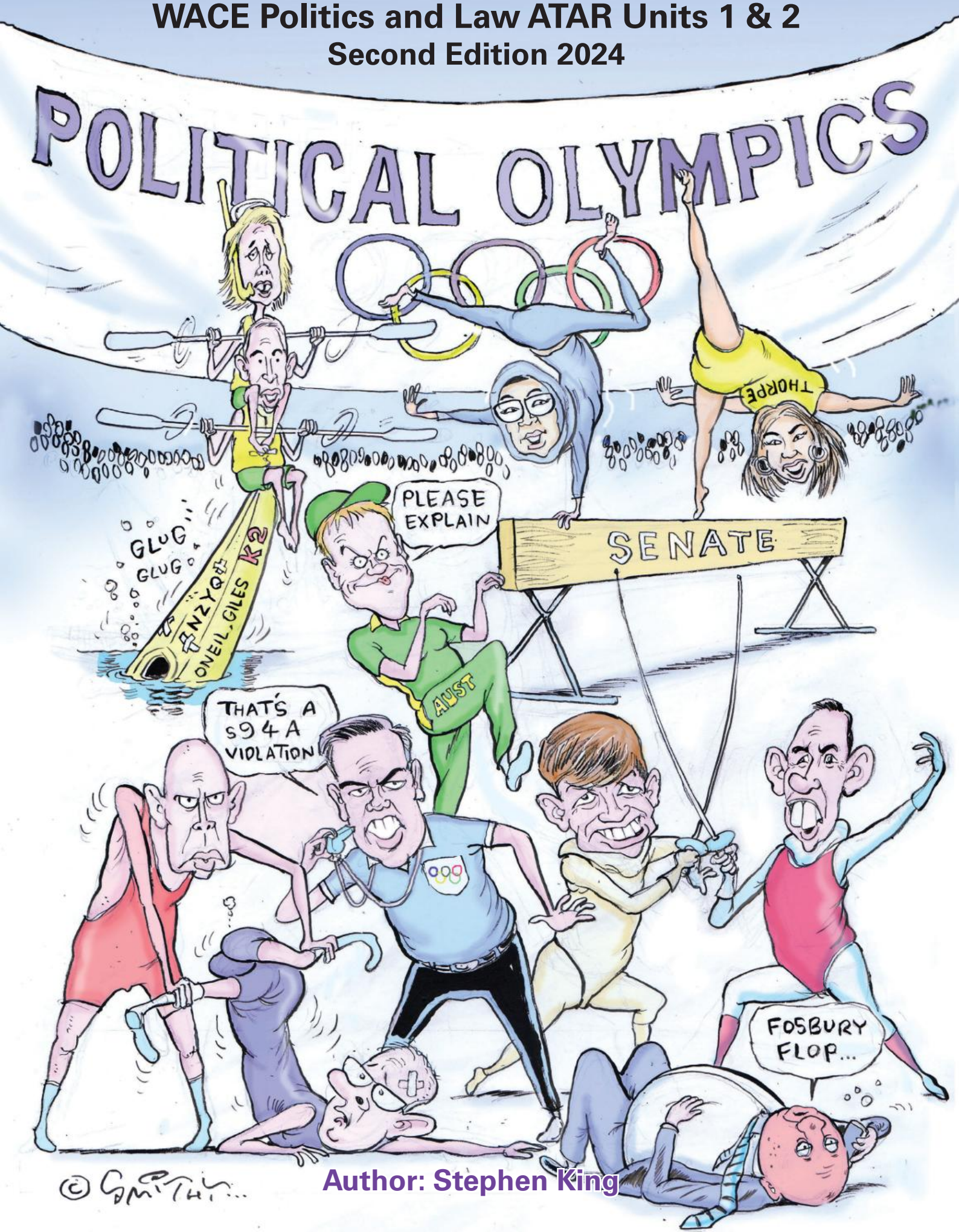
DIGITAL VERSION

Democracy and Justice

WACE Politics and Law ATAR Units 1 & 2

Second Edition 2024



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PLEAWA is a not-for-profit organisation that exists to foster the development of Politics and Law & Civics and Citizenship as a subject for students and teachers. It aims to promote an interest in, the teaching, research and analysis of the Australian political and legal system as well as other countries. We seek to extend the knowledge and skills of students and teachers through publications and the conduct of seminars on topical issues or events. This textbook is an important step towards facilitating these goals and accordingly PLEAWA gratefully acknowledges the contributions of the following persons in the development of this textbook:

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Preface

Democracy and Justice: 2nd Edition (2024) has been written as a student textbook to address the syllabus content of the Western Australian Politics and Law ATAR course in senior schools from 2024. This text is designed to facilitate the teaching and learning for Year 11 study of Unit 1 & Unit 2 principles, knowledge and skills.

The text provides the opportunity to learn the theoretical and practical operation of the Australian and American political and legal systems. Evidence and examples, including contemporary and recent examples, have been utilised to demonstrate principles and knowledge as well as model the importance to students of applying their knowledge to particular contexts. At all times we have endeavoured to replicate the standards reasonably expected of a successful student in the course.

The chapters and topics are arranged in line with the syllabus as accredited by the School Curriculum and Standards Authority. Syllabus points are emphasised on the chapter cover pages. The inclusion of relevant pictures, cartoons, graphics, diagrams and tables enhance and support the content to create a visually appealing text.

Each chapter is supplemented by a summary and exam practice questions. Exam practice questions have been deliberately designed and scaffolded to reflect, in so far as possible, the assessment types and WACE examination structure. Subsequently, each chapter's exam practice questions reflect the style, expected level of difficulty and number of questions as is found in the WACE examination. Furthermore, these exam practice questions will provide ample opportunity to review the principles and knowledge of the chapter as well as practice for the WACE examination. The 2nd edition includes a separate Companion Guide covering Units 1 & 2, where students can find a variety of case studies on the three arms of government: legislative, executive and judiciary.

The Political and Legal Educators Association of WA recommends this textbook to both students and teachers of the Year 11 Politics and Law ATAR course in WA. Feedback from the membership has been instrumental in providing guidance for the production of the 2nd Edition (2024).

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Words written in **bold purple** print are important words that are defined in the glossary.

Words written in **bold black print** are important words that are being emphasized.

Background Information in grey boxes – content is not examinable – the information is there to extend your knowledge. You can skip these boxes if you like.

Examples – give support to statements made in the text about a certain topic. Use of examples is essential to a good exam performance.

The ***Looking Ahead*** symbol indicates that the subject under discussion is covered in more detail in Year 12 (in Units 3 or 4).

The **Noteman** symbol indicates more detailed information on the subject under discussion is provided later in the chapter in this text (in Units 1 or 2)

The **Megaphone** symbol indicates a really important point is being made – something you should remember.

Case Studies are found in a separate book called the **Companion Guide to Democracy & Justice**. For example: '**See CS1**' means go to the Companion Guide to find Case Study 1.

Sources: all source information is found at the end of each chapter.

CHAPTER 1

Democracy and rule of law

Essential understandings

- **Rule of law, sovereignty of parliament, representative government, responsible government, constitutionalism, judicial independence.**

Syllabus points

- **Operating principles of a liberal democracy.**
  - **equality of political rights**
  - **majority rule**
  - **political participation**
  - **political freedom**

Democracy

Democracy is a form of **government** where people govern themselves. It originated in ancient Athens in the 5th century BCE. The people of ancient Athens overthrew a tyrant and decided that **citizens** would govern themselves.

Ancient societies were usually governed non-democratically by monarchs, emperors, tyrants, aristocrats, oligarchs[1] or other elite **individuals** or groups. Some modern political and legal systems are similar. They are collectively called autocracies.

Sovereignty is the right to govern a territory and its people. Sovereignty is **vested** in rulers. It is the source of political and legal **power**, so who is vested with sovereignty is essential when thinking about political and legal systems.

In democracies, sovereignty is vested in the people – so the people rule themselves. In autocracies, sovereignty is claimed by monarchs, dictators, or others.

For many people, 'democracy' means **majority rule**. But how do we know what the majority wants or wills? In ancient Athens, the majority expressed its will through direct participation in government. Citizens – who could only be Athenian-born men – gathered and voted in the *Ecclesia* (a citizen's assembly) to make **laws** and choose officials. They made decisions by voting on matters like going to war or raising taxes. Athenian democracy was **direct democracy** because all citizens participated. Direct democracy only works with small numbers of participating citizens. Strict qualifications for Athenian citizenship kept the number of citizens within workable limits. Athenian citizenship excluded women, foreigners, and slaves.

Ancient Athenian-style democracy is unacceptable today because it withheld political rights and freedoms from the bulk of the population, excluding them from participation in government. Modern democracies vest sovereignty in millions of citizens, including women and naturalised migrants. Full democracies[2] function according to liberal values – including the **operating principles of liberal democracy**. **Liberalism** is the idea that all people have basic **entitlements**, including political and legal rights and freedoms. By today's standards, Athenian democracy was an **illiberal democracy**.

1 Oligarch derives from the term "oligarchy" – a system of government in which a small number of people maintain power for example, Russia, China & Iran

2 The Economics Intelligence Unit (EUI) ranks the world's government according to the operating principles of liberal democracy. Judged by EUI's Democracy Index, government systems are either full democracies, flawed democracies, hybrid regimes or authoritarian regimes.

Full democracy is only possible through liberal democracy.

The operating principles of liberal democracy include majority rule, **equality of political rights**, **political freedoms** and **political participation**. Direct democracy is incapable of functioning by these principles, so another form of democracy is needed for modern liberal democracies. **Representative democracy** allows millions of citizens to enjoy equal political rights and freedoms to participate directly and indirectly in their government. There are several forms of representative democracy including **constitutional monarchies** like Australia and the United Kingdom and **democratic republics** like the United States of America.

Today, the political organisation of the world is based on **nation-states**. Nation-states possess sovereignty. Many countries vest national sovereignty in their citizens – these are representative democracies like Australia. Others do not – they are non-democracies or autocracies. *See Background Information: Sovereignty and the nation-state.*

Unit 1 explores how Australia's democracy achieves the operating principles of liberal democracy. **Elections**, representative law-making bodies, accountable governments, **pressure groups**, political parties and other features of Australian liberal democracy form part of Unit 1. Other aspects of democracy will be studied too. These include the **rule of law**, the doctrine of the **separation of powers**, the sovereignty of **parliament**, the **division of powers**, **representative government**, **responsible government**, **constitutionalism**, **federalism** and **judicial independence**.

Figure 1.1 — The Pnyx with the speaker's platform, the meeting place of the people of Athens.

Background Information: Sovereignty and the nation-state

Who exercises a nation-state's sovereign power? The answer to this question determines whether a country is a democracy or an **autocracy**.

The concept of the **nation-state** needs to be understood before examining the Australian **system of government** in Unit 1.

Nation-states are independent political units that possess the following:

- a territory;
- a population; and
- an organised political system.

Nation-states have sovereignty, a crucial concept in this course. There are approximately 195 nation-states in the world. The nation-state has been the dominant form of political organisation since the end of the great empires following World War 2.

Sovereignty is the 'authority to govern'. Nation-states have absolute rights to govern within the borders of their territory and over their population, free from outside interference. Nation-states cannot interfere in other states and will fiercely defend their right to govern themselves – with force if necessary. Ukraine's military defence against Russia's invasion of its territory in February 2022 is a contemporary example.

When modern China was founded in 1949, its leaders declared, "the Chinese people have stood up" - a clear assertion of Chinese sovereignty. In late 2017, commenting about alleged Chinese interference in Australian affairs, then-Australian **Prime Minister** Malcolm Turnbull paraphrased the Chinese declaration, saying, "the Australian people stand up".[3]

Nation-states cooperate in international organisations. The United Nations (UN) is the most well-known example. Even the UN cannot interfere in the sovereign affairs of its member nation-states.

To govern, nation-states use power. Power is the ability to influence or coerce people to behave in ways they may not choose. Laws are how nation-states use power. **Law** controls people's behaviour and is backed by the nation-state's coercive force – its police. Law carries the weight of **sanction**. Those disobeying the law can be sanctioned by **courts**, which are part of the state system. Law applies universally within a nation-state's territory to the entire population – including foreigners within its borders.

■ Figure 1.2 — Commonwealth of Australia, including Australia's territorial claim in the Antarctic.

Nation-states have governing **institutions** that make, enforce, and interpret laws. They have bodies like parliaments, governments, and courts to perform these functions. The governing institutions of a nation-state collectively make up its system of government. Systems of government have parts and processes arranged in a structure that works together to achieve 'government'. Chapter 2 examines the structure of Australia's political and legal system.

In summary, Australia is one of the world's 190+ nation-states. It possesses sovereignty and a system of government that exercises power through laws that apply universally to Australia's territory and people.

Representative government

Representative democracy creates representative government.

People, or more accurately, citizens, are sovereign in democracies. In direct democracies, people exercise their sovereignty personally. In representative democracies, elected bodies exercise **popular sovereignty**. These bodies are accountable to citizens for **the conduct and performance of government.**

Elected representative bodies are called parliaments, congresses, or assemblies. The **Commonwealth Parliament** is Australia's nationally elected representative body. There are state and territory parliaments too. Parliaments

3 "'The Australian People Stand up': PM Defiant over Chinese Political Interference | SBS News." https://www.sbs.com.au/news/article/the-australian-people-stand-up-pm-defiant-over-chinese-political-interference/0yeq88lrd (April 12, 2023).

are the most important part of representative democracies because they embody popular sovereignty and express majority rule. Thus, parliaments are sovereign too. **Parliamentary sovereignty** means parliament is superior to all other bodies within the political and legal system, such as courts and governments.

Parliaments perform the essential functions of representative government. They:

- represent the people who elect them, and
- make laws.

And in some systems of government, including Australia's, they:

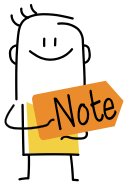
- form the government and hold it to account between elections.

Elected parliamentarians represent many tens of thousands of citizens each. Parliamentarians are called **representative**s and gather in parliament during its sessions. When not in parliament, they are often in their **electorates** – that is the geographical areas they represent – and available to their **constituents**. Constituents are members of the public who live in the electorate represented by their parliamentarians. The Commonwealth Parliament is located in Canberra. Currently, 227 elected members of the Commonwealth Parliament represent approximately 16 million voting Australians – called **electors** – in 151 electorates, six **states** and two territories. Electors are Australians with voting rights. Voting rights are an example of political rights that belong to citizens.

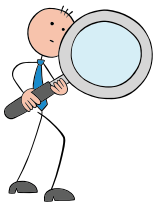
Members of parliament are also called **legislators**. Legislators are lawmakers. Because legislators represent a majority of electors, the laws made by parliament represent the **majority**'s will. In this way, the people live under laws made by their chosen parliaments.

Elected officials form governments to carry out laws made by legislators. Governments may be directly elected or formed by a representative parliament chosen by electors, depending on the type of representative democracy. Democratic governments implement majority rule because the people choose them – directly or indirectly – to implement laws made by representative **legislatures**.

It is important to note that elections are an absolute necessity for representative government. They are how citizens choose parliaments and governments. They also allow the people to hold parliaments and governments accountable. **Accountability** ensures elected officials remain responsible to electors. Free, fair, and regular elections are essential for a truly representative government in a liberal democracy. Therefore, the choice of **electoral systems** and how elections are run are critical. Electoral systems are studied in Unit 2.



Free and **fair elections** depend upon the broadest possible electoral **franchise**. The Australian electoral franchise includes all citizens over 18 years of age, with few exceptions. Australia's population is approximately 24 million, of which about 16 million are electors. A broad franchise maximises political participation by excluding the minimum number of people – and **compulsory voting** enhances political participation further still. A broad franchise also ensures majority rule by making parliaments more representative and governments responsible to citizens. The more people that vote in a liberal democracy, the more legitimate the majority will is expressed in the exercise of political power. They also give parliaments and governments a democratic authority to make and carry out laws.

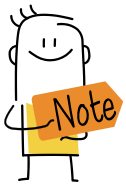


Looking ahead: Electoral systems

Electoral systems are studied in Unit 2 but also make up a significant part of Unit 4 when students learn about how parliament is held to account.

Citizens need free access to political information to make informed choices when voting. Political freedoms facilitate the communication of political information in a liberal democracy. Political freedoms include speech and the press (or media). They allow people to express ideas and communicate them to others without censorship. Ideas can be publicly debated. Debating different views and perspectives through the media, challenges ideas. The public contest of ideas allows bad ideas to be rejected and good ones promoted. Political freedoms also enable public criticism of parliament and government – which is essential for accountability. Non-democratic systems silence criticism of the government. Unit 1 explores non-democratic systems of government.

In a liberal democracy, people may participate in representative government by voting in elections. However, some are motivated to participate more actively. Joining political groups, such as political parties or pressure groups, provides avenues for greater participation for politically engaged citizens. Citizens can participate in electoral democracy more effectively by working collectively through political parties and pressure groups. Political freedoms provide



free access to these opportunities. The freedoms of association and assembly are examples. **Political representation** and participation by individuals, political parties and pressure groups in elections are studied in Unit 2.

Political rights and freedoms greatly enhance **popular participation** in representative democracy. The higher the level of popular participation, the more vibrant and healthier a representative government, like Australia's, will be.

Political rights and freedoms should be universal and equal in a liberal democracy.

The structure of representative government

Parliament and governments are two branches in a system of government. The courts are the third branch. Courts are not representative. Parliaments are directly elected. Governments may be directly elected or chosen by a representative parliament – that is indirectly elected. **Judges** are not elected; the government appoints them. Therefore, only two government branches represent popular majorities. Fig 1.3 illustrates the three branches of government and how they are representative.

Liberal democracy

Liberal democracy is more than simply representative government. Liberalism checks majority rule by insisting on respect for the rights and freedoms of everyone, including those in the minority. Modern societies are plural and diverse. Some countries, like Australia, are multicultural and may have indigenous nations. Pluralism is the acceptance of many views, **ideologies,** and ways of living. Diversity is based on identity grounded in gender, age, geography, education, occupation, and other socio-economic and geographic differences. Multiculturalism is a form of diversity based on ethnicity, language, religion and other cultural differences between citizens. It is common in migrant societies like Australia. Groups like Aboriginal and Torres Strait Islanders are First Nations minorities with a unique status in settler and migrant societies.

Some minorities may be unpopular. Racism is pervasive in many societies. Discrimination based on gender and age is commonplace. Some cultural groups can become out-groups by events outside their control, for example, the heightened discrimination against Chinese Australians during the COVID-19 pandemic and Islamic Australians during the War on Terror. The "Great Australian Silence"[4] casts a long shadow over First Nations minorities.

Liberal democracy has safeguards to prevent majority rule from degenerating into a **tyranny of the majority**. Constitutionalism is one safeguard. It is the principle that power should be limited instead of absolute. Laws also limit government power – a constitution is a type of law. A political and legal system governed by laws exhibits the rule of law, another safeguard. Citizenship is yet another. Citizens, including members of out-groups, possess political rights and freedoms equally.

A democracy that does not protect the weak and vulnerable would be 'illiberal'. An illiberal democracy is a flawed democracy or hybrid regime, according to the Democracy Index.[5] Hybrid and authoritarian regimes are characterised by absolute power, that is, the rule of men (not laws) with the people as **subjects** (not citizens). These regimes oppress minorities, persecute critics, and suppress subjects.

Operating principles of liberal democracy

Systems run by following "operating principles". For example, a transport system has road rules, train timetables, etcetera – these are operating principles that make it work. Liberal democratic representative government is a political and legal system that runs on the operating principles of liberal democracy.

There are four main operating principles of liberal democracy. Each was introduced in the preceding section. This section examines the four principles in depth. They are:

1. majority rule,
2. equality of political rights,
3. political freedom, and
4. political participation.

Majority rule

Majority rule is the most fundamental principle of democracy, including representative government. In practice, it means two things:

1. A legislature is elected to make laws reflecting the popular will.

4 A term coined by anthropologist W.E.H. Stanner in 1968 to describe how Australia has failed to acknowledge colonial-era and early 20th Century injustices against Australia's First Nations and chosen not to think about them. It has led to negative stereotypes of First Nations Australians. Contemporary Australia is working towards recognition of the past and reconciliation.

5 The Economics Intelligence Unit (EUI) ranks the world's government according to the operating principles of liberal democracy.

Figure 1.3 — Former Russian **opposition** leader, Alexei Navalny, was subjected to two show trials and periods of imprisonment at the hands of the state.

2. An **executive** (known as a government) is elected to execute (carry out) the laws.

Majority rule in the legislative branch

Most liberal democracies have similar ways of achieving majority rule through their legislatures. In Australia, citizens use their political right to vote in parliamentary elections to choose **representatives** who will make laws in parliament. The United States of America (USA) does the same—congressional elections allow citizens to use their voting rights to elect a representative law-making congress. Figures 1.5 and 1.6 illustrate the direct election of representative legislatures in Australia and the USA.

Majority rule in the executive branch

Australia achieves majority rule in the executive branch when a government is formed by and within its representative parliament. The government in Australia is the **political party** or **coalition** of parties with a majority of seats in the lower house of Parliament.

The US has a different system. Americans directly vote for their president and vice president, who then choose a Cabinet of executive secretaries (called 'the Administration').

The people's will determines who carries out the laws in both systems. Figures 1.5 and 1.6 illustrate the election of representative executive government in Australia and the USA.

Looking ahead: Mandates

Majority rule relates to the idea of mandates. Mandates are claims to legitimately use power.[6] Mandates are often claimed by governments because they won a majority in the previous election – and therefore have a right to rule. Mandates are studied in Unit 3.

Majority rule in referendums and plebiscites

A **double majority** – that is a majority of electors AND a majority of electors in a majority of states – is required for formal alterations to the Australian Constitution. Electors vote YES or NO on a proposal for constitutional change in a **referendum**. Voting in referendums is compulsory. In 2023, Australia voted on a referendum to enshrine an First Nations Voice to Parliament in the Constitution. Referendums were adopted from Switzerland, where they are used to put important decisions to a direct vote of the people.

A **plebiscite** is a YES or NO vote on a particular question. Plebiscites are non-binding votes that help parliaments deal with contentious issues by putting a question directly to Australian citizens. Voting is often voluntary and may be by postal votes. The last federal plebiscite, which took place in 2017, was about marriage equality. It was run as a postal survey. Nearly 80% of electors chose to vote, with 61.6% supporting changing the law to allow same-sex marriage.

