THE PEOPLE AND THE AUSTRALIAN CONSTITUTION

Notes for Students of Legal Studies

Victoria Law Foundation

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The People and the Australian 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.

Outcome 1

On completion of this unit the student should be able to discuss the significance of High Court cases involving the interpretation of the Australian Constitution, and evaluate the ways in which the Australian Constitution acts as a check on parliament in law-making. To achieve this outcome the student will draw on key knowledge outlined below.

Key knowledge

1. the roles of the Crown and the Houses of Parliament (Victorian and Commonwealth) in law- making
2. the division of constitutional law-making powers of the state and Commonwealth parliaments, including exclusive, concurrent and residual powers
3. the significance of s 109 of the Australian Constitution
4. the means by which the Australian Constitution acts as a check on parliament in law-making, including:
    - the bicameral structure of the Commonwealth parliament
    - the separation of the legislative, executive and judicial powers
    - the express protection of rights
    - the role of the High Court in interpreting the Australian Constitution
    - the requirement for a double majority in a referendum
5. the significance of one High Court case interpreting ss 7 and 24 of the Australian Constitution
6. the significance of one referendum in which the Australian people have protected or changed the Australian Constitution
7. the significance of one High Court case which has had an impact on the division of constitutional law-making powers
8. the impact of international declarations and treaties on the interpretation of the external affairs power.

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". Defence, 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 42 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.

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. We shall look at each and identify examples.

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 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 practise 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.

Terminology

Before we go any further, it is important to clarify terms we use.

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.

1. 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.

2. R v Brislan (1935)

This was a case involving Dulcie Brislan who was prosecuted for refusing to purchase a broadcast listeners licence. The High Court ruled that the Commonwealth Parliament had the power to impose and collect licence 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).*

3. 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).

4. 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 upon which they are called to vote. Anything that prevents them from being informed voters is, therefore, contrary to the spirit of ss 7 and 24 of the Constitution and is thus unlawful.

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”.

a. Theophanous v Herald and Weekly Times Limited (1994)

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

b. 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.

c. In 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”.

Voluntary Surrender of Power

On rare occasions, states have agreed to a voluntary surrender of particular 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

ALSO CALLED 'FEDERAL PARLIAMENT' OR 'AUSTRALIAN PARLIAMENT'

COMMONWEALTH PARLIAMENT

HAS

Specific Powers

THESE ARE THE ONLY AREAS ON WHICH THE COMMONWEALTH CAN MAKE LAWS. IT CANNOT MAKE LAWS ON ANY TOPIC NOT ALLOCATED TO IT IN THE CONSTITUTION

- MAINLY IN S51
- 39 HEADS OF POWER
- THESE WERE INTENDED TO BE FEW IN NUMBER

Exclusive Powers

A VERY SMALL NUMBER OF THE COMMONWEALTH SPECIFIC POWERS ARE EXCLUSIVE I.E. ONLY THE COMMONWEALTH CAN LEGISLATE ON THESE MATTERS.

E.G. THE STATE CANNOT MAKE LAW ON THE FOLOWING EXCLUSIVE POWERS : DEFENCE, CURRENCY, EXTERNAL AFFAIRS

Concurrent Powers

MOST OF THE SPECIFIC POWERS ARE CONCURRENT. THAT MEANS THAT THE COMMONWEALTH AND THE STATES CAN LEGISLATE OIN THESE AREAS. E.G. TAXATION, HEALTH.

NOTE : S109 STATES THAT WHERE A COMMONWEALTH LAW AND A STATE LAW ARE INCONSISTENT, THE COMMONWEALTH LAW PREVAILS.

S109 'MAKES CONCURRENT POWERS POTENTIALLY EXCLUSIVE' E.G. MARRIAGE, INCOME TAX

'ALL EXCLUSIVE POWERS ARE SPECIFIC, BUT NOT ALL SPECIFIC POWERS ARE EXCLUSIVE' (SOME ARE CONCURRENT)

STATE PARLIAMENT

Residual Powers

- ANYTHING NOT SPECIFIC I.E. NOT GIVEN TO THE COMMONWEALTH IN THE CONSTITUTION BELONGS TO THE STATES. THE COMMONWEALTH CANNOT LEGISLATE ON THESE POWERS.
  E.G. MOTOR VEHICLE LAW
  ENVIRONMENTAL ISSUES
  DEFAMATION
- THESE ARE THE BULK OF THE LAW–MAKING POWERS. IT WAS INTENDED THAT THE STATE RETAIN MOST OF THE POWERS THEY ALREADY POSSESSED
- INCLUDES MOST OF THE LAW CONCERNING THE DAY TO DAY LIFE OF THE COMMUNITY

THE DIVISION OF POWER CAN BE CHANGED IN 3 WAYS

- A REFERENDUM — S128. A REFERENDUM ACTUALLY CHANGES THE WORDING OF THE CONSTITUTION VERY FEW OF THESE SUCCEED
- HIGH COURT INTERPRETATION
  - CONSTITUTIONAL DISPUTES ARE SETTLED BY THE HIGH COURT OF AUSTRALIA (HCA)
  - THE HCA **CANNOT** CHANGE THE WORDING OF THE CONSTITUTION, BUT CAN CHANGE THE MEANING. ITS INTERPRETATION CAN CHANGE THE DIVISION OF POWER
- VOLUNTARY TRANSFER
  - THE STATES CAN HAND THEIR POWERS TO THE COMMONWEALTH, BUT NOT THE OTHER WAY ROUND