliament. Despite strong public campaigning in favour of the proposal, it failed because around 60% of voters voted "No", meaning the double majority was not achieved.

The High Court

The High Court of Australia cannot change the wording of the Constitution, but it can change its meaning through interpretation, which may alter the division of powers. For much of the 20th century, the Court followed judicial conservatism, particularly under Chief Justice Sir Owen Dixon, who supported strict legalism and believed judges should interpret the law narrowly and leave law reform to parliament.

Over the last 30 years, the Court has also adopted judicial activism, where judges interpret the Constitution more broadly by considering its purpose and social impact, and are more willing to reinterpret or overturn precedents.

The High Court also exercises judicial review, allowing it to declare laws invalid if they are inconsistent with the Constitution. For example, in *Roach v AEC* (2007), the Court struck down a law banning all prisoners from voting because it breached sections 7 and 24 of the Constitution, which require parliament to be “directly chosen by the people.”

High Court

Judicial Review

declares laws invalid if unconstitutional



Judge

Judicial Conservatism

narrow interpretation,
follows precedent

+

Judicial Activism

broad interpretation,
reinterprets precedents



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.



1926 – Victoria v The Commonwealth

The Roads Case was about section 96 of the Constitution, which lets the Commonwealth give money to the states with conditions attached. Victoria argued that the Commonwealth could not require road funding to be spent on roads chosen by the Commonwealth, because road building was a state responsibility. The High Court rejected this argument and upheld the *Federal Roads Act 1926*. The case showed that the Commonwealth can use tied grants to influence areas that normally belong to the states.



1935 – R v Brislan

This case involved Dulcie Brislan, who was prosecuted for not buying a radio listeners licence. The Court decided that wireless radio services fell under section 51(v) of the Constitution, which gives the Commonwealth power over “postal, telephonic, telegraphic and other like services.” The decision expanded Commonwealth power over communication technology and later supported federal control over television, satellites and the internet.

High Court cases interpreting the Constitution (Cont.)



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

This case tested whether the Commonwealth's *Racial Discrimination Act 1975* was valid. Aboriginal applicants argued that the Queensland Government acted unlawfully by refusing to transfer land to them because of race. Queensland defended its decision by saying it had a policy against setting aside large areas of land for Aboriginal development.

The High Court held that the *Act* was valid under the external affairs power in section 51(xxix). Because Australia had signed and ratified an international treaty against racial discrimination, the Commonwealth could pass laws to carry out that treaty. The decision expanded the external affairs power and was later confirmed in the *Tasmanian Dams Case*. Other important external affairs cases include *R v Burgess*; *Ex parte Henry* and *Tasmania v Commonwealth*.



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

This case challenged a federal law that banned political advertising on radio and television during election periods. The High Court held that the law was invalid because it breached the implied freedom of political communication.

The Court said sections 7 and 24 of the Constitution require Parliament to be “directly chosen by the people.” For this to happen, voters need access to political information. Justice McHugh explained that political communication is necessary for representative democracy, and Commonwealth power must operate subject to this freedom.



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

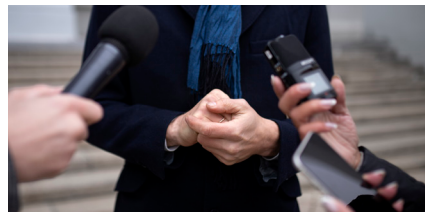
The High Court decided that the by-law was valid. It restricted activities such as preaching, approaching people, making loud public speeches and handing out printed material in Rundle Street Mall.

The people involved were speaking about religious and political issues. The Court found that the restrictions were allowed because they were designed to prevent people from blocking roads and public spaces. The by-law limited political communication only as much as was reasonably necessary and was still consistent with representative democracy.



2019 – Comcare v Banerji

The High Court held that the implied freedom of political communication did not protect a public servant who posted political material online in breach of the APS Code of Conduct. The Court found that public servants must act in an apolitical, impartial and professional way. Her dismissal was therefore lawful.