Changing the fundamental rules of a system of government—its **constitution**—must also reflect majority rule. Australians must agree to changes to the Commonwealth *of Australia Constitution Act 1900 (Cth)* (the Constitution) in a referendum vote. Referendums are an example of direct democracy where the political participation of every elector is encouraged. The US Constitution is also subject to the people's will because its elected state and federal congresses must agree to constitutional **amendments**.

Equality of political rights

Political rights are entitlements, essential to citizens' ability to govern themselves. Political rights enable political participation in government.

The United Nations *International Covenant on Civil and Political Rights* specifies critical political rights. *See Background Information: Civil and Political Rights – Article 25.*

Citizens must be able to take part in government. Two political rights are fundamental to popular participation in government:

1. The right to vote; and
2. The right to hold public office as an elected official.

6 A mandate is the authority given by the voters to the party/parties (government), with a majority of seats in the House of Representatives, to implement the programs and policies outlined in its election platform.

A broad electoral franchise is vital to the equality of the political right to vote. Australia's electoral franchise encompasses all citizens over 18 years of age, with few exceptions. Severe intellectual disabilities and long-term imprisonment may exclude some from the franchise.[7] Australia is one of 47 countries[8] with some form of compulsory voting. Compulsory voting increases popular participation by treating voting as a civic duty – rather than a voluntary right – and creating incentives to vote.

> *"Political rights enable political participation in government."*

The right to hold public office as an elected official is open to anyone enrolled on the electoral roll. Thus, any elector can also hold public office. However, recent decisions of the **High Court of Australia**, which interprets the Commonwealth Constitution (Australia), have stripped dual citizens of this right. The new **interpretation** of SECTION 44 of the Constitution is controversial because it undermines the equal right of Australian citizens to be elected to the Commonwealth Parliament. State and territory parliaments are unaffected by the High Court's interpretation of SECTION 44.

Article 25(a) of the *International Covenant on Civil and Political Rights* specifies citizens' political right to vote, allowing them to elect a parliament and be represented in government and law-making.

Non-citizens, even those living in liberal democracies, may lack these rights. For example, Australia grants citizens voting rights, but not permanent residents, even if they have lived in Australia for many years. Permanent residents must become naturalised[9] Australian citizens to qualify for the political right to vote.

An essential feature of liberal democracy is citizens' equality of political rights. Citizens must be able to engage in political participation on equal terms if they choose. An example of equality of political rights is 'one vote, one value', which is the principle that each elector's vote has the same value as all other votes.

7 Roach Case – covers Section 7 and Section 24 of the Constitution – for more information see http://www.australianconstitutioncentre.org.au/democracy-ndash-the-right-to-vote-survives-incarceration.html

8 Appendix G – Countries with compulsory voting: Australian's Parliament House https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Completed_Inquiries/em/elect04/appendixg

9 Naturalisation is the legal process by which a non-citizen becomes a citizen, with all the rights and responsibilities (for example, compulsory voting) of citizenship.

Background Information: Civil and Political Rights

The United Nations *International Covenant on Civil and Political Rights* specifies political rights and freedoms to which every citizen is entitled. These rights and freedoms are fundamental to popular participation and representative government.

Article 18

a) Everyone shall have the right to freedom of thought, conscience and religion. This right shall include the freedom to have or to adopt a religion or belief of his10 choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.

b) No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.

Article 19

a) Everyone shall have the right to hold opinions without interference.

b) Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or print, in the form of art, or through any other media of his choice.

Article 21

The right of peaceful assembly shall be recognised.

Article 22

Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests.

Article 25

Every citizen shall have the right and opportunity,

a) To take part in the conduct of public affairs, directly or through freely chosen representatives,

b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, *guaranteeing the free expression of the will of the electors,*

c) To have access, on general terms of equality, to ***public service*** *in his country.*

10 Note: While the gendered nature of the language reflects the period the Conventions were written, it should be read to cover everyone regardless of gender.

Political freedoms

Political freedoms are entitlements enabling people to participate in government.

The United Nations *International Covenant on Civil and Political Rights* specifies critical political freedoms. *See Background Information: Civil and Political Rights – Articles 18, 19, 21 and 22*.

Note how Article 25 of the *International Covenant on Civil and Political Rights* limits political rights to citizens. In contrast, the political freedoms in Articles 18, 19, 21 and 22 belong to everyone – citizens and non-citizens alike.

Political freedoms include the freedoms of:

- Speech;
- Assembly;
- Association; and
- Press.

In Australia, people enjoy the freedom of conscience and religion and can think and believe what they wish. The freedoms of speech and the press, including social media, allow free expression and communication of these thoughts, beliefs, and opinions. In Australia, political freedom is broad and protected mainly by **common law**.

> *Political freedoms are entitlements enabling people to participate in government.*

Australians have an implied constitutional right to political communication but not a constitutional right to free speech, as Americans do. Australian law sets limits about what can be expressed. For example, using speech to incite racial vilification or hatred is unlawful in Australia. Democracies may limit freedom based on preventing harm to other people's freedom. In the example above, limits to speech can increase overall freedom by protecting vulnerable people and groups from harmful speech by the powerful, enabling them to participate freely. The limitation of fundamental freedoms is always a contested issue. It should be maximised rather than absolute. Parliaments are the proper place for their debate and resolution because they represent majority values and liberalism. See the *Case Study: Failed Religious Discrimination **Bill*** [2021] for more information.

Freedoms of assembly and association enable people to take collective political action. Political parties and pressure groups are associations formed to achieve political change. The Liberal and Labor parties, trade unions, and business and environmental groups are examples. They increase political participation in government.

See the *Case Study First Nations Voice to Parliament* for more political rights and freedoms.

Looking ahead: Rights

Rights are a significant topic in Unit 4, where students learn how they are protected in Australia and one other country.

Political participation

Political participation occurs when people exercise political rights and freedoms to influence government and law-making actively.

There is a myriad of ways for active citizens to participate politically. Voting in elections, debating issues with other people, joining pressure groups and political parties, writing to parliamentarians or the media, publishing opinions, protesting, volunteering, donating to a cause and running for public office are all examples of political participation in a liberal democracy.

A healthy liberal democracy maximises opportunities for political participation. Declining political participation is a sign of decay in a democracy. It can result in a full democracy degenerating into a flawed democracy or hybrid regime, as measured by the Democracy Index. The deliberate suppression of political participation is a hallmark of authoritarian regimes.

> *Political participation occurs when people exercise political rights and freedoms to influence government and law-making actively.*

Background Information: Private Members' Bills and Political Participation

Full political participation of members of parliament is facilitated in Australia by the use of **Private Member**s' Bills. Any member of parliament may introduce a bill. For example, in 2022 private members Alicia Payne (ACT) and Luke Gosling (NT) put forward the Restoring Territory Rights Bill, 2022. Twenty-five years previously the ACT and Northern

Territory Governments had passed voluntary assisted dying legislation, but both were struck down by the Howard Government. In 2022, however, the NT and ACT remained the only jurisdictions in Australia without voluntary assisted dying legislation.

Private Members' Bills are notoriously difficult to pass. Since federation, only 30 PMBs have passed in the Commonwealth Parliament. The Restoring Territory Rights, 2022 bill was one of the successful ones. The high failure rate of PMBs shows the tensions between the principle of political participation for all members of parliament and the reality that their success rate is low.

Additional principles of a liberal democracy

The rule of law

The rule of law is a fundamental feature of liberal democracy. Laws regulate society by creating enforceable obligations. Laws should reflect the values to which most citizens subscribe because they are made and implemented by a representative government.

The elements of the rule of law are:

- equality of all before the law (universality of the law);
- government power is subject to law;
- the law is known, clear, consistent, and coherent; and
- independent and impartial courts interpret the law, hold power to account and protect rights and freedoms.

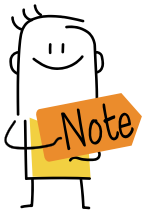
The rule of law's most well-understood characteristic is that laws apply universally. All members of society, including those with power, wealth, or influence, must be subject to the law. This includes the highest officials—prime ministers, presidents, monarchs, and judges; and those who implement the law – the police, for example. The law should be blind to power, wealth and privilege and not discriminate against the powerless and weak.

Less obvious but equally critical is the requirement that all parts of the political system – its parliaments, courts, governments, police, etcetera – are also subject to the law.

The rule of law protects citizens from abuses of power. Recall that constitutionalism is the idea that power should be limited. Constitutions are a superior type of law that creates and defines the powers of government. Defining power limits power, preventing its abuse. Non-democracies are characterised by the rule of men rather than the law. In the absence of the rule of law, including constitutional law, autocrats ruling authoritarian regimes, have absolute power. They use it to dictate the rules and **regulations** by which their subjects are condemned to live. They use unchecked power to suppress rights and freedoms, deny political participation and persecute minorities.

> *"The rule of law protects citizens from abuses of power."*

The rule of law depends on the design of a representative liberal democratic system. Liberal democratic structures reflect principles and doctrines designed to limit power and make it accountable. Separate and independent courts are one such structural feature. Judges in courts apply the law in specific cases. The government may sometimes be a party to a case. Wealthy or powerful individuals or corporations may also be parties to a case. If judges could be influenced by power or wealth, it would undermine the equality of rights and freedoms necessary for liberal democracy. Separate courts protect judges from these influences.



Chapter 2 examines the rule of law in the context of the structure of Australia's political and legal system. Chapter 4 examines another democratic system – that of the United States of America – and two non-democratic authoritarian regimes – China and Russia. The status of the rule of law in each system is a defining difference between them.

Law is superior to all other forms of social control, such as customs, morals, and rules. Law controls the use of power within democracies. The following briefly outlines the relationship between law and other forms of social control. Students are encouraged to link this discussion to their understanding of the rule of law.

Laws are universal.

The rule of law exists because laws apply universally over the territory and people within the jurisdiction of the sovereign parliament, which made them. Laws override all other forms of social control like customs, traditions, and rules.

Law overrides **customs and traditions**. Migrant communities from countries whose customs conflict with Australian values must abandon customs outlawed in Australia. For example,

Figure 1.4 — Frederick Dielman, Law, 1896. Mosaic representing both the judicial and legislative aspects of the law.

female genital mutilation and child marriage are customary in some countries but illegal in Australia. Migrants from countries where these customs are practised must not practise them in Australia. Australian law is based on Australian values, which categorically oppose these customs. There is no question about this, and no exception. It is the law. *See Background Information: Australia's First Nations' customary law and the rule of law.*

Background Information: Australia's First Nations' customary law and the rule of law.

Aboriginal First Nations' customary law, which is oral and based on centuries-old customs and traditions, can conflict with laws made by state and commonwealth parliaments – that is. statutes. The relationship between First Nations' customary law and statute is controversial in modern Australia. Recall that the power to make law originates in sovereignty. Many indigenous leaders assert that Australia's First Nations never surrendered sovereignty in 1788. For this reason, some regard Australia Day (26 January) as "Invasion Day".

The status of Aboriginal customary law is one area where reconciliation and recognition between Australia's nations are yet to be fully achieved. An indigenous "Voice to Parliament" is one proposal for resolving the conflict between Australia's nations with claims to sovereignty over the same territory. A "Voice to Parliament" would enable parliament to recognise customary law that did not conflict with majority rule or liberalism. It would also significantly enhance indigenous political rights and participation. *See CS2.*

The rule of law exists when laws reflect **morals**. Laws should be morally acceptable to most citizens and reflect these moral truths. Moral values, such as the prohibition against murder,

Figure 1.5 — Matt Golding. Some people regard Australia Day on the 26 January as "Invasion Day".

are often the basis of laws. The moral basis of law is why most people obey laws without consciously knowing them. The moral principle of equality drove amendments to the *Marriage Act 1961(Cth)* making same-sex marriage lawful in December 2017. Before the amendment, there was a growing sense amongst Australians that the *Marriage Act* was morally wrong because it legalised discrimination and inequality.

Today, many people think the *Migration Act 1958 (Cth)* is misaligned with our obligations to treat asylum seekers and refugees according to moral concepts such as **human rights**. Moral discomfort with existing law is a powerful force leading to changes in the law. The marriage and migration examples show how the law responds to society's changing values.

Laws override **rules**. Some sports' rules tolerate levels of violence that are unlawful off-field. However, rules cannot shield perpetrators of extreme violence against the law. If on-field brawling results in serious injury, the culprit may be charged with assault under the Criminal Code, no matter what the rules say. It becomes a matter for the police and courts, not a sport's governing body or tribunal.

Laws govern the governors. Recall that constitutions are superior law – also known as fundamental law. Constitutions create the structures and powers of government. Laws made by parliaments, decisions made by courts, or government policies may be struck down if unconstitutional.

Law should be known, clear, consistent, and coherent.

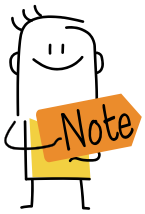
People have a right and a duty to know the law. Secret laws breach the rule of law. People must be able to know the law so they can behave lawfully. New laws are published in the *Government Gazette*. Freedom of the press means that changes to the law are freely discussed. Ignorance of the law is no defence against **prosecution**.

Laws should not be retrospective (backdated). The rule against retrospective laws supports the point above – that is laws should be known. Backdating laws is not unconstitutional in Australia, but it is rare. Australian courts interpret laws in ways that prevent retrospectivity unless parliament explicitly backdates them and explains why.

Laws ought to be clear so they are understandable. Opaque or ambiguous law leads to uncertainty in the public mind and law enforcement by government agencies like the police. Consistency makes law fair and equitable. Laws ought to complement and not conflict with each other. Today's laws are written in plain English to make them understandable.

Judicial independence

Judicial independence means courts are entirely separate from parliaments and governments. It protects judges from pressure to make certain decisions. Impartial judges and magistrates interpret the law when making judgments in particular cases. They must provide reasons for their decisions so that higher courts can check them to ensure the laws were applied correctly in the original case.



It is important to note that the rule of law depends on a separation of powers. Distributing powers throughout a political and legal system, to be discussed further in Chapter 2, protects the superiority of law over competing sources of power. It protects courts and judges too.

The best way to think about these ideas is to imagine a simple situation. Imagine the police charge a person with breaking the law. The police do not decide the person's guilt. Instead, the police – part of the executive branch – must prove the accused person's guilt to an independent judge and **jury** in a court of the judicial branch. Separating the police's executive power from the court's **judicial power** protects the accused person. It ensures the criminal process is applied according to the law. The police and the judge are part of the political and legal system. The separation of powers ensures justice, equality, consistency, and clarity in applying the law. Meanwhile, the parliament – which made the **criminal law** – has no role in the case.

Equality before the law

The rule of law exists when laws protect equality and political rights and freedoms.

Legal rights such as the presumption of innocence and the right to silence are essential aspects of the rule of law because they guard against the use of arbitrary power. **Trial** processes used in courts protect these rights.

■ Figure 1.6 — Matt Golding. Before the amendment, there was a growing sense amongst Australians that the *Marriage Act 1961 (Cth)* was wrong in a moral way.

Further, people are equal before the law. They enjoy the same access to the legal system with rights to be treated without bias or discrimination.

Background information: Judicial independence

Judicial independence is the separation of the **judiciary** from the legislative and executive branches of government, making it free from interference and intimidation. It is one of the essential features of the separation of powers and the rule of law in a liberal democracy.

Judicial independence is essential for effective **judicial review**. Laws passed by parliament may be tested to see if they are ultra vires (unconstitutional). Also, legislation may be interpreted when its meaning is in doubt. Courts declare the law when interpreting statutes. An independent judiciary is thus a check and balance against the powers of the legislature.

Judicial independence is a democratic principle that requires judicial power to be exercised independently of legislative and executive influence. According to SECTION 71 of the Commonwealth Constitution, this power is vested in the High Court and other federal courts created by the Parliament.

Under SECTION 72, federal judges can only be removed by the **Governor-General** in Council, on address from both Houses of Parliament, praying for removal due to misbehaviour and incapacity. This has never occurred, though proceedings were initiated against Justice Lionel Murphy in 1986.

The maximum age and tenure of justice is also fixed by SECTION 72. The latter cannot be diminished after a judge is appointed.

As determined in *R v Kirby; Ex parte Boilermakers' Society of Australia* [1956], judicial power can only be exercised by courts established under Chapter III of the Constitution. This power has been interpreted narrowly - e.g., *Brandy v Human Rights and Equal Opportunity Commission* [1986].

The Commonwealth Parliament cannot **abrogate** constitutional decisions – for example, *Thoms v Commonwealth; Love v Commonwealth* [2020].[11]

An independent judiciary also checks the actions of the executive – its policies. Policies are action plans; they are an executive government's way of carrying out the statutes of parliament. Statutes are broad and leave it open to governments to implement them in different ways. Courts have the power of judicial review – they may have to decide if a government's policies are permissible under the law. They can limit a government's freedom of action by declaring its policies unlawful. An independent judiciary is therefore also a check and balance against the powers of the executive.

Australia has a strong and independent judiciary.

This is achieved by CHAPTER THREE of the Australian Constitution in which:

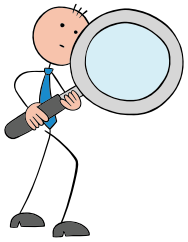
- SECTION 71 vests judicial power in the High Court and other courts the parliament may create;
- SECTION 72 guarantees judicial independence by protecting judges from arbitrary removal (security of tenure until age 70) or reductions in their pay. Only the executive can appoint judges and only the Parliament can 'pray for their removal' only to proved misbehaviour or 'incapacity'– separating the powers of appointment and dismissal. Judges can only be removed from office under extraordinary circumstances, as in the case of proven misbehaviour, incompetence, 'incapacity', or corruption, upon the Governor-General addressing both houses of parliament. No federal judge has ever been removed by Parliament using this power.

The **appeals** process within a liberal democracy ensures that there is high degree of public confidence in the extent to which Australian courts uphold the **independence** of the judiciary. The judicial process is an important part of a liberal democracy by providing a just, impartial, and fair legal system.

The following case illustrates judicial independence because it shows that the government cannot interfere with the decision. The Gillard government's Malaysian Solution was ruled unlawful in *Plaintiff M70/2011 v Minister for Immigration and Citizenship* [2011] – a common law case. The Gillard government had no choice but to respect these judgments and find alternative solutions to the Malaysian Solution.

Australia has robust and effective judicial independence. The legislative and financial powers of the commonwealth are subject to legally binding judicial review. Executive policy can also be held accountable to law by judicial review.

Judges are appointed and not elected. Electing judges would make them 'political' and reduce their authority and impartiality. This would undermine public confidence, an essential characteristic of the independence of the judiciary.



Looking ahead: Rule of law

The rule of law is part of Unit 4. Students learn how Australia and one other country may uphold or undermine the rule of law.

Recent examples concerning the rule of law

The World Justice Project surveys individuals and expert groups in countries on their perceptions of the rule of law in their nation.

In the *Rule of Law Index 2022 Report,*[12] Australia ranked thirteenth globally out of 113 nations and second to New Zealand in the East Asia & Pacific region, with an overall score of 0.79 out of 1. This result is based upon indicators about limits to government, absence of corruption, open government, fundamental rights, order and security, enforcement, civil justice, and criminal justice. Australia ranked seventh on the open government scale – a measure of democratic transparency. Australia has remained relatively stable in upholding the rule of law.

However, Australia is not perfect. According to the same report, between 2018 and 2020, Australia faced problems regarding the accessibility and affordability of civil justice,

11 https://www.hrlc.org.au/human-rights-case-summaries/2020/2/21/aboriginal-australians-cannot-be-deported-as-aliens-high-court-holds

12 World Justice Project, WJP Rule of Law Index 2022, https://worldjusticeproject.org/rule-of-law-index/downloads/WJPIndex2022.pdf

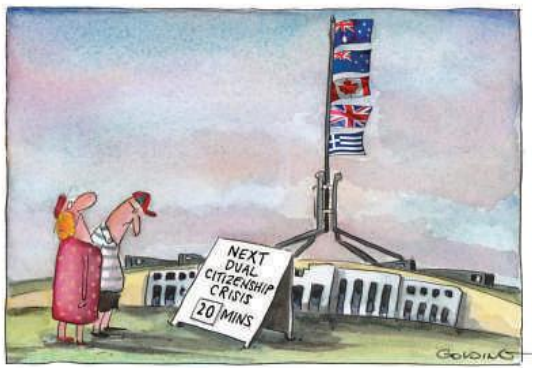


Figure 1.7 — Matt Golding. After the issues associated with the citizenship of Australian parliamentarians caused by Section 44 of the Constitution, many argue it should change.

issues of discrimination in legal justice and rights and increased questions about the corruption of legislators. These issues saw Australia's overall ranking fall one place from tenth in the world in 2018 to eleventh in 2020.

Australia has a good record of ensuring the universality of the law. Individuals with power, wealth and status who have broken the law have been charged and convicted. Former commonwealth parliamentarian, Craig Thomson MHR, was convicted of misusing funds. Former Federal Court Judge Marcus Einfeld was convicted of perverting the course of justice. These examples demonstrate that individuals are subject to the law regardless of their position, status, and power.

SECTION 44 of the Constitution sets strict citizenship requirements for federal parliamentarians. The High Court has held that SECTION 44 means an Australian with dual nationality or entitlement to a foreign country's citizenship cannot be elected to the Commonwealth Parliament. Numerous Members of the **House of Representatives** and the **Senate** of the 45th Parliament (2016-2019) were evicted from parliament because the High Court invalidated their election based on SECTION 44. Note how an independent court held parliamentarians accountable to law – this is the rule of law in action.

Both parliament and government must comply with laws and the Constitution. Individuals and groups can challenge the validity of parliament's laws and **ministers**' decisions. See Example: *Amato v Commonwealth of Australia* [2019].

Example: Amato v Commonwealth of Australia (2019)

Deanna Amato is an ordinary Australian who took the federal government to court and won. She claimed the government's method of calculating her income and subsequent welfare overpayment debt was unlawful. The government used computer algorithms to average her income. The Federal Court ruled that the algorithm's averaging method was unlawful. Ms Amato's case led to the government waiving 470,000 debts and refunding over $720 million to thousands of welfare recipients. The Robodebt case – *Amato v Commonwealth of Australia* [2019] – demonstrates the accountability of government and ministers to the law. It also shows how independent courts can hold powerful governments and their ministers accountable to the law and how ordinary people are equal to ministers in the eyes of the law.

Figure 1.11 provides a range of issues related to the rule of law. Students may investigate recent issues and their implications for the rule of law in Australia. For instance, in Western Australia, mandatory sentencing laws significantly impact a judge's ability to make a sentence fit the crime. Arguably, mandatory sentencing laws are an example of parliament interfering in the **independence** of the courts.

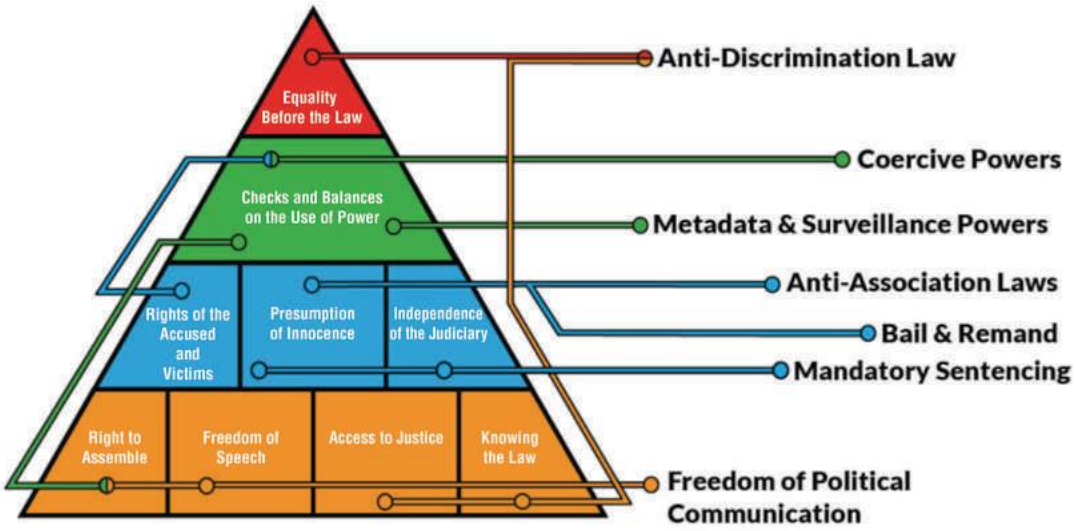


Figure 1.8 — Issues and the rule of law in Australia.

Summary

- Sovereignty is the right to rule a territory and its people through a political and legal system. Nation-states possess sovereignty. Australia is a nation-state.
- Sovereignty can be vested in individuals. – For example - monarchs or dictators; or elite groups – such as. aristocrats, oligarchs or the military. In democracies, sovereignty is vested in the people.
- In democratic systems, citizens may take part personally in direct democracy – For example ancient Athens; or elect representatives to govern on their behalf and in their interest – such as. representative democracy. All modern democracies are representative democracies.
- Representative democracy produces representative government. Representative government relies on political and legal bodies to do government business on the people's behalf. These bodies are parliament, the government, and the courts. The parliament and the government are elected and embody majority rule.
- Parliament is a representative assembly with law-making powers. Between elections, parliament exercises popular sovereignty to make laws endorsed by most citizens. A representative government carries out the law in ways approved by the majority. The courts are unrepresentative because they are not elected.
- Parliament is sovereign over all parts of the political and legal system, including the government and the courts, because it embodies popular sovereignty and majority rule.
- Majority rule must be moderated by liberal values – producing 'liberal democracy'. Liberalism is a political philosophy that emphasises individual rights and freedoms, including the rights of minorities and unpopular out-groups. Liberalism guards against the tyranny of the majority.
- Power – even democratic power – should be limited to prevent its abuse. Constitutions are superior laws that limit political and legal power. They do so by creating the political and legal system – that is the parliaments, governments, and courts – and then defining their powers and relationships with each other. Constitutionalism distributes power and creates **checks and balances** within the political and legal system. Democratic constitutions embody the operating principles of liberal democracy.
- Liberal democracy depends on four fundamental operating principles. These principles are:
  - majority rule;
  - equality of political rights;
  - political freedoms; and
  - political participation.
- Majority rule is reflected in representative parliaments and governments. Liberalism protects political rights and freedoms. Political participation is maximised when there is an equality of political rights and few restrictions on political freedoms. Maximising political participation makes the government more representative and responsible.
- Citizenship is a legal concept that entitles people to political rights. Political rights enable political participation. Everyone, including non-citizens, is entitled to political freedoms. Political freedoms also enable political participation.
- There are additional principles of liberal democracy. The rule of law is essential. The elements of the rule of law are:
  - equality of all before the law;
  - government power is subject to law;
  - the law is known, clear, consistent, and coherent; and
  - independent and impartial courts interpret the law, hold power to account and protect rights and freedoms.
- Judicial independence is the strict separation of the courts from the parliament and the government. Judicial independence ensures impartial interpretation of laws.

Exam practice questions

Short answer

1a. Outline what is meant by the term 'democracy'?

1b. Outline **two** differences between direct democracy and representative democracy.

1c. With reference to examples, discuss how Australia achieves the operating principle of political participation.

2a. Outline what is meant by the term 'sovereignty of a nation'.

2b. Outline **two** ways in which the Australian Parliament upholds the principle of representative government.

2c. Discuss **one** strength and **one** weakness of elections in contributing to representative government in Australia.

3a. Briefly explain the term 'liberal democracy.'

3b. Outline **two** ways in which the Australian political and legal system has safeguards to prevent the tyranny of the majority.

3c. Discuss how political rights have contributed to political participation in Australia's political and legal system.

4a. Outline what is meant by the term 'rule of law.'

4b. Outline **three** elements of the rule of law.

4c. With reference to examples, discuss **one** strength and **one** weakness of Australia in upholding the rule of law.

Source analysis

Source 1 is adapted from: Phillip Correy and Tom McIlroy 10 February 2022, Defeated Morrison shelves religious freedoms until after the election, from https://bit.ly/405EPPv.

During the election campaign, the Morrison government will prosecute its case for religious freedom laws after five Liberal MPs sided with Labor to scuttle the Prime Minister's signature policy and erode his authority.

Two days after Scott Morrison told his party room that support for the legislation was emblematic of the unity needed to win the election; he shelved the package when it became apparent it would also face internal resistance in the Senate.

The shelving of the religious freedom laws was a major embarrassment for Mr Morrison, who had promised before the last election to implement them this term, and who had introduced the legislation personally as a sign of commitment to religious communities and schools.

In a dramatic marathon session until dawn on Thursday, Mr Morrison was thwarted by Liberal moderates Trent Zimmerman, Bridget Archer, Fiona Martin, Katie Allen and Dave Sharma.

The bill enshrining religious freedom passed the lower house with the support of Labor and the Coalition, but the drama concerned the associated Sex Discrimination Act 1984 (Cth).

The five Coalition MPs sided with the crossbench and Labor to extend protections to transgender students from being discriminated against by religious schools. The government had agreed to exempt gay students from expulsion and have a review into transgender students.

Religious schools opposed the transgender exemption.

continued overleaf

The Sex Discrimination Act 1984 (Cth) was amended then passed, despite the government voting against it after the same five Coalition MPs sided with Labor and most of the crossbench.

They repealed section 38(3) of the Sex Discrimination Act 1984 (Cth) that allows religious schools to discriminate against students on the basis of sexual orientation, gender identity, marital or relationship status or pregnancy. That vote was carried by 65 votes to 59.

The government had hoped to knock out the amendment in the Senate, but NSW Liberal Andrew Bragg signalled he would not vote for that, meaning the government was headed for defeat.

Religious groups, including the Australian Christian Lobby (ACL), urged the government to pull the whole package rather than just pass the religious freedom laws.

Refer to Source 1:

5a. Outline what is meant by the term 'political freedom.'

5b. With reference to **Source 1** explain, in your own words, **two** reasons why there was criticism of the Religious Freedom Laws.

5c. With reference to examples, discuss how the operating principle of majority rule is evident in Australia's political and legal system.

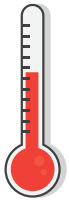
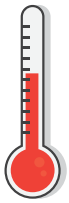
5d. Evaluate the extent to which political rights and freedoms are exercised in Australia's political system.

Essay response

6. Evaluate the extent to which the principle of political participation and two other operating principles of a liberal democracy are upheld and undermined in Australia.

7. Evaluate the extent to which Australia and one non-democratic country uphold the rule of law.

Investigation

Investigate the operating principles in Australia's liberal democracy					
Define liberal democracy: *Define majority rule:* *Define political freedom:*					
Principle	**Upheld**	**Undermined**	**Examples**	**Significance/Extent**	
Majority rule	For example: A government can claim a mandate when they have won a majority of seats in the HoR. Winning a majority of seats in the 'people's house' means that a government may claim that it has a 'will of the majority mandate.'	For example: The ALP can claim its government rules because it represents a majority of electors. However, Labor won with less than 33% of the primary vote, while the Coalition lost with 35%. Thus, the Coalition - not Labor - was the first choice of most electors. After preferences, Labor won just over 52% of the two party preferred (TPP) vote compared to the Coalition's nearly 49%. By the TPP standard, Labor represents the preference of a majority of electors. In such circumstances, a government's claim to embody majority rule and claim a mandate for its policies, is highly contestable.	The 2022 May election. The Labor Government are arguing they have a mandate to address the the rights issues with Temporary Protection Visas and honour its election promise.		
Political freedom					

8a. Define each of the terms below.

8b. For each operating principle, write an explanation for each principle as to how it is both upheld and undermined. Include at least two arguments for each operating principle of a liberal democracy.

8c. Provide an example for each of your arguments in the example column.

8d. Using the barometer test, judge the extent to which Australia's political and legal system upholds this principle. For example, to a significant degree, moderate or limited extent.

9. Use the findings above to create an essay plan for the following question.

9a. Evaluate the extent to which Australia's political and legal system upholds the operating principles of majority rule and political freedom.

9b. Create an essay plan using the template provided.[13]

13 The investigation resource was adapted from Daniel Tomlinson at St Mary's AGS. The writer would like to acknowledge the contribution of Daniel and the wonderful resources he creates.

Introduction: **Broad/contextual statement:** In your first couple of sentences, you should grab the reader's attention by providing a brief background of the topic. **Define key terms:** You need to define key terms, not just those explicitly stated in the question. **Thesis statement:** State your thesis - what is your overall line of argument? **Introduce key ideas:** Outline the major points of your argument, in order.	**Plan your ideas:**
Body Paragraph: **Topic sentence:** Your first sentence should link to the question and the topic/argument that is to be covered in this paragraph. **Explanation:** Provide a clear and detailed explanation of the topic being discussed. Clearly explain the link between the evidence that is raised and the thesis statement that is being argued. **Evidence:** Provide specific examples or evidence that support your main points. For example. statistics, case studies, quotations, and legislation. **Discussion:** Provide a 'however' statement that acknowledges an opposing perspective. **Linking sentence:** The last sentence of your paragraph builds on the argument, linking the topic to the thesis statement to demonstrate your evaluation.	**Plan your ideas:**
Conclusion: **Thesis:** The essay's main argument is restated and then built upon by providing further clarity. **Summary of main points:** Main points of the essay are summarised clearly and succinctly. **Overall evaluation:** An overall statement concludes the essay to clearly demonstrate your evaluation. (For example, "In evaluating the…it is clear that..."	**Plan your ideas:**

Sources

Figure 1.1 Source: https://commons.wikimedia.org/w/index.php?curid=701621
Figure 1.2 Source: https://commons.wikimedia.org/w/index.php?curid=9397159
Figure 1.3 Source: https://commons.wikimedia.org/wiki/File:%D0%90%D0%BB%D0%B5%D0%BA%D1%81%D0%B5%D0%B9_%D0%9D%D0%B0%D0%B2%D0%B0%D0%BB%D1%8C%D0%BD%D1%8B%D0%B9_%D0%B2_%D0%B7%D0%B0%D0%BB%D0%B5_%D0%9B%D0%B5%D0%BD%D0%B8%D0%BD%D1%81%D0%BA%D0%BE%D0%B3%D0%BE_%D1%81%D1%83%D0%B4%D0%B0_%D0%9A%D0%B8%D1%80%D0%BE%D0%B2%D0%B0.JPG
Figure 1.4 Source: https://sq.m.wikipedia.org/wiki/Skeda:A_mosaic_%22LAW%22_by_Frederick_Dielman,_1847-1935.JPG
Figure 1.5 Source: http://www.threefingers.com.au/>
Figure 1.6 Source: https://twitter.com/goldingcartoons?lang=en
Figure 1.7 Source: https://behindthelines.moadoph.gov.au/2017/roll-up-roll-up/the-dual-citizenship-flagpole
Figure 1.8 Source: https://www.ruleoflaw.org.au/education/teaching-strategies/

All sources last accessed on 23/7/24

Australia's system of government

Essential to the understanding of democracy and the rule of law is knowledge of:

- **the separation of powers doctrine**
- **sovereignty of parliament**
- **division of powers**
- **representative government**
- **Westminster conventions of responsible parliamentary government**
- **constitutionalism**
- **federalism**
- **judicial independence.**

Syllabus Points

Structure of the Australian political system and the Australian legal system, including:

- **separation of powers**
- **federalism**
- **representative government**
- **Westminster conventions of responsible parliamentary government**
- **constitutional monarchy**
- **common law system**

Roles of the legislative, executive and judicial branches of government.

This chapter examines the structure of the Australian political and legal system.
Australia is a **representative democracy** with a **constitutional monarchy** organised as a **federation** with a responsible parliamentary **government** and an independent **judiciary**.

The main elements of this definition and the associated parts of the Australian political and legal system are outlined in Table 2.1.

> *Australia is a representative democracy with a constitutional monarchy organised as a federation with a responsible parliamentary government and an independent judiciary.*

Australia's political and legal system		
Characteristics	Components	Terms and Names
Representative democracy	A **bicameral** national parliament	**Commonwealth Parliament**
Constitutional monarchy	A hereditary head of state represented by an appointed **Governor-General**	King Charles III and Governor-General Samantha Mostyn
Federation	Six self-governing sub-national regions with sovereign political and legal systems	Australian **States** – NSW, VIC, QLD, WA, SA, TAS
Westminster conventions of responsible parliamentary **government**	An executive that is drawn from and responsible to the parliament, operating according to Westminster constitutional conventions	Federal **Ministry / Cabinet** and Federal Executive Council
Independent judiciary	A **court** system operating separately from **parliament**, executive and other influences	The High Court and other courts of the Australian **court hierarchy**

Table 2.1 — The structure of Australia's political and legal system – characteristics, components and names

The Commonwealth level of government

Figure 2.1 illustrates the organisation of the Australian political and legal system at the commonwealth level.

The legislative branch

The Commonwealth Parliament and representative democracy

A **representative assembly** is an essential part of any system of **representative government**. Parliaments perform this role in Australia. Elected officials – called politicians – gather in parliaments to re-present **citizens**' views, values and concerns.

Parliaments are **legislatures** that make laws reflecting the will of most citizens, so they embody the democratic principle of majority rule. In Australia, the national representative legislative assembly is called the Commonwealth Parliament. There are state and territory parliaments, too, because Australia is a federation.

Elections are the most critical process in a representative democracy. Citizens use elections to choose **representatives** to participate in government on their behalf. They also choose State and Territory parliaments. In 2023, Australia had approximately 17 million citizens with voting rights who chose 227 politicians to represent them in the Commonwealth Parliament.

Through elections, citizens **delegate**, or entrust their sovereign right to self-government to members of parliament until the next election, when they will hold them to account.

Sound **electoral systems** uphold the principle of representative government. Elections must be free of intimidation, fairly translate votes into parliamentary representation, occur regularly and maximise popular participation. Democratic electoral systems are studied in Unit 2. In Chapter 3 in this unit, you can read about countries that do not uphold these ideas and values.

The Commonwealth Parliament has three parts; these are the:

1. Crown—the monarch;
2. **House of Representatives**—called the lower house; and
3. **Senate**—called the upper house.

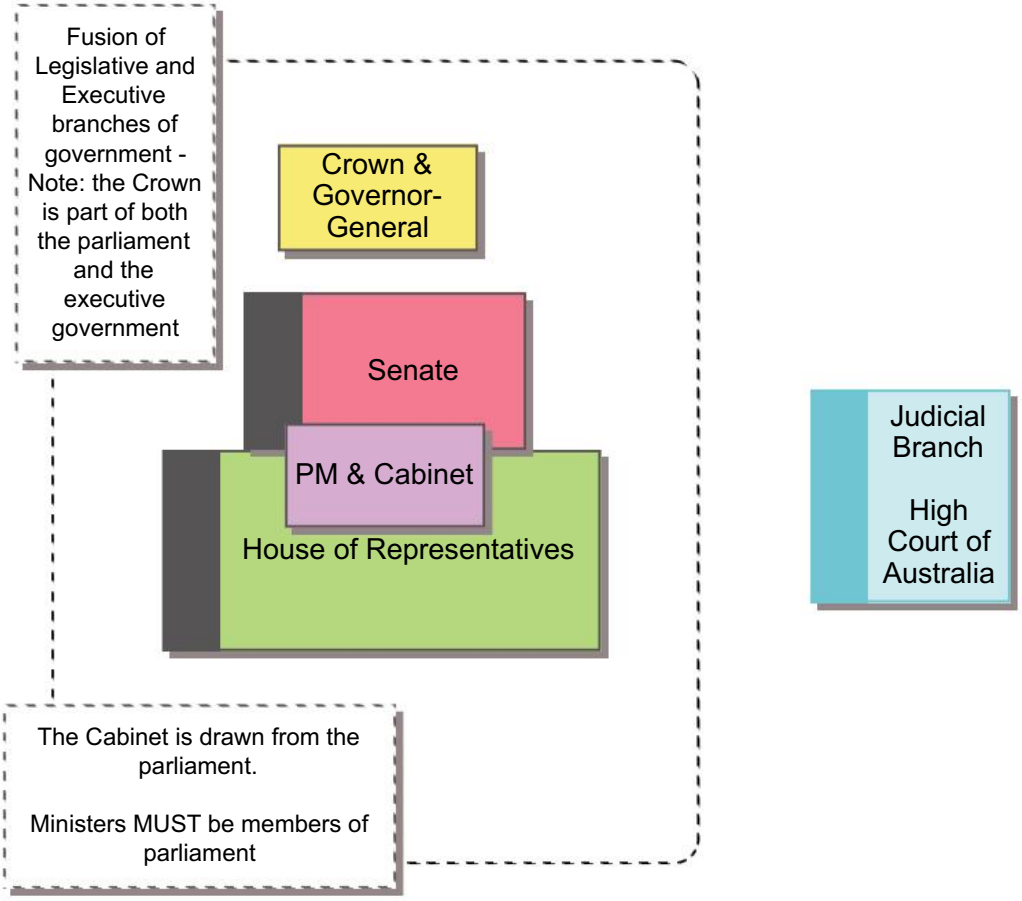


Figure 2.1 — The structural organisation of Australia's political and legal system at the Commonwealth level.[1]

The Crown and the Commonwealth Parliament

All Australian parliaments include **the Crown**.

The Crown is a feature of the Commonwealth Parliament due to Australia's historical links with Britain – that is, constitutional monarchy and the **Westminster system**. Theoretically, royal powers are extensive. For example, laws can only be made with royal consent. In practice, the Crown's parliamentary powers are limited to granting **Royal Assent** (agreement) to **bills** (SECTION 58 of the Commonwealth Constitution), issuing election writs (SECTION 32), and ceremonial duties like opening a new parliament after an election (SECTION 5).

The Crown is an unrepresentative part of parliament because citizens do not choose kings and queens. Therefore, royal powers are strictly formal to prevent monarchy from undermining representative democracy. For example, although Royal Assent to bills is necessary, it is only a formality. The limits to royal **power** mean that Australia's monarchy is a constitutional monarchy where the principle of **constitutionalism** applies. Constitutionalism is the idea that power should be limited. Unwritten **conventions** or rules make constitutionalism

> *Constitutionalism is the idea that power should be limited. Unwritten conventions or rules make constitutionalism a feature of the Australian political and legal system.*

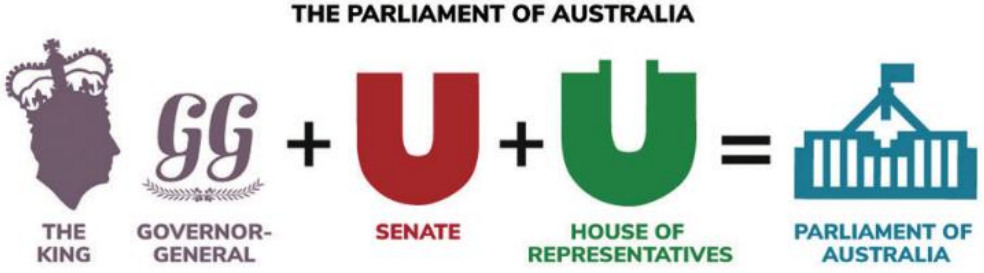


Figure 2.2 — Composition of the Australian Parliament.

1 Arising from **Section 64** of the Constitution, requires Ministers to be, or become, members of Parliament.

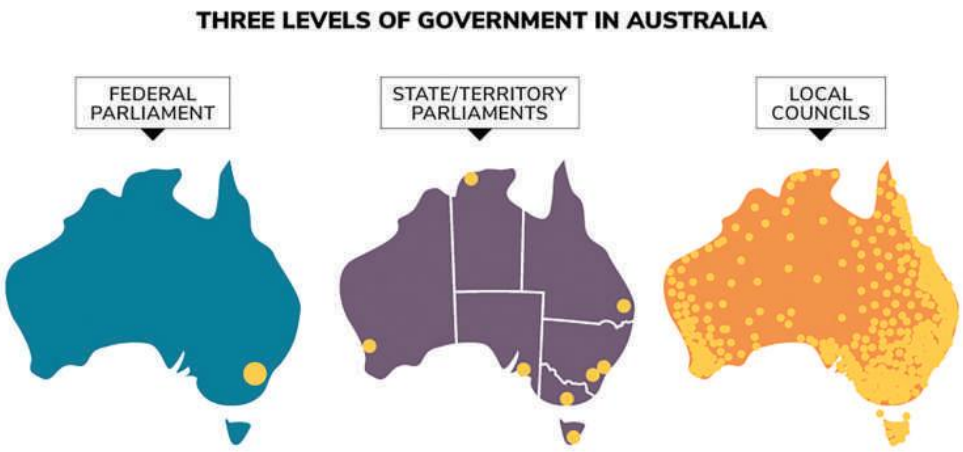


Figure 2.3 – The three levels of government in Australia.

a feature of the Australian political and legal system.

See Background Information: Australian constitutional monarchy.

The two houses of the Commonwealth Parliament

Bicameralism – that is, having two chambers - is a feature of most Australian parliaments, including the Commonwealth Parliament. The parliaments of Queensland, NT and ACT are **unicameral**.