2021 – Liberty Works Inc. v Commonwealth of Australia

This case challenged the *Foreign Interference Transparency Scheme Act 2018* for limiting the implied freedom of political communication. The High Court upheld the *Act*, but Justice Steward questioned whether the implied freedom is truly supported by the Constitution. The case confirms the freedom remains recognised, though its basis is still debated.

Voluntary Surrender of Power

On rare occasions, states voluntarily transfer powers to the Commonwealth under s51 of the Constitution, allowing state parliaments to refer specific matters to the Commonwealth to achieve national consistency in areas where uniform laws are desirable, while maintaining state choice and avoiding constitutional amendment.

A key example began in 1986, when Victoria referred powers over children from de facto relationships to the Commonwealth, leading to amendments to the *Family Law Act*. Other states later chose to adopt the law, resulting in a national system. In 2004, this was extended to property and financial matters, creating a uniform national system for de facto family law matters.

**State
Parliament**

Passes legislation to voluntarily refer a specific power to the Commonwealth



**Commonwealth
Parliament**

Passes legislation using the referred power, applies the law only to referring/adopting states.



Key knowledge of Unit 4

Use this to test your understanding of the key knowledge. You can rate how well you understand the content to see which lessons or chapter you may need to revisit.

AOS 1: The people and the law-makers

My understanding

I can explain the role of parliament and the Australian Constitution in law-making, including the roles of the Crown and the Houses of Parliament at both Victorian and Commonwealth levels, the division of law-making powers (exclusive, concurrent and residual), the significance of section 109, and one High Court case that has affected state and Commonwealth law-making powers.

I don't know	Getting there	I can teach this

Go to Chapter 10 for Revision

I can explain the factors that affect parliament's ability to make law and the ways the Constitution limits parliament, including the bicameral structure of parliament, international pressures, the representative nature of parliament, the role of the High Court in protecting representative government, the separation of legislative, executive and judicial powers, and the express protection of rights.

I don't know	Getting there	I can teach this

Go to Chapter 10 for Revision

I can explain the role of the Victorian courts and the High Court in law-making and their relationship with parliament, including the reasons for and effects of statutory interpretation, the features of the doctrine of precedent (binding and persuasive precedent, reversing, overruling, distinguishing and disapproving), factors affecting courts' ability to make law (precedent, judicial conservatism and activism, costs, time and standing), and the interaction between courts and parliament through parliamentary supremacy, court influence, codification and abrogation of common law.

I don't know	Getting there	I can teach this

Go to Chapter 10 for Revision

I can explain why law reform occurs and how it can be influenced, including reasons for law reform, the ways individuals and groups can influence reform (such as petitions, demonstrations and the use of the courts), the role of the media and social media, the role and influence of the Victorian Law Reform Commission, one recent VLRC inquiry into the civil or criminal justice system, and the role and influence of Royal Commissions or parliamentary committees, including one recent Royal Commission or parliamentary committee inquiry.



Go to Chapter 10 for Revision

I can explain how and why the Australian Constitution can be reformed, including reasons for constitutional change, the requirement for Commonwealth parliamentary approval and a double majority referendum, factors that affect the success of a referendum, and the significance of the 1967 referendum regarding First Nations people and the 2023 referendum on an Aboriginal and Torres Strait Islander Voice.



Go to Chapter 10 for Revision

[63 & 64 Vict.]

*Commonwealth of Australia
Constitution Act.*



Act to constitute the Commonwealth of Australia.

CHAPTER 12.

[9th July 1900.]

WEAS the people of New South Wales, Victoria, South
Australia, Queensland, and Tasmania, humbly relying on the
mighty God, have agreed to unite in one indissoluble
Commonwealth under the Crown of the United Kingdom of
Great Britain and Ireland, and under the Constitution
expedient to provide for the
Australian Commonwealth.