House of Representatives

The House of Representatives is the lower house of the Commonwealth Parliament. It is the **people's house** because it is directly chosen by citizens aged 18 and over. Citizens elect Members of the House of Representatives (MHRs) to represent them in the **electorates** in which they live. There are currently 151 electorates. Electorates are geographical areas containing approximately the same number of electors (~107 000 +/- 10%), which upholds the equality of the political right to vote.

MHRs serve for a parliamentary term, which is a maximum of three years. Their terms commence on the opening of a parliament after an election. There is no limit to the number of terms MHRs may serve.

Senate

The Senate is known as the **states' house**. Australia is a federation where the role of the Senate is to represent state populations at the commonwealth level. Citizens elect an equal number of senators per state; currently, twelve. The ACT and the NT are not states and elect only two senators each.

State senators serve for six years and territory senators for two. State senators' terms commence on 1 July following an election. The four territory senators' terms start concurrently with members of the House of Representatives at the opening of a parliament after an election. There is no limit to the number of terms senators may serve.

Background Information: Australia's constitutional monarchy

Monarchy is a form of government in which political and legal power is inherited by a single **individual** (*mono*=one, *arkhia*=rule). Since the rise of the state about 10,000 years ago, monarchy has been the oldest form of government and, until modern times, one of the most common. For most of history, the power of kings, queens or emperors was unlimited by laws, making monarchical power absolute.

Absolute monarchy is incompatible with **liberal democracy** because it undermines all its operating principles, such as majority rule and political rights and freedoms.

Most European absolute monarchies were abolished between the late 16th and early 20th centuries. The French and Russian Revolutions are famous examples of violent political changes during this period. Meanwhile the monarchies of Britain, the Netherlands, Sweden and Denmark survived by adopting the idea of constitutionalism. They became **constitutional monarchies** by surrendering their power to representative assemblies (that is, parliaments) and elected governments and retaining only formal and ceremonial functions. The end of absolute monarchy in Europe heralded the modern era with its contemporary forms of representative government.

Constitutionalism is the idea that power should be limited. It began with the Magna Carta in the 13th century but only became widely established in the modern period. In constitutional monarchies, special laws or customs limit the powers of government and monarch. They are called constitutions. Constitutions may be written laws or unwritten customs or practices, called conventions. In Australia, a written constitution and unwritten conventions combine to achieve the principle of constitutionalism.

In CHAPTER TWO, Section 61 of Australia's written constitution, creates the Governor-General as the representative of the Crown in Australia. In contemporary Australia, the person occupying the Office of the Governor-General is always an Australian, selected by the Australian **Prime Minister** and appointed for five years by the King. The Governor-General exercises the roles and powers of the King in Australia and is bound by the same Westminster conventions.

In SECTION 62 the Constitution also creates a council of ministers to advise the Governor-General, called the **Federal Executive Council** (FEC). FEC is part of the system of constitutional monarchy in Australia. It links the legal power of the Crown to the democratically elected Cabinet and Ministry. Without this link, ministers would have no access to legal executive power. Ministers advise the Governor-General in the Federal Executive Council. [2]

The Australian Constitution does not explicitly limit the Crown's power. That critical task is left to unwritten conventions.

The conventions which bring the monarchy under the **rule of law** include:

- The use of executive power, such as dissolving parliament, and appointing ministers, is exercised only on the advice of ministers who are responsible to parliament. This advice is given through the FEC;
- Royal Assent to bills is guaranteed;
- The parliamentary executive – that is, the Prime Minister and ministers responsible to parliament – exercise the Crown's **prerogative powers.** Prerogative powers can be used without parliamentary approval. Examples include declaring war and implementing executive schemes such as compensation payments.

2 https://www.aph.gov.au/About_Parliament/House_of_Representatives/Powers_practice_and_procedure/Practice7/HTML/Chapter2/Federal_Executive_Council

British laws of succession determine who Australia's monarch is. The current monarch is King Charles III, who assumed office on the death of his mother, Queen Elizabeth II. King Charles is Australia's Head of State.

The Governor-General performs the King's duties and may be regarded as Australia's practical Head of State. The Governor-General lives at Government House Canberra, and has constitutional duties, ceremonial duties, commander-in-chief duties, and community engagement roles. The King appoints the Governor-General on the advice of the Australian Prime Minister for a five-year term. They are supported by staff employed by the Office of the Governor-General.

Figure 2.4 — King Charles III and Camilla on the Buckingham Palace balcony following their coronation.

The executive branch

Overview: the executive's three parts

The **commonwealth** executive has three distinct parts:

- King, Governor-General and Federal Executive Council – the *formal* constitutional executive;
- Cabinet and Ministry led by the Prime Minister – the *parliamentary* or *political* executive; and
- **Public service** – the *administrative* executive.

Constitutional or formal executive

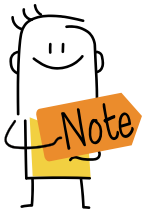
The executive is created by CHAPTER TWO of the Australian Constitution and may be referred to as the **constitutional executive**. Chapter Two vests the executive power of the commonwealth in the Crown and makes it exercisable by the Governor-General.

King Charles III is the King of Australia and the formal head of state. The Governor-General is his Australian representative and the practical head of state.

The Federal Executive Council (FEC) links the Governor-General with ministers of the

parliamentary executive. The FEC does not make executive decisions. However, it places legal executive power at the command of ministers.

The constitutional executive is above **politics** and does not exercise actual power. It is not elected and thus has no democratic claim to power – that is, it does not embody majority rule. Note: Majority rule is an operating principle of a liberal democracy that was addressed in Chapter 1.



The Crown and Governor-General's executive roles are covered in detail in other parts of this Chapter – see:

- *Background Information: Australia's constitutional monarchy*
- *Background Information: Westminster conventions of responsible parliamentary government – section on Governors-General always act on advice.*

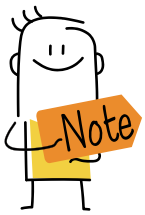
Parliamentary and/or Political executive

Ministers are members of parliament who have executive roles. The government they belong to is chosen by parliament and responsible to its lower house. Ministers are elected members of parliament and senior members of the party with a lower house majority. They meet in the Cabinet and have **portfolio** responsibilities for public service departments and agencies – *see next section*.

Despite having no legal power, the Cabinet is the most powerful part of the Australian political and legal system. Ministers in Cabinet and the Ministry employ real executive power because Governors-General always act on their advice through the Federal Executive Council. Hence, the parliamentary executive may be termed the *real political* executive.

The Cabinet is the principal **committee** of the executive. It is sometimes called the "engine room of government" because it drives the government's agenda and directs the **public service**. The Cabinet is composed of senior ministers and meets regularly. The source of the Cabinet's power is Westminster convention – not the written constitution. Cabinet conventions determine its organisation, how it operates and the limits of its power.

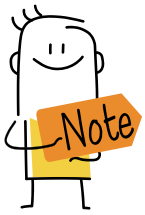
The Ministry is the entire parliamentary executive, including the Prime Minister, Cabinet-rank ministers, junior ministers, and **assistant ministers** – all of whom must be members of parliament. As the head of government, the Prime Minister leads the parliamentary executive, chairs Cabinet meetings, chooses ministers, and allocates portfolios. These functions – not legal authority – make the Prime Minister Australia's chief executive officer and the most powerful figure in the Australian political and legal system.



Winning a majority in the people's house gives the parliamentary executive democratic legitimacy – that is, it embodies majority rule. Refer to Chapter 1 and the operating principles of a liberal democracy. Command of the House of Representatives is also a source of the executive's power.

> *Bureaucracy is an organisation in which hierarchy, expertise and procedure combine to control and complete enormous volumes of work.*

The real executive engages in the political battle of ideas in parliament. The House of Representatives holds the parliamentary executive to account through the conventions of ministerial responsibility and scrutiny of the government's spending and legislation.



The parliamentary executive, including Cabinet, is covered in detail later in this Chapter.

Administrative executive or public service

Governing represents approximately twenty-five per cent of economic activity in Australia, indicating the administrative executive's vast scope and scale.

The Australian Public Service (APS) is the biggest part of the Australian political and legal system. It employs many thousands of permanent workers in APS departments and agencies. Some public servants make a lifetime career out of serving the public, rise to high positions, and have years of experience in government. Senior public servants are highly trained within their areas of public administration.

The APS bureaucracy has procedures and processes for getting government business done. Bureaucracy is an organisation in which hierarchy, expertise and procedure combine to control and complete enormous volumes of work.

The APS carries out the day-to-day governing of Australia using bureaucratic procedures.

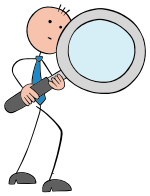
It implements laws regulating taxes, health, infrastructure, resources, environment, education, welfare and all other government activities.

Despite its immense power, the APS is not elected. It is appointed and does not embody the principle of majority rule. It operates under the *Public Service Act 1999 (Cth),* is politically neutral and does not participate in politics. It is directed by and accountable to the elected parliamentary executive. Every department and agency of the APS is accountable to a minister. Ministers provide policy direction to APS departments and agencies in their portfolio areas of responsibility. However, they also rely on APS advice because of its expertise in governing.

The public service is appointed and does not embody the principle of majority rule. It operates under the *Public Service Act*, is politically neutral and does not participate in politics.

Students should note that there is a chain of **accountability** from the APS through ministers to the parliament and the people. It is known as the **Westminster Chain of Accountability** – see Figure 2.7.

The public service is not covered any further in this Chapter.



Looking ahead

Students of Politics and Law Unit 4 learn how the executive is accountable to parliament through ministerial responsibility and reviews of its operations and decisions via audits, tribunals and courts.

Australia's responsible parliamentary government

When people talk about 'the government', they usually mean the executive branch of the political system. In Australia, the name of the **head of government** describes a particular government. For instance, in 2023, the 'Albanese Government' was the executive branch of the Australian political and legal system, and the 'Cook Government' was the executive branch of the Western Australian Government.

The structure of the executive branch in different political systems may vary. For example, the United States of America (USA) has a presidential executive separate from the US legislative and judicial branches.

Britain heavily influenced the structure of Australia's political and legal system. Australia adopted the British form of **responsible parliamentary executive** in its federal and state governments. The defining characteristic of the Westminster system is the structural fusion of the legislative and executive branches of government. Despite this fusion, a **separation of powers** – although weaker than that of the USA – is still achieved.

■ Figure 2.5 — The British Houses of Parliament are within the Palace of Westminster in London.

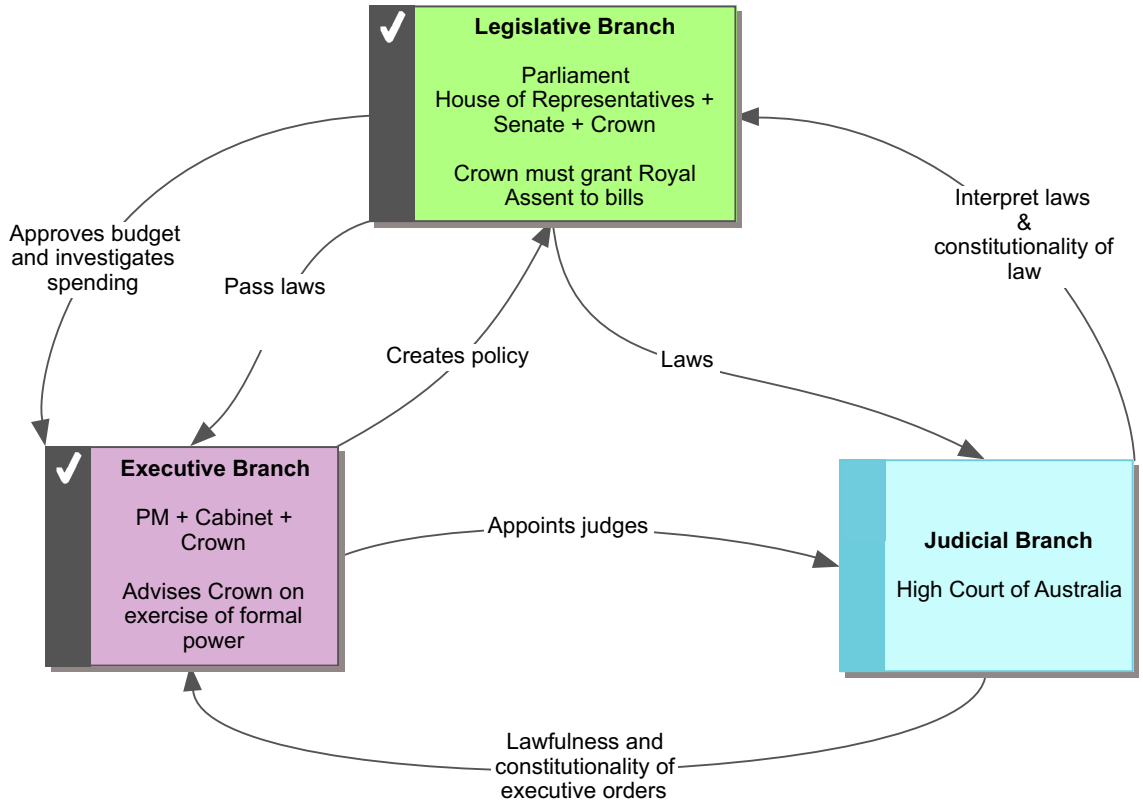
Westminster conventions of responsible parliamentary government and the separation of powers

Systems with responsible parliamentary government are known as the Westminster system.[3] In a Westminster system, 'responsible' means the executive is *drawn from* and *responsible to* the parliament. Thus, ministers are members of parliament – which is why it is also called 'parliamentary government'.

> *'responsible' means the executive is drawn from and responsible to the parliament. Thus, ministers are members of parliament – which is why it is also called 'parliamentary government'.*

One of the most robust Westminster conventions concerns the formation of the executive branch. The party or parties which command the confidence of the House of Representatives form the government. They remain the government until either…(a) a new parliament is elected, or (b) they lose the confidence of the House of Representatives. In practice, the party or parties with the support of 50%+1 of the members of the lower house form the government.

3 The British parliament is housed in London's Westminster Palace, from which the name 'Westminster system' is derived.



■ Figure 2.6 — The separation of powers in the Australian political and legal system.

Since Australia uses the Westminster system, its senior executive officials – called ministers – are members of both the legislative and executive branches. As a result, Australia's separation of powers is weaker than in non-Westminster democratic systems, like that of the USA's presidential system. Although weaker, there is still an effective separation of legislative and executive powers in Westminster systems, including Australia's. See Figures 2.1 and 2.6 for infographics showing the separation of powers in the Australian political and legal system.

In a Westminster system, ministers have *executive* roles in addition to the legislative and representative roles of ordinary **private members** of parliament.[4] Thus:

- Ministers' roles = legislative + representative + executive.
- Private members' roles = legislative + representative.

In Australia's Westminster system, ministers are responsible to the House of Representatives for the performance of their executive functions.[5] The Prime Minister is the first and most senior minister. The Prime Minster leads their minsters in an executive committee called Cabinet. The Cabinet meets secretly and separately from parliament.

The secrecy and separation of the Cabinet is one way the Westminster system achieves the separation of the executive from the legislative branch. Another way the separation of powers is achieved is through the membership of parliament's many committees. Only private members are allowed to sit on parliament's committees. Ministers are barred from parliamentary committees; however, they may be called to provide evidence to committees scrutinising the government's activities and spending.

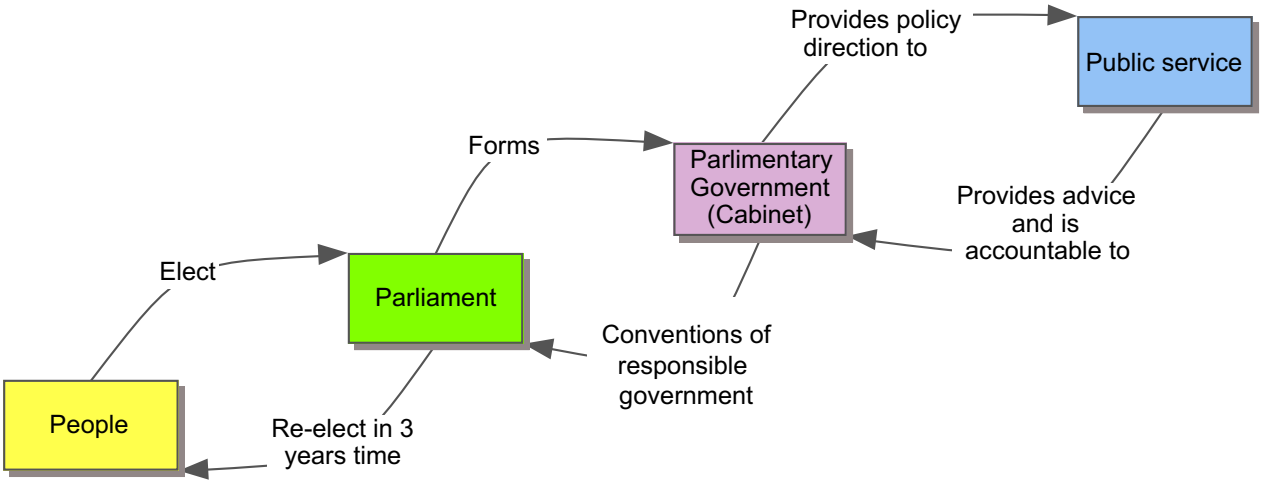
Note that despite the structural fusion between the legislative and executive branches (which share some personnel in common), they function separately and can check and balance each other. The Westminster system's unwritten constitutional conventions enable this functional separation.

Private members and private senators question and scrutinise ministers and the government each sitting day.[6] They do this through various parliamentary procedures such as Question Time and the parliamentary committee system outlined above. Parliament *checks* the executive's performance through these procedures and *balances* its power.

4 A private member or senator is any parliamentarian who is not a minister.

5 In Australia, senators may also be ministers. However, Westminster conventions are more robust in the lower house because Britain's upper house is undemocratic and does not contain ministers. Therefore, no Westminster convention holds upper house ministers accountable to parliament, making Australian ministers drawn from the Senate less accountable than their lower house counterparts.

6 The Commonwealth Parliament sits approximately 40% of the year.



■ Figure 2.7 — The Westminster chain of accountability links all parts of government to the people.

Westminster conventions provide these checking and balancing procedures critical to the separation of powers. The primary check and balance on executive power is the convention of ministerial responsibility. Parliament holds individual ministers and the whole government responsible through individual and **collective ministerial responsibility** conventions. *See Background Information: Westminster conventions of **responsible parliamentary government.***

Parliament also checks the executive's finances. Most government spending must be authorised by **law** – which means 'money bills must pass parliament for the government to access public funds. The executive introduces money bills, also called **appropriations** bills, into the House of Representatives (never the Senate). Money bills must pass both houses and receive Royal Assent. Parliament monitors government spending by scrutinising these money bills as they go through the **legislative process**. The government's annual and mid-year budgets are the main money bills.

> *Cabinet, the most powerful institution in Australia's political and legal system, has no legal basis and derives its power from conventions alone.*

Finally, parliament can inquire into executive schemes and policies. Powerful parliamentary committees, often in the Senate, can compel public service witnesses and ministers or their proxies to answer questions and provide documents. The Morrison Government's RoboDebt scheme (2015-2020) was investigated by parliament, leading to a court finding the scheme unlawful and a major judicial inquiry into the failings of executive policy.

It is important to understand that a **chain of accountability** leading from the executive government through parliament to citizens is central to the Westminster system's accountability machinery. See Figure 2.7.

Cabinet

The main parts of a responsible parliamentary government are its Cabinet and **Ministry**.

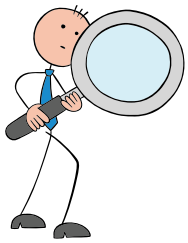
The Westminster Cabinet system emerged through the historical struggle between the English Monarchy fighting to preserve its absolute power against the English parliament seeking to bring executive power under its control and accountable to electors. Parliament won this struggle and slowly transferred executive power from the monarchy to a group of ministers drawn from the parliament. Meanwhile, the monarchy evolved into a constitutional monarchy – *see Background Information: Australia's constitutional monarchy.*

The Cabinet can be defined as an executive committee of ministers, led by a Prime Minister, that is drawn from and responsible to the parliament. Notably, the Cabinet is not a parliamentary committee.

Note that the operations of the Cabinet have no basis in written constitutional law. Instead, they are governed by the unwritten Westminster conventions of responsible parliamentary government, which emerged throughout the turbulent English history briefly outlined above. Consequently, Cabinet, the most powerful institution in Australia's political and legal system, has no legal basis and derives its power from conventions alone. CHAPTER TWO of the Constitution, which establishes the Commonwealth Executive, says nothing about the reality of executive power and does not mention the terms 'Prime Minister' and 'Cabinet'.

Cabinet conventions are flexible. The size of the Cabinet is adaptable and has expanded to about 30 ministers. Prime Minister Gough Whitlam (1972–1975) split his Cabinet into an 'inner Cabinet' of senior ministers and an 'outer Cabinet' of junior ministers. Mr Whitlam's inner Cabinet would meet regularly and frequently. Members of the outer Cabinet would be co-opted into a Cabinet meeting only if their portfolio area was on the Cabinet agenda. A two-part Cabinet and the co-option of junior ministers are Australian Cabinet conventions.

Prime Ministers can use the flexibility of Cabinet conventions to structure and run their Cabinets in different ways. Some Prime Ministers are authoritative with a command or 'presidential' style of leadership (for example, Rudd, Abbott and Morrison), while others are more consultative and prefer collective or 'consensus' decision-making (for example, Gillard, Turnbull and Albanese). Therefore, a Prime Minister's personality and leadership style influences their Cabinet's operation and relationships with other ministers. This is important because, in the absence of constitutional or legal executive power, the actual power of a Prime Minister depends heavily on their personality, leadership style, and the unity of their Cabinet.



Looking Ahead: Roles and powers of the Prime Minister & Cabinet.

The roles and powers of the Prime Minister, Cabinet and Ministry are part of Unit 3. Students learn about the sources of Prime Ministerial power and its strengths and weaknesses. Cabinet's roles and powers are also studied.

Figure 2.8 — Prime Minister Albanese with the 18 women in his Ministry. The term **Ministry** is the collective term for all ministers. It includes senior Cabinet-rank ministers and junior and assistant ministers in the outer Ministry.

Background Information: Westminster conventions of responsible parliamentary government

The following is a list of the primary Westminster conventions related to responsible parliamentary government:

- The government is formed by whoever commands the confidence of the lower house.
- Governors-General always acts on the advice of ministers.
- Ministers are individually and collectively responsible to the lower house.
- The Cabinet meets in secret and must maintain solidarity.

Formation of government – confidence of the lower house

The parliament, specifically the lower house, is where the government is formed. It is sometimes said to 'make the government'.

The government is formed by the party (or parties) which can command support from a majority of members of the House of Representatives. The majority party or **coalition** allocates ministerial portfolios to their senior members in both houses. The majority party's leader becomes the 'head of government' or Prime Minister. As long as the government continues to enjoy the majority support – or the confidence – of the House of Representatives, it will survive in government.

If the government should lose the confidence of the House of Representatives, it is expected to resign. The House may move motions of no confidence against a government. Should a majority of the lower house support such a motion, the parliament will have dismissed or 'broken' the government.

Governors-General always act on ministerial advice

CHAPTER TWO of the Australian Constitution vests the executive power of the Commonwealth in the Crown and makes it exercisable by the Governor-General. Thus, legal – or formal – executive power rests with the Crown and the Governor-General, not the parliamentary executive formed in the House of Representatives. Remarkably, this means the Cabinet has no constitutional basis and no formal powers.

The principle of constitutional monarchy depends on executive power – **vested** in the Crown – being used on the advice of ministers

responsible to parliament. Ministers advise the Governor-General in the Federal Executive Council. According to convention, the Governor-General always accepts ministerial advice.

The Governor-General has three rights when dealing with ministers – the right to be consulted, the right to encourage, and the right to warn. All three protect the constitutional system.[7]

The Governor-General has **reserve powers** that may be used without advice in an emergency.

The reserve powers require the Governor-General to exercise their own discretion as to whether or not to act contrary to advice from the Prime Minister. For example, SECTION 64 the power to appoint or dismiss Ministers; the power to dissolve or refuse to dissolve the House of Representatives under SECTION 5; the power to withhold assent to bills SECTION 58.

Such an emergency must be a crisis in which constitutional government has broken down – that is, a constitutional crisis. Use of reserve powers is exceedingly rare, having been used in controversial circumstances in 1975 and at no other time – *see Looking Ahead: the 1975 Crisis.*

Ministerial responsibility

Parliament holds individual ministers accountable for their portfolio[8] and their personal and political conduct, that is, their probity and propriety.[9] The Westminster convention of **individual ministerial responsibility** (IMR) holds an incompetent or corrupt **minister** accountable to parliament. Parliament may vote to censure such a minister. A censure motion is a parliamentary process. A censured minister is expected to resign.

Parliament also holds the whole Ministry responsible for the government's performance. The Westminster convention of collective ministerial responsibility (CMR) holds the whole government responsible to parliament. The House of Representatives may withdraw its confidence in the government through a no-confidence motion. A government must resign if it cannot maintain the confidence of the House of Representatives. The upper house has no role in determining who forms government.

Figure 2.9 — Cabinet secrecy is considered a lynchpin of responsible government. This might be considered a problem where it would be in the interest of the public for government action to be more transparent.

Cabinet secrecy and solidarity

Cabinets meet regularly and frequently. Most meetings are held in the Cabinet Room inside the Ministerial Wing of Parliament House. The room has no windows, is soundproof and is regularly checked for listening devices to ensure secrecy. Cabinet records are protected by law for 30 years. It is an offence to leak information from Cabinet or publicise its discussions.

Cabinet ministers argue different points of view *within* the Cabinet. However, after Cabinet decides, ministers must be publicly united in support of its decisions - this is the convention of **Cabinet solidarity**. A minister who cannot publicly support a Cabinet decision is expected to resign from the Ministry and become an ordinary private member of parliament – they are said to return to the backbench.

The function of secrecy is to allow ministers to speak their minds and debate important issues. The purpose of solidarity is to unite a group of ministers into a cohesive government. Secrecy and solidarity also separate the executive and legislative branches because private members of parliament do not participate in Cabinet and are not bound by Cabinet conventions.

7 Walter Bagehot, an English journalist who wrote extensively about government. https://www.aph.gov.au/About_Parliament/House_of_Representatives/Powers_practice_and_procedure/Practice7/HTML/Chapter1/Powers_and_Functions_of_the_Governor-General

8 A portfolio is an area of executive responsibility. Examples include treasury, defence, social services, health, foreign affairs and trade, resources and education. Ministers have responsibility for one or more portfolios.

9 Probity can be defined as adhering to a high standard of behaviour that is moral, honest and conducted with integrity. On the other hand, propriety, is the way a person conducts themselves as to what is considered a socially accepted behaviour.

Looking Ahead: The 1975 Crisis

The 1975 Crisis is part of Units 3 and 4. Students study the constitutional crisis when the Governor-General, Sir John Kerr, used the reserve powers to dismiss the Whitlam Government. Students learn that the government retained the confidence of the House of Representatives through the emergency and question whether Sir John Kerr's use of the reserve powers was justified.

The judicial branch

Judicial power, courts and the rule of law

The judiciary – or judicature – is the branch of government that interprets laws and makes legally binding decisions about their meaning.

The foremost institution of the judiciary is the **court**. Courts are places where **judges** and magistrates hear cases in which parties dispute questions of law and rights. The judiciary operates through courts and cases, using laws to enforce parties' rights. Enforcing rights is called justice.

To achieve justice, courts exercise **judicial power**. Judicial power is the authority to decide the legality of arguments – based on evidence and proofs – and impose a sentence, remedy or binding ruling. It is the third power of government and distinct from legislative and executive power – both of which judicial power holds to account.

Courts exercising judicial power can create new laws, alter the meaning of existing laws and hold the other branches of government accountable to the law. To perform these roles without fear or favour, the judiciary must be independent of undue influence from parties and the other branches of government. Without **judicial independence**, the rule of law is unachievable.

> *Judicial power is the authority to decide the legality of arguments – based on evidence and proofs – and impose a sentence, remedy or binding ruling.*

Equality before the law, just **interpretation** of laws and keeping legislative and executive power accountable to the law are three elements of the rule of law. Thus, a well-functioning and independent judiciary is fundamental to the rule of law and Australia's system of liberal democratic government.

Australia has a strictly separate and independent judiciary. Judges are appointed by the executive branch but can only be removed by the legislative branch on proven grounds of incapacity or misbehaviour under SECTION 72 of the Commonwealth Constitution. These features ensure the **independence** of the judiciary and uphold the rule of law in Australia.

Court hierarchies

Thousands of legal disputes reach the courts yearly. They range from minor (summary) matters to the most serious criminal (indictable) offences. Constitutional disputes may even affect the **system of government** itself.

Courts are arranged in court hierarchies to efficiently allocate the vast caseload and ensure the types of cases match the expertise of courts. Court hierarchies are based on jurisdictions – *see Background Information: Jurisdictions.*

There are *geographical* and *legal* jurisdictions. Geographical jurisdictions mean there are federal and state/territory hierarchies. Within these geographical jurisdictions, courts are arranged in hierarchies of inferior, intermediate and superior courts with general and special legal jurisdictions.

Hierarchies enable the following:

1. Division of work;
2. Legal specialisation;
3. Appeals;
4. The **doctrine of precedent**.

Division of work

Cases are distributed among different courts to ensure the efficient use of judicial resources.

Cases may be about constitutional, criminal, civil, administrative, and other types of law. They may also be minor or serious in consequence and complexity. Cases are allocated to courts based on the type of law and the seriousness of the dispute. Inferior courts hear minor matters; intermediate courts hear more serious cases, and superior courts hear the most serious and complex cases.

Specialisation

Cases are assigned to courts that specialise in particular legal areas.

Courts of general jurisdiction handle criminal and civil cases, with less serious cases heard in

Figure 2.10 — The High Court of Australia, the nation's highest court.

inferior courts and more serious ones in higher courts. Courts with special jurisdiction specialise in family law, juvenile justice, drug cases, land disputes, et cetera.

Specialisation has two benefits. Firstly, courts and judges develop high levels of expertise in narrow areas of complex law and thus make better decisions. Secondly, specialisation reduces the time needed to deal with cases, helping achieve timely justice.

Australia has one constitutional court and final court of **appeal** – the **High Court of Australia**. Under the High Court are many federal, state and territory courts of general and special jurisdiction.

According to SECTION 71 of the Commonwealth Constitution of Australia, the judicial power of the commonwealth shall be vested in a Federal Supreme Court, to be called the High Court of Australia, and in such other federal courts as the parliament creates, and in such other courts as it invests with federal jurisdiction. The High Court shall consist of a **Chief Justice**, and so many other Justices, not less than two, as the parliament prescribes.

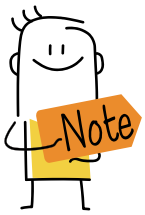
Appeals

Appeals are essential because they hold lower courts accountable and improve justice by enabling parties to test case outcomes.

Courts with **appellate jurisdiction** – that is, intermediate and superior courts – hear appeals. They review the original case's arguments, law and evidence and decide if the lower court's decision was correct.

Doctrine of precedent

Courts with appellate jurisdiction can make **common law** by applying the doctrine of precedent. Legal **precedents** are created when courts deal with novel cases where no existing law applies.



A precedent is binding on courts lower in the same hierarchy as the precedent-setting court, and persuasive for courts in other hierarchies. This will be explored further in Chapter 6.

The doctrine of precedent helps make law flexible, predictable and consistent.

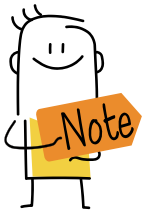
See Common law below.

Adversarial trial

Parties in court cases are adversaries, that is, in a contest with each other. The role of judges is to ensure a fair **trial**.

How does a contest reveal the truth? The assumption is that competition between the parties reveals the truth. To win, each party presents their best evidence and legal arguments. Parties actively drive cases, and judges are impartial umpires. The trial process has strict rules to ensure fairness. Thus, quality evidence, convincing argument and fair processes reveal the truth.

The adversarial trial is like any fair competition – it has competing sides, an unbiased umpire and transparent rules to ensure fairness.



The processes of the adversarial trial are covered in detail later in Chapter 7 (Unit 1).

Common law system

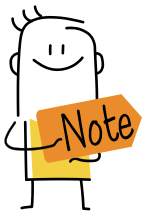
The **common law system** is the legal system followed in Australia, inherited from the United Kingdom. England has centuries of legal history. In short, following the Norman Conquest of Britain in 1066 AD right up to the present day,

judges have developed law by hearing cases throughout England and, later, in Britain and its colonies and former colonies. Throughout this time, judges have recorded the reasons for their decisions. The most important judicial decisions become precedents for similar future cases.

Law created this way is called judge-made law, case law or common law – because it is made by judges in cases and applied to future cases with features common to the original case.

Precedents guide courts in new cases with similar facts. Sometimes **judges** are compelled to follow precedent; sometimes, they are merely persuaded by it. It depends on the rank of the court hearing the case.

Common law develops slowly and incrementally, case by case. Novel cases sometimes arise and result in new common law as judges make decisions where no law exists. Like any evolutionary system, common law adapts to changing circumstances – old law is overruled (and goes extinct), and new precedents emerge in response to the changing social environment. Consider the reactive nature of common law in which it responds to changes in the social environment such as social media.



The doctrine of precedent governs the way common law evolves.

English common law and the doctrine of precedent are covered in detail in Chapter 6.

Background Information: Jurisdictions

Juris-diction means "where the law speaks" and refers to where courts have authority. The law speaks in two ways. Firstly, laws and courts have authority within a territory – like a whole country or regions within a country. Secondly, they have authority within areas of law – for example, constitutional, criminal, civil, family, juvenile, drugs, and many others. Courts also have the authority to hear certain cases a first time, and higher courts have the authority to hear appeals from lower courts.

Geographical jurisdiction

Australia is a federation with both federal and state legislatures and executives. It also has both federal and state judiciaries, with:

- a federal court hierarchy; and
- state and territory court hierarchies.

A court's **geographical jurisdiction** refers to the area over which its authority extends. In Australia, this refers to the part of the country where the court has authority. Australia's state and territory courts have jurisdiction in their relevant states and territories. For example, WA's courts only have jurisdiction in WA. Federal courts have Australia-wide jurisdiction, including offshore territories.

Legal jurisdiction

A court's **legal jurisdiction** refers to the areas of law over which it has authority. Some courts, such as Western Australia's Supreme and District Courts, have *general* jurisdiction and can hear criminal and civil cases. Some have *special* jurisdictions, like the Family Court of Australia, which can only hear cases concerning family law. Many specialist courts exist, such as the Perth Drug Court, the Children's Court of Western Australia and the Queensland Land Court.

Legal jurisdictions are also based on the severity or importance of the case. For example, murder is a serious indictable criminal offence for which the maximum sentence is greater than 20 years in prison and where the **defendant** has a right to a trial by **jury**. A murder case will begin in the Supreme Court of the state in which the crime was committed. Assault is a serious indictable criminal offence with a maximum sentence of fewer than 20 years. Most assault cases will likely start in the District Court. Minor or summary offences, such as traffic infringements, littering and so on, will be heard in the Magistrates Court. Simple or summary offences are dealt with quickly and do not generally have a custodial (prison) sentence.

Original and Appellate jurisdiction

Original jurisdiction (SECTIONS 75 and 76) refers to the authority of a court to hear a case for the first time.

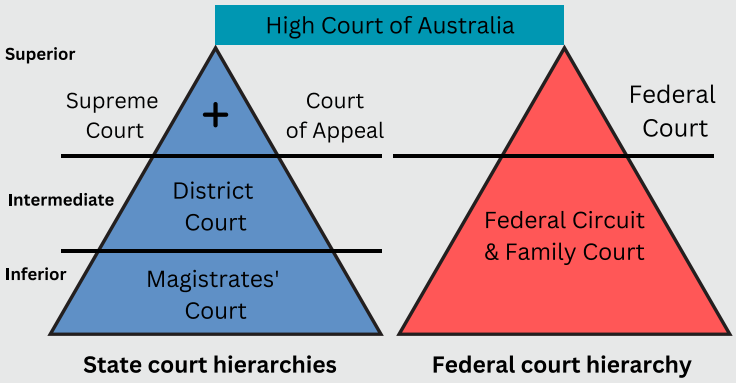
In Australia, the original jurisdiction of the High Court is defined by the Constitution, the *Judiciary Act 1903*, and other laws creating federal courts. Two of the High Court's original jurisdictions are constitutional cases and disputes between Australian governments.

State and territory courts also have original jurisdiction in most criminal and civil matters, as defined by various laws. There are also specialist courts, each with original jurisdiction in a narrow area of law.

Appellate jurisdiction is the power to hear appeals from lower courts. Only intermediate and superior courts have appellate jurisdiction. For example, the Western Australian Court of

Appeal has appellate jurisdiction in Western Australia. The High Court has appellate jurisdiction covering all Australian courts. Under SECTION 73, it is the ultimate court of appeal.

Figure 2.12 illustrates the federal and state court hierarchies in Australia. At the apex of both types of hierarchy is the High Court of Australia. The High Court is a federal superior court and the final court of appeal from all courts, including state and territory courts. It, therefore, unifies the Australian system of court hierarchies. Any decision made in the High Court is final and binding on all courts in Australia.



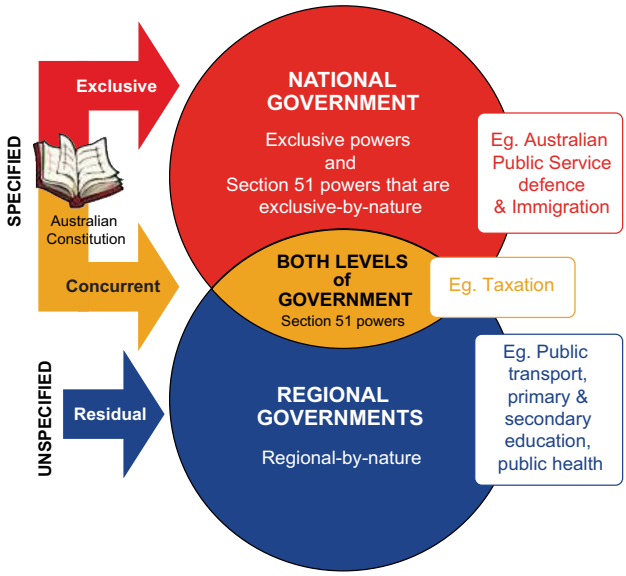
■ Figure 2.11 — Australia's state and federal court hierarchies

The Commonwealth and the States

Federalism

The authors of the Australian Constitution faced a dilemma. The six Australian colonies won self-government between 1850 and 1890 and were unlikely to surrender newly won powers to a new national government. At the same time, a national government was essential if the colonies were to unite in one Australian political and legal system.

The solution to this dilemma was **federalism**. The United States of America invented federalism in 1787, and since 1868 Canada proved it could work in a Westminster system. America and Canada were like Australia. All three are continental in scale and wanted to preserve self-governing regions – that is, states in USA and Australia and provinces in Canada – within a single national political and legal system.



■ Figure 2.12 — The division of powers in the Australian federal system. A written constitution allocates powers depending on their nature.

> *"Federalism is divided sovereignty between one national government and two or more regional governments."*

Federalism is divided **sovereignty** between one national government and two or more regional governments. It depends on two levels of government, each sovereign within its sphere of power. It is an alternative to the undivided sovereignty of a **unitary** state like Britain. Figure 2.13 shows how Australia's sovereignty is divided between the Commonwealth (the national government) and the States (the regional governments).

The Constitution and the division of powers

In a federal system, each level of government governs within its sphere of sovereignty. In Australia, the Constitution divides and allocates sovereignty – that is, powers – in three ways. See Figure 2.13.

Commonwealth powers

The Commonwealth came into being as the national government on 1 January 1901.

CHAPTERS ONE, TWO and THREE of the Constitution create the Commonwealth's legislative, executive and judicial branches of government, separating them in the process.

All Commonwealth powers are specified (that is, written) and enumerated (that is, numbered) in the Constitution. The Commonwealth has no power beyond those written in the Constitution.

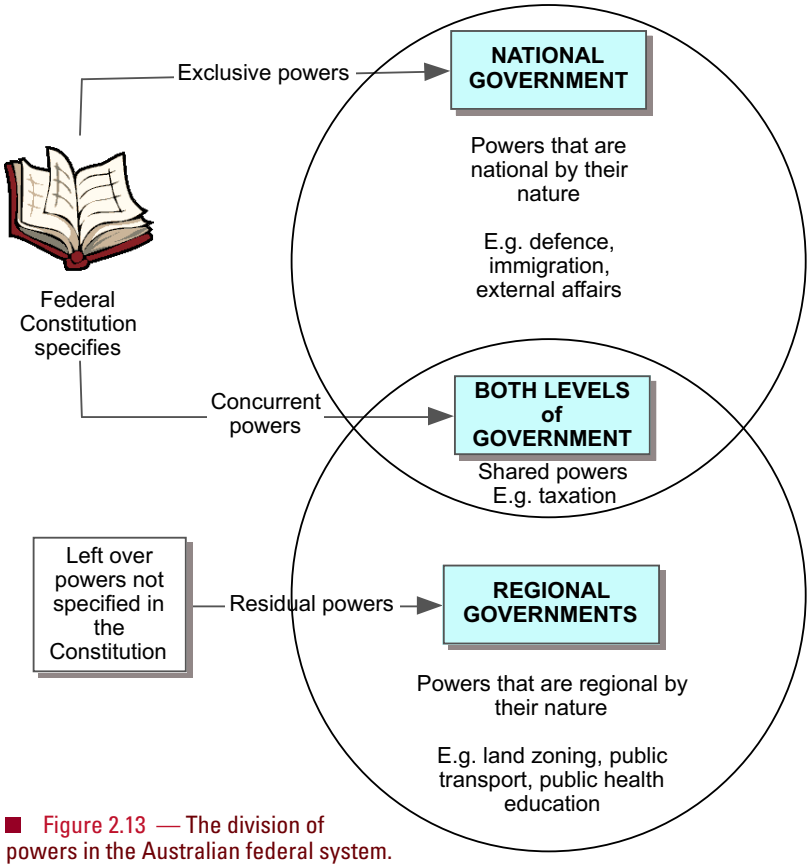


Figure 2.13 — The division of powers in the Australian federal system.

A small number of these powers are called **exclusive powers** and relate strictly to matters of a national character. Examples of exclusive powers, enumerated in SECTION 52, are the power over the Australian Public Service and the power to collect certain types of taxation called duties, bounties and excise. The states are excluded from making laws for these matters.

The Constitution also specifies and enumerates forty legislative and financial powers of the commonwealth but does not specifically exclude the states from making laws for them. Therefore, these powers can be exercised by both the commonwealth and the states. These are called **concurrent powers** and are listed together in SECTION 51. They include powers necessary for both levels of government, such as taxation.

> *"any power not specified and enumerated is automatically a State power."*

Some SECTION 51 powers are – by their nature – national in character, so the commonwealth makes laws for them. These powers are said to be **exclusive-by-their-nature**. Defence, immigration, external affairs and nationality are examples. While the states are not barred from these powers, they refrain from making laws for them because of their national character. Any state laws made in this 'national domain' would likely conflict with commonwealth law and be invalidated by SECTION 109.

SECTION 109 resolves conflicting commonwealth and state laws made under SECTION 51 by invalidating state law "to the extent of the inconsistency".

State powers

The states existed as colonies long before the federation of Australia. CHAPTER FIVE of the Constitution converted the colonies into States and saved their constitutions and lawmaking powers on 1 January 1901.

The states exercise concurrent powers specified in SECTION 51 that are not exclusive-by-their-nature. Taxation is an example.

Many powers are not specified in the Constitution. They are called **residual powers**. Residual means 'left over', so any power not specified and enumerated is automatically a State power. Residual powers relate to matters that are regional in character. There are many residual powers such as education, health, land management, crimes, policing, conservation and local government.

The commonwealth cannot make laws for residual matters.

Each level has a separation of powers with legislatures, executives and judiciaries:

- Nationally—a Governor-General, a Commonwealth Parliament, a federal executive government, and federal courts; and
- Regionally—six Governors, state parliaments, executive governments, and courts. See Figure 2.14

Note: there is no mention of local government in Australia's Constitution and efforts to formally change the constitution to include this have been rejected in the past.

A written constitution allocates powers depending on their nature.

Federal bodies

Because there are two levels of government in the federation, they need to cooperate and coordinate with each other to reduce duplication and inefficiency. Importantly, they must work together to do things neither can do alone.

There are many bodies through which the national and regional levels of government interact. The main ones are the following:

- The National Federal Reform Council (NFRC)
  - A council of the Prime Minister, State Premiers, Territory Chief Ministers, Treasurers and the President of the Australian Local Government Association, which
  - meets several times a year to set national[10] priorities, and
  - replaced the Council of Australian Governments (COAG) in 2020 during the COVID-19 pandemic.
- The National Cabinet
  - A new body created at the same time as the NFRC, which is
    - a streamlined and more frequent meeting of the heads of Australian governments – that is, the Prime Minister, Premiers and Chief Ministers, that
    - responds to emerging or high-priority issues of national significance.
- The High Court of Australia
  - Interprets the constitutional **division of power** between the commonwealth and states, and
  - **adjudicates** disputes between Australian governments, that is, commonwealth versus a state or states, or state versus state.

Federal balance of power

All federations have a federal **balance of power**. A balance of power occurs between the two levels of government because federalism divides power between them. The federal balance of power can take one of three forms and may shift from one to another at different times:

1. The national government is more powerful—this is called coercive federalism;
2. Both levels are co-equal in power—this is called dual, cooperative or coordinate federalism; or
3. The regional governments are more powerful—this is called confederation.

Several factors can alter the balance of power between the commonwealth and the states. Some are listed below.

- The High Court interprets exclusive and concurrent powers specified in the Constitution;
- Constitutional **referendum**s increase or decrease power to a level of government;
- States voluntarily transfer powers to the Commonwealth;
- There is no legal challenge to a commonwealth law made without constitutional authority.

Money matters, too. The commonwealth is affluent compared to the states because it collects more taxes and spends less money – and the states vice versa. A financial inequality between the two levels of government is called a 'vertical fiscal imbalance' (VFI). In the Australian federation, the VFI is quite extreme and is a source of financial power, which the commonwealth has used to coerce states. Australian federalism has been described as fiscal federalism - a form of coercive federalism - due to the significant influence of the fiscal imbalance.

10 In Australian federalism, 'national' refers to programs and agreements that apply to both Commonwealth and State powers and resources to solve national issues. Solving national issues requires 'cooperative federalism', where the Commonwealth and States work together to achieve outcomes neither can achieve on their own. One example is the Closing the Gap program, which targets socioeconomic gaps between First Nations communities and the rest of Australia. The NFRC and National Cabinet negotiate intergovernmental agreements, which are the primary vehicles of cooperative federalism.

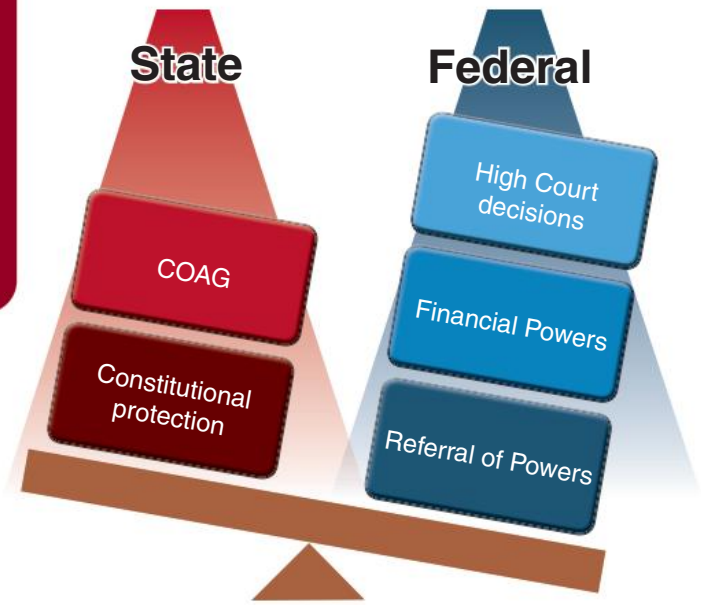


Figure 2.14 — Sources of federal imbalance.

Looking ahead: Australian federalism

Australian federalism, the federal balance of power, cooperative versus coercive federalism and the role of the High Court are part of Unit 3. Students learn about the nature of Australian federalism and how the federal balance of power has changed over time.

The geography of Australian federalism

In federal systems, national governments are often located in a unique region. Geographically, this makes the national capital separate from any state. Australia's national government is in the Australian Capital Territory, home to the national capital Canberra.

Canberra contains the three branches of the national government – the Commonwealth Parliament, the federal executive and the High Court of Australia. The Governor-General's residence is also in Canberra. The headquarters of major departments of the Australian Public Service, like the Treasury, Foreign Affairs and Defence are in a precinct of central Canberra called the Parliamentary Triangle.

Regional governments are located in major cities within the regions. In Australia, these are the State capitals. State capitals contain State parliaments, State executives, State Supreme Courts and Governors.

Territories are legally different to States. The two mainland territories mirror States' political and legal structures but lack their sovereignty. Instead, they exercise powers delegated by the Commonwealth rather than entrenched in the Constitution.

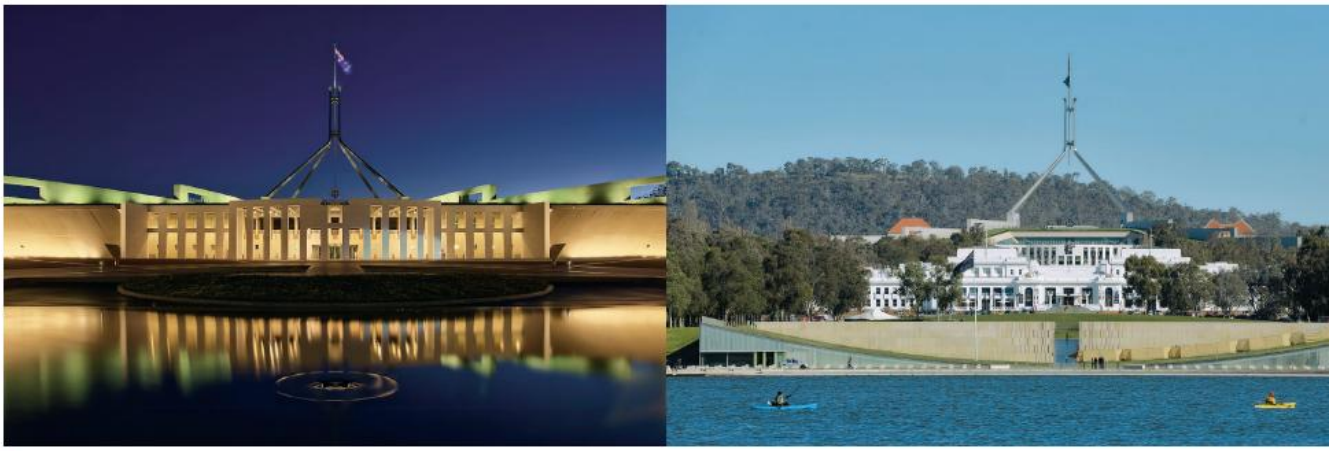


Figure 2.15 — Australia's Commonwealth Parliament is located in Canberra. The original Parliament House building was used from 1927-1988 when the New Parliament House was completed.[11]

11 Old Parliament House, formerly known as the Provisional Parliament House, was the seat of the Parliament of Australia from 1927 to 1988. The building began operation on 9 May 1927 after Parliament's relocation from Melbourne to the new capital, Canberra. In 1988, the Commonwealth Parliament transferred to the new Parliament House on Capital Hill. Old Parliament House, looking across Lake Burley Griffin, is situated in front of Parliament House and in line with the Australian War Memorial. It now serves as a venue for temporary exhibitions, lectures and concerts.

Summary

- Australia is a representative democracy and a constitutional monarchy organised as a federation with a responsible parliamentary form of government.
- At the national level, the King of Australia is represented by a Governor-General as head of state. It has an executive government led by a prime minister as head of government and a Cabinet of ministers drawn from and responsible to the lower house of its bicameral Commonwealth Parliament. It has a federal court hierarchy headed by the High Court of Australia. Federal courts operate according to English common law and the adversarial trial system.
- At the regional level, the King is represented by six state Governors as heads of state. It has executive governments led by Premiers as heads of government and Cabinets of ministers drawn from and responsible to the lower houses of their parliaments. Each state has a court hierarchy headed by a Supreme Court. State courts operate according to English common law and the adversarial trial system.
- The Australian Constitution creates the Commonwealth and States and enshrines their sovereignty. The Constitution divides the nation's legislative, executive and judicial powers between these two levels of government. Legislative powers are allocated exclusively and concurrently to each level by the Constitution. Unspecified powers are residual and fall to the States.
- There are two mainland territories with political and legal systems that mirror the States but lack their sovereignty. The Commonwealth Parliament delegates their powers.
- The critical process for representative democracy is elections. Elections enable citizens to choose representatives who become legislators in a representative assembly called a parliament. Parliaments make laws through a legislative process that represents electors' interests and is accountable to them.
- Royal power is limited by unwritten constitutional conventions that place the formal powers of the Crown at the command of ministers answerable to the representative parliament.
- The Cabinet, in turn, is governed by conventions like **Cabinet secrecy** and solidarity that ensure ministers can act as a single government separate from the rest of parliament.
- The judiciary is organised into a hierarchy that operates through the common law and the adversarial trial system. The doctrine of precedent is the primary process through which common law evolves.
- On the 1st of January, 1901, Australia adopted a federal system of government. Australia has two constitutionally entrenched levels of government, the Commonwealth and the States. This division of powers outlines the exclusive, concurrent and residual powers of the levels of government. Over time, Australia's federal system has changed dramatically from the one envisaged by Australia's founding fathers. The change in the federal balance has occurred due to how the High Court has interpreted the Constitution, the financial powers of the Commonwealth, and a range of intergovernmental relations that has evolved in response to changing circumstances both domestically and internationally. Despite these changes into a more centralised system, the States still maintain a crucial role, particularly concerning the core service delivery functions of government.

Exam practice questions

Short answer

1a. Outline what is meant by the term 'representative government.'

1b. Explain the role of the Governor-General in the legislative process.

1c. Discuss how the Commonwealth Parliament upholds representative democracy.

2a. What is meant by the term 'Constitutional monarchy' as it applies to Australia's political and legal system?

2b. Explain **two** differences between the constitutional executive and the political executive.

2c. Discuss how the Westminster chain of accountability contributes to upholding accountability in Australia's political and legal system.

3a. Outline the role of public servants as part of the Commonwealth Executive.

3b. Explain the relationship between the Prime Minister and Cabinet.

3c. Discuss **two** conventions of responsible parliamentary government within the Australian political system.

4a. Outline what is meant by 'judicial power' in the legal system.

4b. Explain **three** reasons for the court hierarchy in Australia's legal system.

4c. With reference to examples, discuss **two** jurisdictions of the High Court of Australia.

Source analysis

Source 1 is adapted from: Fenna, A., & Manwaring, R. (2021). *Australian government and politics*. Pearson Australia.

In 1901, Australia's six self-governing colonies united to form the Commonwealth of Australia. That involved creating a new central government, dividing powers and responsibilities between the Commonwealth and the States; and creating institutions to manage that relationship. The division of powers left primary responsibility to the States, but centralisation has made the Commonwealth a much powerful player in the system over the past century. Its allocated authority in has been interpreted broadly; it gained a position of financial superiority; and it has used that superiority to extend its influence.

The entanglement of the Commonwealth and the States resulting from centralisation has necessitated increased degrees of negotiation and coordination between Australia's governments. This has resulted in a web of intergovernmental relations, generally termed 'cooperative federalism'. At the apex of that for almost three decades was COAG, recently displaced by a less formally structured arrangement, 'National Cabinet'. The intensity and amicability of these intergovernmental relations have fluctuated according to need, circumstance and inclination. Entanglement has also resulted in a degree of policy and program overlap and duplication that has frequently been criticised and in recurrent discussion about possibilities for rationalising and reforming the system. These, so far, have come to nought. Finally, although it is a long shot, there have also been suggestions that some innovative federal or quasi-federal arrangements might represent a way towards indigenous self-government.

Refer to Source 1:

5a. Outline what is meant by a federal balance of power in Australia's political and legal system.

5b. With reference to Source 1 explain, in your own words, **two** consequences that have resulted from a change in the relationship between the Commonwealth and the States.

5c. Discuss the division of powers in Australian federalism.

5d. Evaluate the extent to which the separation of powers is achieved in Australia's political and legal system.

Essay response

6. Evaluate the extent to which the structure of Australia's political and legal system accurately reflects the Commonwealth (Australian) Constitution.

7. Evaluate the role of the Judicial branch in upholding the rule of law in Australia's political and legal system.

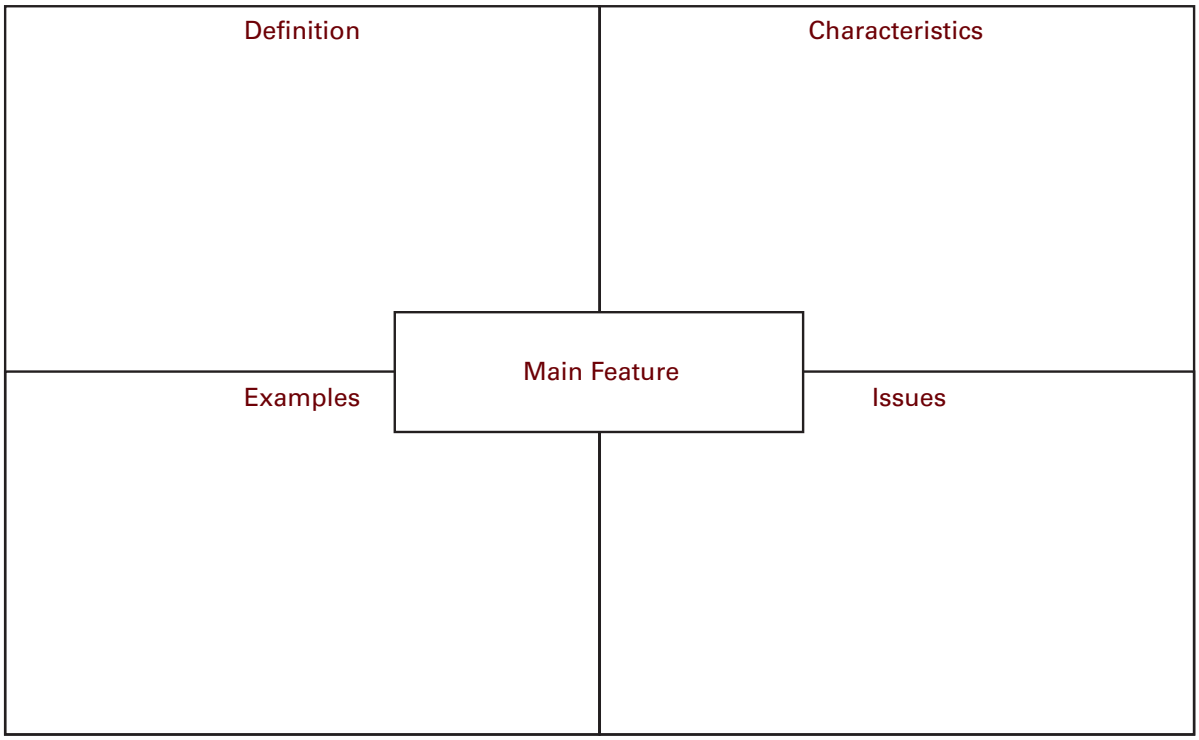
Investigation

8. The Frayer Model can be used by students to deepen their understanding of the main features of Australia's political and legal system at the commonwealth level.

Students could use this model for the following essential understandings of Unit 1:

- the separation of powers doctrine
- division of powers
- representative government
- Westminster conventions of responsible parliamentary government
- federalism
- judicial independence

This could be completed in small groups or as a collaborative activity as a whole class.



Sources

Figure 2.1 Source: Stephen King, 2018
Figure 2.2 Source: PEO.GOV.AU
Figure 2.3 Source: PEO.GOV.AU
Figure 2.4 Source: Open Government License 3, < https://en.wikipedia.org/wiki/Charles_III#/media/File:2023_Coronation_Balcony.jpg.
Figure 2.5 Source: Adrian Pingstone (talk · contribs), 2005, https://en.wikipedia.org/wiki/Westminster_system#/media/File:Houses.of.parliament.overall.arp.jpg; and The Houses of Parliament, seen across Westminster Bridge, Self-photographed, Public Domain, <https://commons.wikimedia.org/w/index.php?curid=327144>
Figure 2.6 Source: Stephen King, 2018
Figure 2.7 Source: Stephen King, 2018
Figure 2.8 Source: David Wilkie, The First Council of Queen Victoria, 1838, https://www.royalcollection.org.uk/collection/404710/the-first-council-of-queen-victoria and <https://en.wikipedia.org/wiki/Cabinet_(government)#/media/File:Victoria_Privy_Council_(Wilke).jpg>
Figure 2.9 Source: Lukas Coch, AAP Images, <https://photos.aap.com.au/search/albanese%20ministry?q=%7B%22pageSize%22:25,%22pageNumber%22:3%7D
Figure 2.10 Source: Matt Golding, < https://www.pollbludger.net/2023/03/01/polls-morgan-morning-consult-and-bludgertrack-open-thread/comment-page-24/>
Figure 2.11 Source: The judiciary: The High Court of Australia, the nation's highest court, https://en.wikipedia.org/wiki/Government_of_Australia#/media/File:High_Court_of_Australia_(6769096715).jpg; and Alex Proimos, High Court of Australia, 2012, CC BY 2.0, <https://commons.wikimedia.org/w/index.php?curid=25649423>
Figure 2.12 Source: Stephen King, 2018
Figure 2.13 Source: Stephen King, 2018
Figure 2.14 Source: Stephen King, 2018
Figure 2.15 Source: Nicol Davis, 2018
Figure 2.16 Source: Thennicke, Old and new parliament houses, Canberra, Australia, 2017, Own work, CC BY-SA 4.0, <https://commons.wikimedia.org/w/index.php?curid=49175634; and https://commons.wikimedia.org/w/index.php?curid=57886437>

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Australia's hybrid political and legal system

Essential understandings

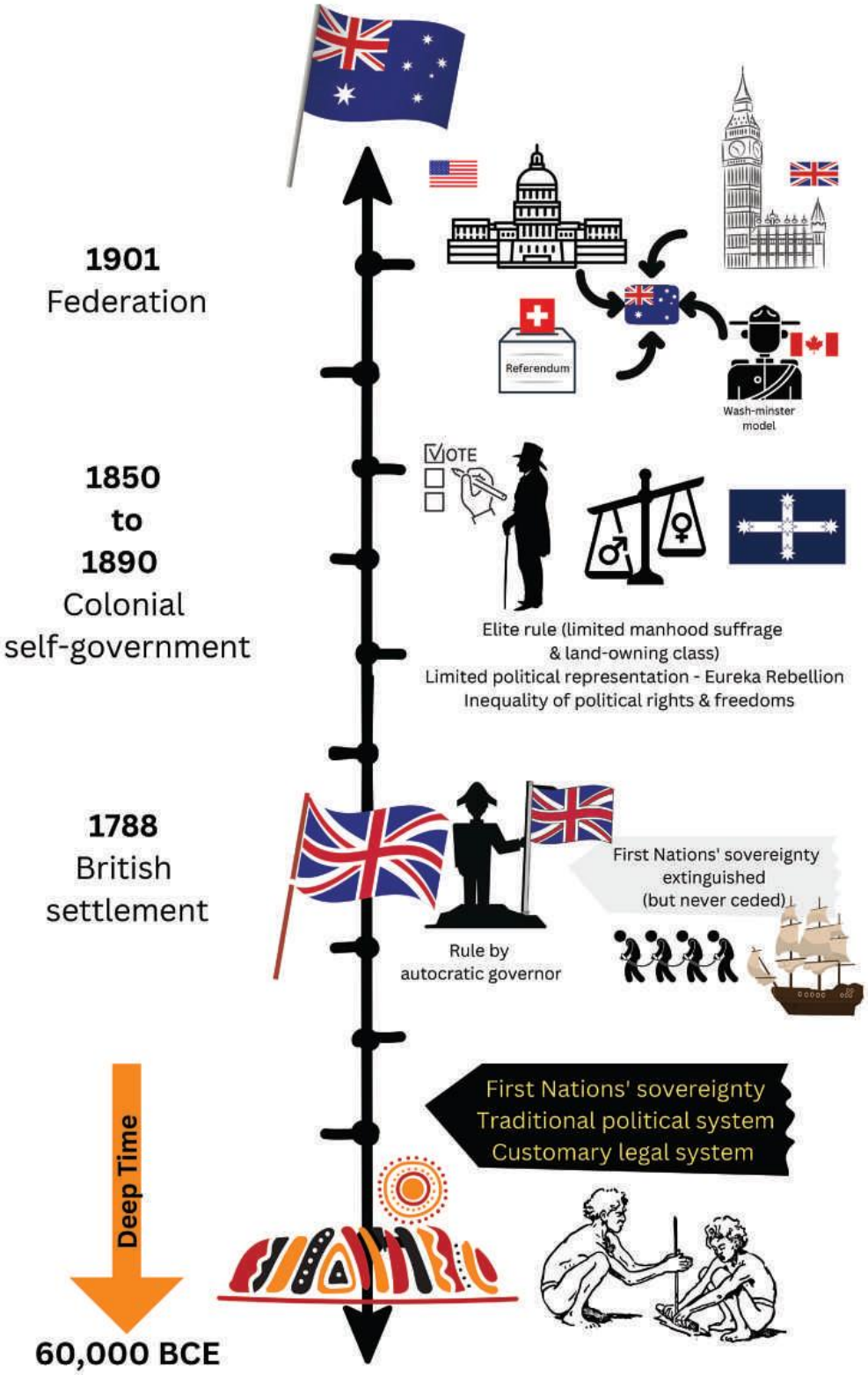
- **Essential to the understanding of democracy and the rule of law is knowledge of:**
  - **The separation of powers doctrine**
  - **Sovereignty of parliament**
  - **Division of powers**
  - **Representative government**
  - **Westminster conventions of responsible parliamentary government**
  - **Constitutionalism**
  - **Federalism**
  - **Judicial independence**

Syllabus points

- **Key influences on the structure of the political and legal system in Australia**
  - **the Westminster system of government**
  - **English Common Law**
  - **the American federal system**
  - **the Canadian federal system**
  - **the Swiss referendum process**

Overview of Australia's political and legal history

Indigenous forms of governance existed for approximately 60,000 years. They were based on language groups[1] organised into hundreds of First Nations.[2] The First Nations had **sovereignty** over their territories and governed themselves according to their traditions and customs. Traditional political systems were based on kinship.[3] Indigenous legal systems worked through customary law.[4]



■ Figure 3.1 — A simple timeline of Australia's political and legal history to 1901. Timeline is not to scale.

1 National Museum of Australia, <https://australianmuseum.net.au/indigenous-australia-introduction>.

2 A nation is a large body of people with a shared descent, history, culture, or language inhabiting a particular territory.

3 A traditional political system is based on a community's traditions, customs, or norms. It often revolves around kinship (family or clan relationships) and their relationship to territory (country). It is the way a community makes collective decisions.

4 Customary law is a set of rules and practices governing behaviour based on a community's traditions, norms, or culture. It is unwritten and established through prolonged and consistent use.

Figure 3.2 — Indigenous tribes had their own system of governance and law before the arrival of Europeans in 1788.

British possession of Australia occurred in two steps. Captain James Cook claimed the eastern two-thirds of the continent in 1770. Captain Charles Fremantle took possession of the remaining western third in 1829. These events legally extinguished First Nations sovereignty over the entire continent, however, some First Nations remained unaware or were beyond the reach of British **law** until well into the 20th century.

British rule began when Captain Arthur Phillip established the first British settlement as a penal colony at Sydney in 1788. The early colony was composed mostly of convicts and their guards. Gradually, more free settlers and emancipated convicts took up land for farming, and the settlement expanded. **Government** during this period consisted of autocratic rule by a British-appointed Governor who exercised almost unlimited legislative, **executive**, and judicial authority within the colony. Gradually, a council of advisors, appointed by the Governor or drawn from a small and unrepresentative elite, would assist him. The principles of **democracy** were absent at this stage.

By 1829, six colonies were established at far-flung locations around the Australian coast where harbours enabled seaborne communication with Britain. The Australian colonies grew relatively independently of each other due to distance and isolation. Some became wealthy through wool and gold rushes, while others – like the Swan River colony in Western Australia – struggled until 1890. Between 1856 and 1890 all six colonies became self-governing after the British **Parliament** delegated **power** to them. Colonial parliaments were **bicameral** and formed executives based on the **Westminster system**. However, the electoral **franchise** was limited to land-owning men, which excluded most residents, including all women and Aboriginal people from **political participation** and **representation**. Gradually, the franchise expanded to include all white men – a system called manhood suffrage. However, **majority rule** was limited by restricted political participation and rights.

At **federation** in 1901, Australia's political system had almost reached its modern form. It included universal franchise, enabling women's political participation and representation. However, Aboriginal people were legally excluded from the Australian community by the Constitution, which relegated them to a profoundly unequal status. Aboriginal exclusion would delay the implementation of full majority rule, political representation and the legal **equality of political rights** and freedoms until the 1960s.

The path to federation

At the close of the 19th century, a number of factors were pulling the six colonies towards union. Defence, economic integration, immigration, and identity were the main issues. Colonial leaders believed that political union was the answer to these issues.

The path to federation was gradual, taking over 40 years. By the late 1890's, several inter-colonial conferences and conventions had produced a draft Australian Constitution. The draft was taken by ship to Britain and passed as the *Commonwealth Constitution (Australia) **Act** 1901* by the British Parliament. It was then democratically ratified in Australia, thus, based on the will of the people.

The objective of the authors of the Constitution was to create a 'federal union', while preserving the sovereignty, laws, and identities of the existing colonies.

Federation was achieved when Britain passed the *Commonwealth Constitution (Australia) Act 1901*. Clause 9 of the Act is the Constitution. The Constitution drew ideas from four sources – Britain, the USA, Switzerland, and Canada resulting in what is known as the '**Washminster hybrid**'. It has not always been a perfect union with issues emerging over time.

The timeline at Figure 3.3 outlines the stages on Australia's pathway to federation.[5]

The four factors driving the process of federation are shown. Also illustrated are the constitutional ideas from Britain, the USA, Canada, and Switzerland that influenced the authors of the Australian Constitution.

5 Australia Indonesia Institute, *Australia's Journey to Federation*, 2004, <http://www.abc.net.au/ra/federasi/tema1/aus_timeline_e.pdf>; and <http://www.abc.net.au/ra/federasi/tema1/timeline_e.htm>.

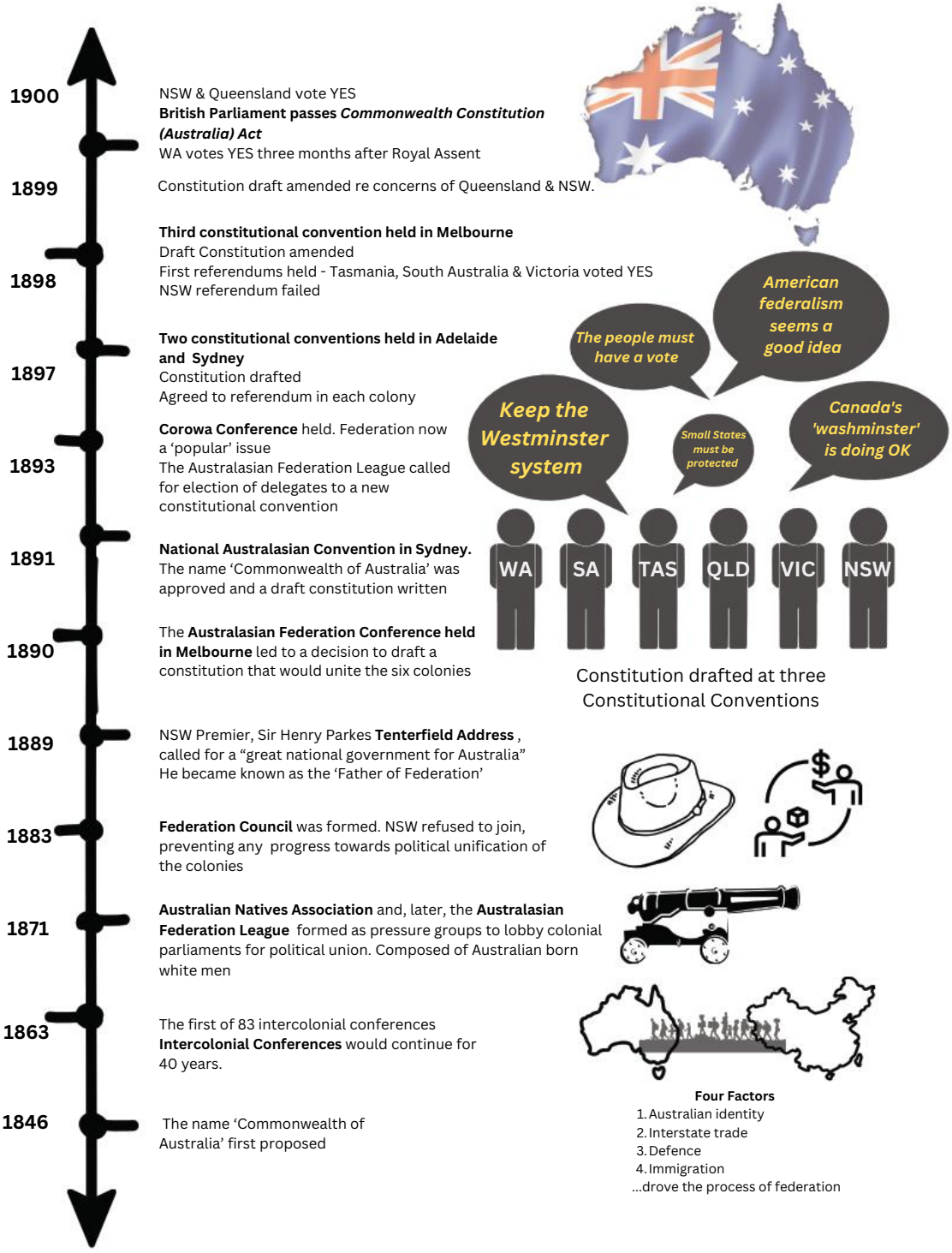


Figure 3.3 — The pathway to Federation. Note: timeline is not to scale.

British influences

Britain's political and legal system had a profound influence on Australia. The following were particularly influential:

- Constitutional monarchy;
- Bicameralism;
- The Westminster system and **responsible government**; and
- English **common law**.

The British political and legal system is a **representative democracy** with a **constitutional monarchy** organised as a **unitary** state with responsible parliamentary government. It features the Westminster system of unwritten **conventions**, a weak bicameral parliament, and a **separation of powers**. Its defining characteristic is the fusion of the legislative and executive branches. The highest court – the Privy Council – is also part of parliament. The **court hierarchy** is not shown.

Constitutional monarchy

Britain's constitutional monarchy is a system where the King's power is limited by the principle

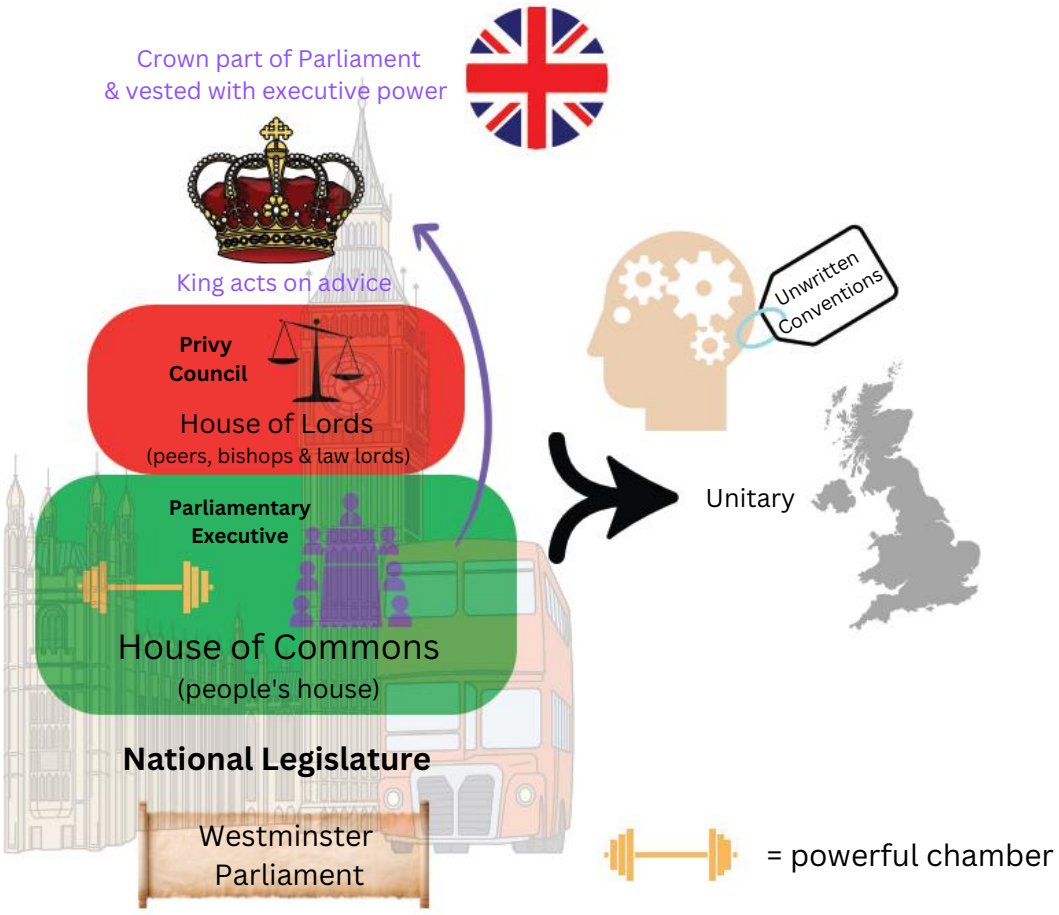


Figure 3.4 — The British Westminster system and illustrates the British political and legal system.

of **constitutionalism**. Unwritten conventions and statutes provide the constitutional limits. The King has formal executive power and is part of the British Parliament and must assent to **bills** before they can become law. However, these powers are not real because convention dictates that they are exercised on the advice of elected **ministers**. Thus, the British monarch's role is mainly ceremonial, with the **Prime Minister** and **Cabinet** exercising real executive power.

Australia is a constitutional monarchy that shares the same monarch with Britain. The King of Australia is represented in Australia by the **Governor-General**, who has the same executive and legislative powers - and constitutional limits - as the British monarch. The Governor-General's role is also largely symbolic. One significant difference is that the Governor-General's powers are specified in the Australian Constitution and so have the force of constitutional law. Therefore, conventions are extremely important in upholding the principle of constitutionalism because they govern how specific legal powers are used. *See Background information: Powers of the Governor-General.*

Background information: Powers of the Governor-General

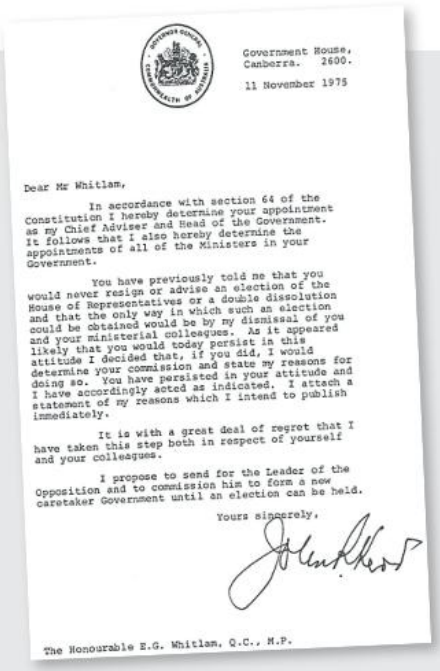
The Governor-General's powers are specified in the Australian Constitution. They fall into three categories:

1. Formal powers – used on ministerial advice through the Federal Executive Council.[6] These are commonly used.
2. **Reserve powers** – used in emergencies to restore constitutional government. These have been used only once in Australian history.
3. Fictional powers – never used.

The Governor-General's formal powers are:

- Prorogue (to postpone or suspend) Parliament (SECTION 5);
- Dissolving Parliament (SECTIONS 28 AND 57);

6 The Federal Executive Council (FEC) is a council of ministers chaired by the Governor-General. It is the part of the executive branch that links the Governor-General and their legal executive power, to ministers. Ministers have no legal power and rely on the convention that the Governor-General follows advice to exercise executive power.



Government House,
Canberra. 2600.

11 November 1975

Dear Mr Whitlam,

In accordance with section 64 of the Constitution I hereby determine your appointment as my Chief Adviser and Head of the Government. It follows that I also hereby determine the appointments of all of the Ministers in your Government.

You have previously told me that you would never resign or advise an election of the House of Representatives or a double dissolution and that the only way in which such an election could be obtained would be by my dismissal of you and your ministerial colleagues. As it appeared likely that you would today persist in this attitude I decided that, if you did, I would determine your commission and state my reasons for doing so. You have persisted in your attitude and I have accordingly acted as indicated. I attach a statement of my reasons which I intend to publish immediately.

It is with a great deal of regret that I have taken this step both in respect of yourself and your colleagues.

I propose to send for the Leader of the Opposition and to commission him to form a new caretaker Government until an election can be held.

Yours sincerely,

The Honourable E.G. Whitlam, Q.C., M.P.

■ Figure 3.5 — Letter from Governor-General Sir John Kerr to then Prime Minister Gough Whitlam.

- Issuing writs for an election (SECTION 28);
- Assenting and dissenting to bills (SECTION 58);
- Appointing and dismissing ministers (SECTION 64); and
- Appointing **judges** to federal courts (SECTION 72).

These powers are used by the Governor-General, but only on advice from ministers provided through the Federal Executive Council (FEC). They are **formal powers**.

The Governor-General's powers may be used in emergency situations to restore constitutional government in a crisis. When used this way they are called reserve powers. An example is SECTION 64, which may be used to dismiss the **ministry** if a government refuses to resign after losing the confidence of the **House of Representatives**.

The 1975 Crisis occurred when Governor-General Sir John Kerr used the reserve powers to dismiss the Whitlam Government. The **Senate** refused to pass the government's money bills (supply), and Mr Whitlam refused to call an election to resolve the crisis. Arguably, this is the type of emergency that the reserve powers are designed to resolve.

SECTION 68 makes the Governor-General the Commander-in-Chief of the Australian defence forces. This is a **fictional power** as it is never exercised. Governors-General review troops on parade and perform other ceremonial duties such as awarding medals, but these do not reflect the use of executive power.

Looking ahead: The Whitlam Dismissal

The Whitlam Dismissal is the most controversial event in the history of Australia's Constitution and is covered in detail in Unit 3 of this course. Students will learn how the power of the Senate and the specified reserve powers of the Governor-General caused Australia's greatest constitutional crisis.

Bicameralism

Bicameralism refers to the structure of parliament. Bicameral parliaments have two chambers, which provides a system of **checks and balances** and prevents a concentration of power.

In Britain, the two chambers are the House of Commons and the House of Lords. The House of Commons is the lower house and is composed of elected members who represent geographical areas called constituencies. Thus, it is a people's house embodying the principle of majority rule. The House of Commons is powerful because it represents the will of the majority.

The House of Lords is the upper house and comprises hereditary peers (aristocrats), and appointed bishops (Lords Spiritual) and judges (Law Lords). It can only delay, not block bills. Money bills are guaranteed unhindered passage. The House of Lords is weak because it is undemocratic – all its members are hereditary or appointed.

Australia adopted bicameralism for the **Commonwealth Parliament.** However, only its lower house - the House of Representatives - is modelled on the British Parliament. The House of Lords had no influence on the Australian Senate - its aristocratic values conflicted with Australia's democratic and egalitarian values. The Senate has an elected or political mandate like the House of Representatives. It has rotated

■ Figure 3.6 — House of Commons, United Kingdom.

Figure 3.7 — "The Middlesex Guildhall houses the SupremeCourt of the United Kingdom and Judicial Committee of the Privy Council".

elections modelled on the American system. In 1949 proportional voting was introduced for Senate elections allowing for the rise of minor parties and less dominance of the executive. This has caused some conflict between the two houses. Having a strong upper house represents a significant move away from the British Westminster system.

The Westminster system and responsible government

The Westminster system is the British system of parliamentary government. It is based on the principles of **parliamentary sovereignty** and responsible government. Responsible government was already established in the legislative assemblies of the colonies before federation. The key feature is the relationship between the legislative and executive branches – which are fused.

The executive branch (that is, the Prime Minister and Cabinet) is drawn from and accountable to the **legislature** (that is, the parliament) – hence it is a 'parliamentary executive'. It is formed by and located within the lower house. The party that has a lower house majority commands its confidence and forms the government. It remains in office if it continues to command the confidence of the lower house.

The lower house can remove a government by a vote of no confidence. Parliament also checks individual ministers by questioning them. It may remove ministers by a censure motion if they are personally or politically corrupt or incompetent.

The Westminster system also emphasises the importance of the **opposition.** The Opposition – which is the second largest party in the lower house - scrutinises the government and offers electors an alternative government.

Responsible government is synonymous with parliamentary government. It is the principle that the executive branch is accountable to the legislature. In practice, this means that the Prime Minister and Ministry are accountable to parliament and can be removed from office if they lose the support of a majority of parliamentarians through a vote of no confidence. This principle ensures that the government is responsive to the people's wishes and reflects majority rule, represented by their elected **representatives.** *See Background information: Making and breaking the government.*

Background information: Making and breaking the government

Formation of government – confidence of the lower house

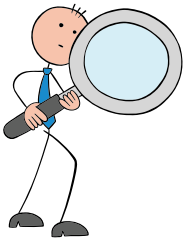
In Chapter 1, the idea that the parliament makes and breaks the government was introduced. The processes of forming and dismissing governments, is governed entirely by **Westminster conventions**.

The most important convention is that the executive government must have the confidence of the lower house. In practice, this means that the executive requires the support of the majority of members in the House of Representatives. In the Commonwealth Parliament that means at least 76 of the 151 Members of the House of Representatives must support the government on confidence and supply. The House shows confidence by either refraining from proposing no-confidence motions or by defeating such motions when they are presented. Supply is provided by the successful passage of money bills (also called **appropriations** bills). Executives cannot govern without confidence and supply and must resign if they fail to secure either.

Westminster convention dictates that government is formed in and responsible to the House of Representatives. However, Australian governments' supply bills must pass both houses of parliament. SECTION 53 of the Constitution prevents money or appropriations bills from originating in the Senate. It also prevents the Senate from amending such bills. However, if a government cannot persuade the Senate to pass supply, then it faces significant challenges in governing. – see *Looking Ahead: The Whitlam Dismissal*. This is a quirk of the Australian system and the significant power of the Senate – students will recall the House of Lords passes money bills unhindered.

The Australian executive is modelled directly on the British system of responsible parliamentary government. Australian governments and ministers are accountable to the House of Representatives through the same procedures as their British counterparts.

Looking ahead: The public service



The Australian **Public Service** (APS) is modelled on the British Civil Service. It is a bureaucracy organised into departments that serve the government of the day. The APS takes policy direction from and provides expert advice to the Ministry and Cabinet, regardless of which party is in government.

The APS is part of the executive branch that administers laws. It comprises appointed and trained officials who serve the government. The APS is a bureaucracy organised into departments, each of which is responsible to a minister and, through them, parliament. Departments are responsible for implementing government policies and providing advice to ministers.

An apolitical public service ensures that advice to ministers is "frank and fearless" and that policies are implemented impartially.

The **accountability** of the APS is part of Unit 4.

In addition to written laws and statutes, Britain's constitutional system depends on unwritten conventions and practices, known as **constitutional conventions.** These include practices such as the government being formed in the House of Commons, the procedures for holding the government accountable to the House of Commons, the Prime Minister's weekly meetings with the monarch, the requirement for the Prime Minister and ministers to be members of parliament, and the convention that the House of Lords does not block government legislation. These conventions are not legally binding - as written constitutional rules are - but are essential in shaping the country's constitutional arrangements.

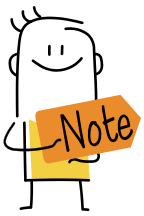
Australia inherited unwritten Westminster conventions. The way the government is formed, the procedures for holding the government accountable to the House of Representatives, the Governor-General meeting with ministers and so on are examples. Some conventions were codified in the Australian Constitution. For example, the requirement for ministers to be members of parliament is expressed in SECTION 64 of the Constitution.

Other conventions, like the upper house not blocking government bills, are not part of the Australian political system. Conventions, unlike laws, are not enforceable, that is justiciable - they are incapable of adjudication by a court because there are no texts to interpret. This fact makes constitutional conventions quite flexible and adaptable. *See Background information: Westminster conventions limit executive power.*

English common law

Common law is a system of law based on the **Doctrine of Precedent** rather than on written laws or statutes. It developed in the England system and later in the British system, where the common law forms a significant part of the legal system and has been developed over centuries through **court** decisions in particular cases. It provides flexibility and adaptability, allowing the law to evolve in response to changing circumstances.

Australia's legal system is based on English common law. Australian courts use the same **trial** system and develop common law through judges' decisions in cases. Common law is also called 'judge-made law' or 'case law'. Chapter 6 examines the courts, court hierarchies and the common law.



Background information: Westminster conventions limit executive power

The operation of the Australian executive branch is governed by unwritten Westminster conventions.

Chapter Two of the Constitution vests the executive power of the **Commonwealth** in the King and the **Governor-General**. However, these powers are not real. The Governor-General only exercises these powers on advice from ministers. This follows British practice, with the King acting only on ministerial advice.

The Constitution does not mention the Cabinet or the Prime Minister. SECTION 62 creates the **Federal Executive Council** (FEC), which is chaired by the Governor-General. All ministers, including the Prime Minister, are members of the FEC. However, the FEC does not make executive decisions. It is the forum in which ministers advise the Governor-General. Convention requires the Governor-General to always accept ministers' advice – placing real power in ministers' hands.

SECTION 64 refers to **Ministers of State** and requires ministers to be members of parliament

– fusing the executive and legislative branches and entrenching parliamentary government and the Westminster system in the Constitution. Collectively, Ministers of State form the Ministry and Cabinet. Cabinet is a committee of the parliamentary executive and is the real executive decision-making forum. It has no legal power and relies on convention to exercise power through advising the Governor-General.

Public servants in a Westminster system are experts in their field of administration. They provide advice to ministers about matters related to the administration of laws. Public servants are responsible to their minister – who is responsible to parliament. Thus, there is a chain of accountability linking parliament to the public service. These arrangements are known as the **Westminster Chain of Accountability**, which reflects the British influence on the APS.

Note that the executive branches of both the British Westminster system and the Australian political system have the following structure:

1. A formal constitutional executive – the King / Governor-General, bound by unwritten Westminster conventions;
2. A real or political executive – consisting of a Prime Minister and Cabinet drawn from and responsible to the lower house of parliament; and
3. An administrative executive – a politically neutral public service to implement laws.

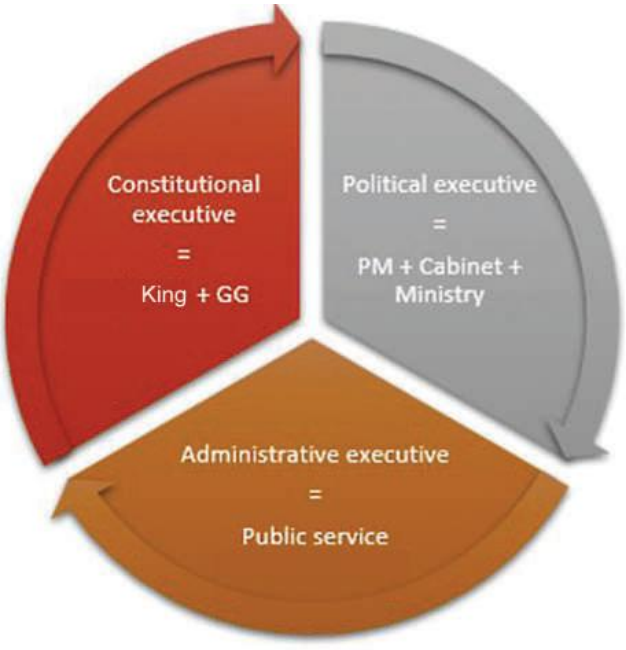


Figure 3.8 — The three parts of the executive branch.

Figure 3.9 — Australia's 28th Governor-General, Samantha Mostyn AO.

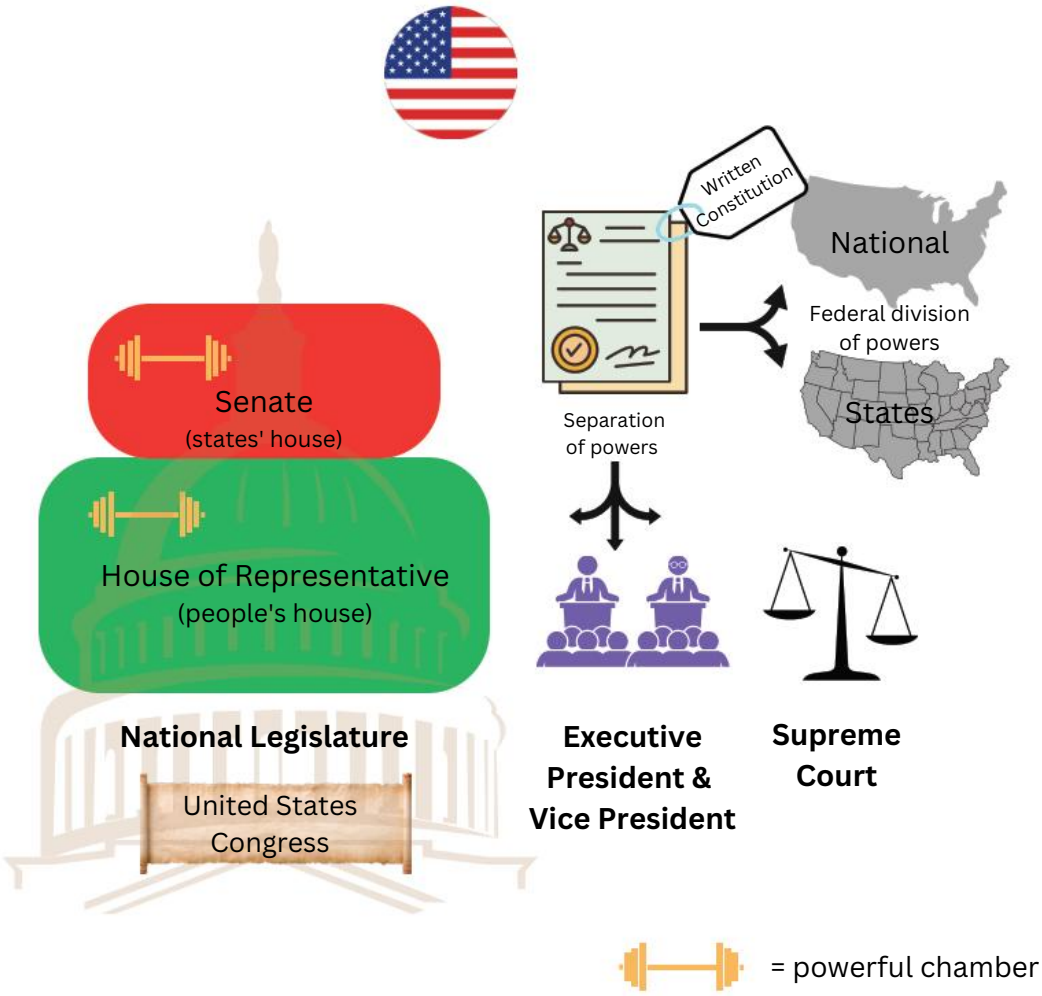
American influences

American **federalism** also strongly influenced the authors of the Australian Constitution. Federalism is a political system where sovereignty is divided between a national government and regional governments. It was considered necessary because the Australian Constitution needed to unite six regions (that is, the colonies) to produce a **nation-state** under one government. American federalism works through several interrelated ideas, all of which influenced Australia's political and legal system. This section looks at all of them. They were:

- Federalism;
- Strong bicameralism;
- A written or codified constitution; and
- A constitutional court.
- Federalism

The US Washington system is a representative and republican democracy organised as a federation with an executive presidential **system of government**. It features a written constitution which strictly separates and defines legislative, executive, and **judicial powers**, and divides sovereignty between one national and many regional governments. It has a strongly bicameral legislature where each house has relatively equal power. Figure 3.10 illustrates the political system of the United States of America.

The Constitution of the United States is a superior law establishing a federal system. It divides the legislative, executive, and judicial powers of government between the national government in Washington DC, called the Federal Government, and many state governments – currently 50 – with jurisdiction over geographical regions within the USA. The federal and state levels are sovereign in their spheres of power.



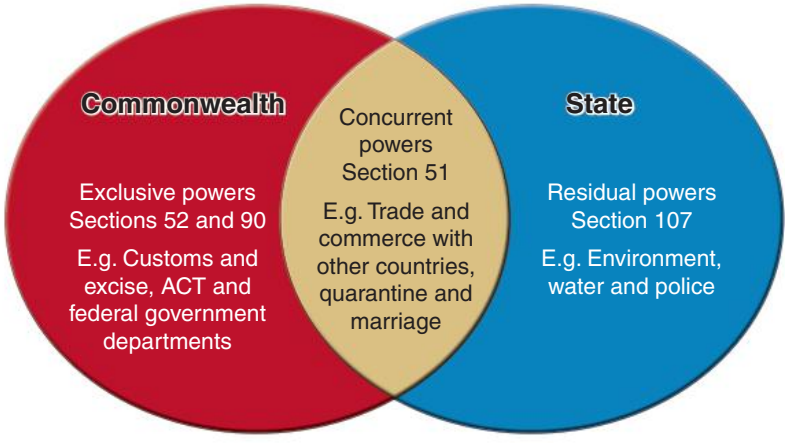
■ Figure 3.10 — The USA 'Washington' system

The Constitution allocates powers to the two levels appropriate to their national and regional functions. National powers, like defence, are made exclusive to the Federal Government. Powers necessary for both levels, like taxation, are concurrent (shared). Powers with a regional character are left to the states. The US Constitution specifies exclusive and concurrent powers. Remaining powers are unspecified - meaning any power not expressly stated in the Constitution falls to the states. They are called **residual powers**.

Figure 3.10 illustrates the political and legal system of the United States of America and is known as the 'Washington' system. Characteristics include checks and balances between its strictly separate branches of government and the division of sovereignty. The court hierarchy is not shown.

The US Washington system is a representative and republican democracy organised as a federation with an executive presidential system of government. It features a written constitution which strictly separates and defines legislative, executive and judicial powers, and divides sovereignty between one national and many regional governments. It has a strongly bicameral legislature where each house has relatively equal power.

The US idea of federalism was essential to Australia's political and legal system. Without it, the political union of the six colonies was unlikely because they would cease to exist in a unitary system like Britain's.



■ Figure 3.11 — The federal division of powers.

Australia's Constitution follows the US federal model almost perfectly. It establishes a federal system of government in which the legislative, executive, and judicial powers of government are divided between the national government in Canberra, called the Commonwealth, and six state governments with jurisdiction over the territories of the former colonies. Australian commonwealth and state governments are sovereign in their spheres of power. The Australian Constitution also mirrors the US Constitution's method of allocating powers to each level. National powers are exclusively commonwealth powers, while basic governmental powers, like taxation, are concurrent to both levels. As in the US, residual powers are unspecified and fall to the states.

Strong bicameralism

Strong bicameralism describes systems where the two legislative chambers are equally powerful. The US Constitution adopts British bicameralism, where the upper house is a house of review. However, it modifies it by making the upper chamber powerful. As a result, the US Congress exhibits strong bicameralism.

The US House of Representatives is the lower house. It represents the people in constituencies across the US, where states with large populations have more representatives than smaller states. When the US Constitution was drafted, smaller states feared large states would dominate Congress – a fear shared by Australia's smaller colonies.

The US Senate was intended to protect smaller states. It is a federal chamber representing the states at the national level of government. It does so by representing each state equally regardless of population. In this way, small states have the same voting power in the Senate as big states.

The US idea of a powerful federal senate influenced Australia's political system. The Australian Senate also serves as a house of review and represents the six states equally regardless of their population, so Tasmania has the same representation and voting power as NSW. The Australian Senate has almost the same legislative power as the House of Representatives, making strong bicameralism a feature of the Commonwealth Parliament. Its role is like that of the US Senate. Like its US counterpart, it checks the power of the House of Representatives. For example, it can veto legislation passed by the House, limiting the legislative impact of more populous States in the lower house.

Figure 3.12 — The US Constitution.

Note that the Australian Senate's power to veto bills means it can block money bills too. Thus, its power is not limited to checking the power of large states – it can check the government as well. This feature is not Westminster like – the House of Lords cannot block supply. Senate power to check the government was responsible for the 1975 Crisis – *see Looking Ahead: The Whitlam Dismissal.*

A written constitution

Unitary systems have no need to divide power, meaning they do not require a written constitution to the same extent as federal systems – note how well Britain's system functions without a constitution.

Like the USA, Australia's political and legal system is a federal system depending on a specific **division of powers.** To combine American federalism with its British inheritance, Australia needed a US-style written constitution.

Yet, written constitutions can become inflexible - even rigid - if they cannot evolve in changing circumstances. The US solved this problem by providing its Supreme Court with jurisdiction to interpret the US Constitution. Australia did the same.

A constitutional court

Interpretation by a constitutional court is arguably the most important method by which written constitutions adapt. When Australia wrote federalism into its Constitution, it was compelled to adopt a constitutional court.

Institutions of Government		United States Constitution	Australian Constitution
National government	**Legislative branch**	**Article 1** *Section 2: The House* *Section 3: The Senate* *Section 8: Powers*	**Chapter 1** *Part 2: The Senate* *Part 3: The House* *Part 5: Powers*
	Executive branch	**Article 2** *President & Vice President*	**Chapter 2** *King & Governor-General*
	Judicial branch	**Article 3** *Supreme Court – the constitutional court*	**Chapter 3** *High Court – the constitutional court*
State governments	State constitutions and powers	**Article 4**	**Chapter 5**

Table 3.1 — Comparison of the federal constitutions of the US and Australia.

The US Supreme Court is the final arbiter of disputes about the meaning of the United States Constitution. The **High Court of Australia** – modelled directly on the Supreme Court – performs an identical role regarding the Australian Constitution. Both the US Supreme Court and the High Court of Australia have the power to strike down unconstitutional laws. They are able to interpret the meaning of laws as well as the words, the meaning of clauses and the structure of the constitution. Both bodies act as a powerful check on their respective countries' legislative and executive branches. Both also have significant power because their constitutional interpretations can alter their nations political and legal systems and rights of citizens.

Four American ideas; federalism, a powerful senate, a written constitution, and a constitutional court significantly influenced Australia's political and legal system.

USA and Australia—comparing constitutions

The authors of the Australian Constitution applied the US Constitution's structure to the Australian Constitution.

Other influential constitutional ideas

Canada's 'Washminster' system

Of all the world's political and legal systems, Canada's is the most like Australia's. Canada achieved political union by adopting American federalism while retaining the British constitutional monarchy, the Westminster system and English common law.

Canada demonstrated how a 'hybridised' Anglo-American system worked in practice. The success of the Canadian federal system provided evidence that helped convince the authors of the Australian Constitution that a Washminster hybrid was a viable political and legal system. Specifically, it proved that the Westminster system and federalism could work together in a blended system.

It is important to note that Australia did not adopt Canadian federalism. Canadian federalism is different to Australia's in significant ways. For example, it allocates exclusive powers to the provinces (equivalent to **states**) rather than the national government. Moreover, its Senate – although a federal chamber –

	Institution	Notes
W A S H	A written federal constitution which divides and allocates powers of the legislature	Necessary to create the new federal level of government, to allocate powers exclusively and concurrently to the federal and state levels, and to residual powers to the states
	A powerful upper house federal chamber or 'house of the states'—the Senate	A house to represent the interests of the states at the federal level
	Strong bicameralism	An upper house as a states' house, with powers almost equal to the lower house, the people's house
M I N I S T E R	Constitutional monarchy with the King incorporated into the Commonwealth Parliament	The Commonwealth Parliament has three parts—the King, the Senate and the House of Representatives
	A lower 'house of government'—the House of Representatives	The House of Representatives is the home of the executive government. It is formed by whoever commands a house majority
	Responsible parliamentary government operating under unwritten constitutional conventions	A form of executive government fused with and responsible to the parliament and operating under the traditions and customs called 'conventions'

Table 3.2 — A summary of elements of the US (Wash) and British (Minster) contributions to the design and powers of the Commonwealth Parliament in Australia.

is weak and appointed, making it more like Britain's House of Lords. Therefore, Australian federalism is more like America's than Canada's.

Canada created the world's first Washminster hybrid in 1868. The system had operated successfully for 32 years before Australia implemented the same model. Canada was the experiment that proved the system worked. See *the Case Study: The Canadian Political and Legal System*.

■ Figure 3.13 — Australia's system of government is a combination of the federalism of Washington and the parliamentary Westminster system, that is, a Washminster hybrid.

Swiss referendums

Switzerland is a representative democracy with the Federal Assembly (the equivalent of our parliament) as its legislature. The Swiss also have over 100 years of experience with **referendums**. A referendum is a direct vote by the people on a particular question – that is, it is **direct democracy**. In Switzerland, referendums can override laws made by the Federal Assembly or make changes to the Swiss constitution.

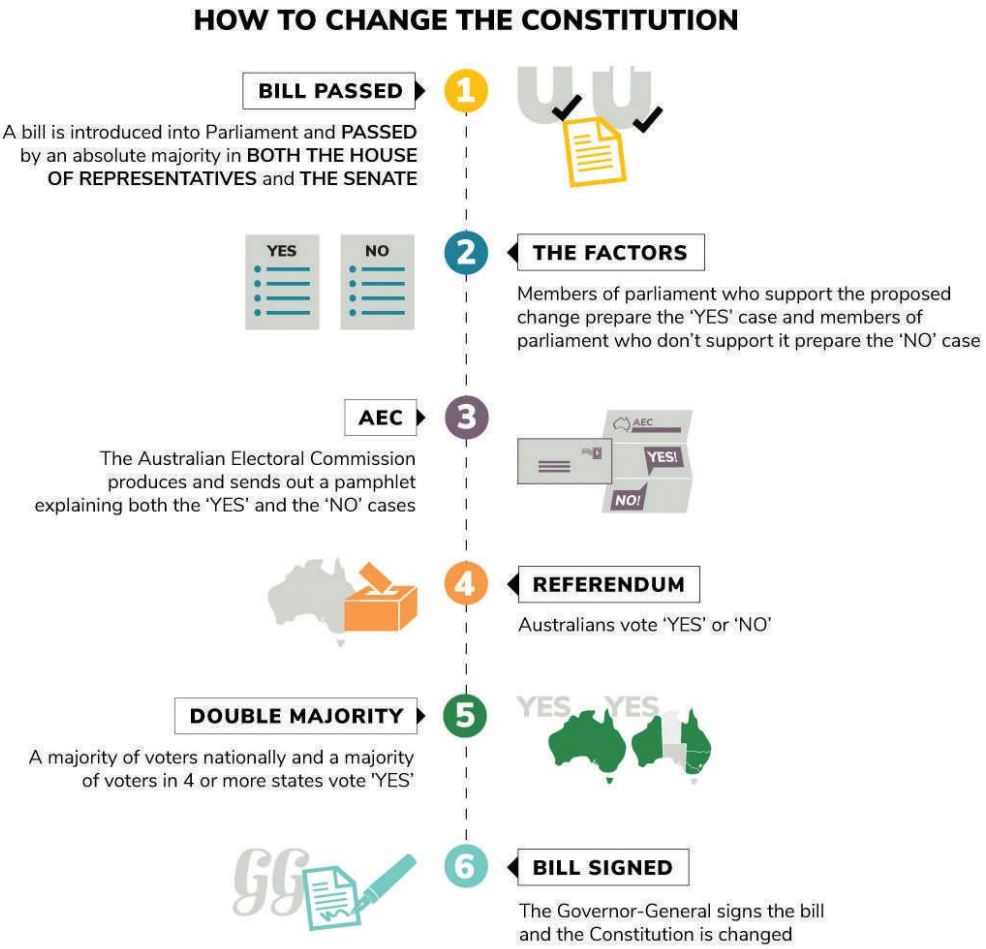
The Swiss use referendums at the national, regional, and local levels of government. They are a characteristic feature of Swiss democracy and enhance popular participation in government.

The authors of the Australian Constitution valued democracy highly. Thus, the referendum was an attractive feature of the Swiss political system. Notably, the proposed Australian Constitution was approved by referendums in all colonies. Australia was born through an act of Swiss-style direct democracy.

Direct democracy via referendum was chosen as the mechanism for formal changes to the Australian Constitution.

The procedure for constitutional change is codified in SECTION 128 of the Constitution. The process requires two forms of majority to change the wording of the Constitution:

1. a majority of Australian electors – a minimum of 50% + one of the national vote; and
2. a majority of electors in a majority of states – a minimum of four states.



■ Figure 3.14 — SECTION 128 outlines the process by which the Australian Constitution can be changed.

The requirement for two types of majorities is referred to as a **double majority**.

Proposed constitutional changes are passed by Parliament as a **bill**. The question is put to the people in a referendum. If a double majority is achieved, the Governor-General gives **Royal Assent** to the bill. The resulting law changes the Constitution.

Australia's Washminster hybrid

Hybridising the US 'Washington' and British 'Westminster' systems produced an Australian 'Washminster hybrid' political and legal system.

Figure 3.15 illustrates the British and American influences on Australian Washminster hybrid political and legal system. The Canadian and Swiss influences are not shown.

The Australian political and legal system is a representative democracy with a constitutional monarchy organised as a federation with responsible parliamentary government. It features a written constitution which separates powers and defines legislative and judicial power. The executive is largely governed by Westminster conventions. The Australian Constitution also divides sovereignty between a national government and regional governments. It has a strongly bicameral legislature where each house is almost equally powerful. Defining characteristics are the fusion of the legislative and executive branches, a strictly judicial branch, and the division of sovereignty. Canadian and Swiss influences and the court hierarchy are not shown.

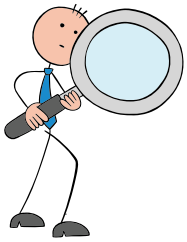
The Australian Washminster hybrid

Hybridising results in a best of both worlds. But it also has costs.

The Washminster hybrid created a workable 'best of both worlds' solution to the problem of uniting the six colonies within a federation while preserving the Westminster system and constitutional monarchy. However, unforeseen problems would necessitate the emergence of uniquely Australian conventions. By combining the Westminster and Washington systems, the Fathers of Federation created the potential for conflict between a codified constitution and the unwritten rules of conventions. For example, how the Senate deals with money bills ultimately brought about the crisis of 1975.

Constitutional problems in Washminster systems are caused primarily by:

- The written constitution clashing with unwritten Westminster conventions concerning the powers of the Governor-General;
- A powerful Senate blocking money bills and bringing about a crisis of government—something Britain's weak House of Lords cannot do; and
- Parliamentary sovereignty being limited by a written constitution and the federal division of powers.



Looking ahead: Australia's federal architecture

Australia's federal architecture is studied in Unit 3.

Federalism results in many governments wielding various powers. Without coordination or cooperation between them – or the coercion of one level of government by the other – federalism is a recipe for inefficiency. Contemporary Australia solves this problem through National Cabinet.

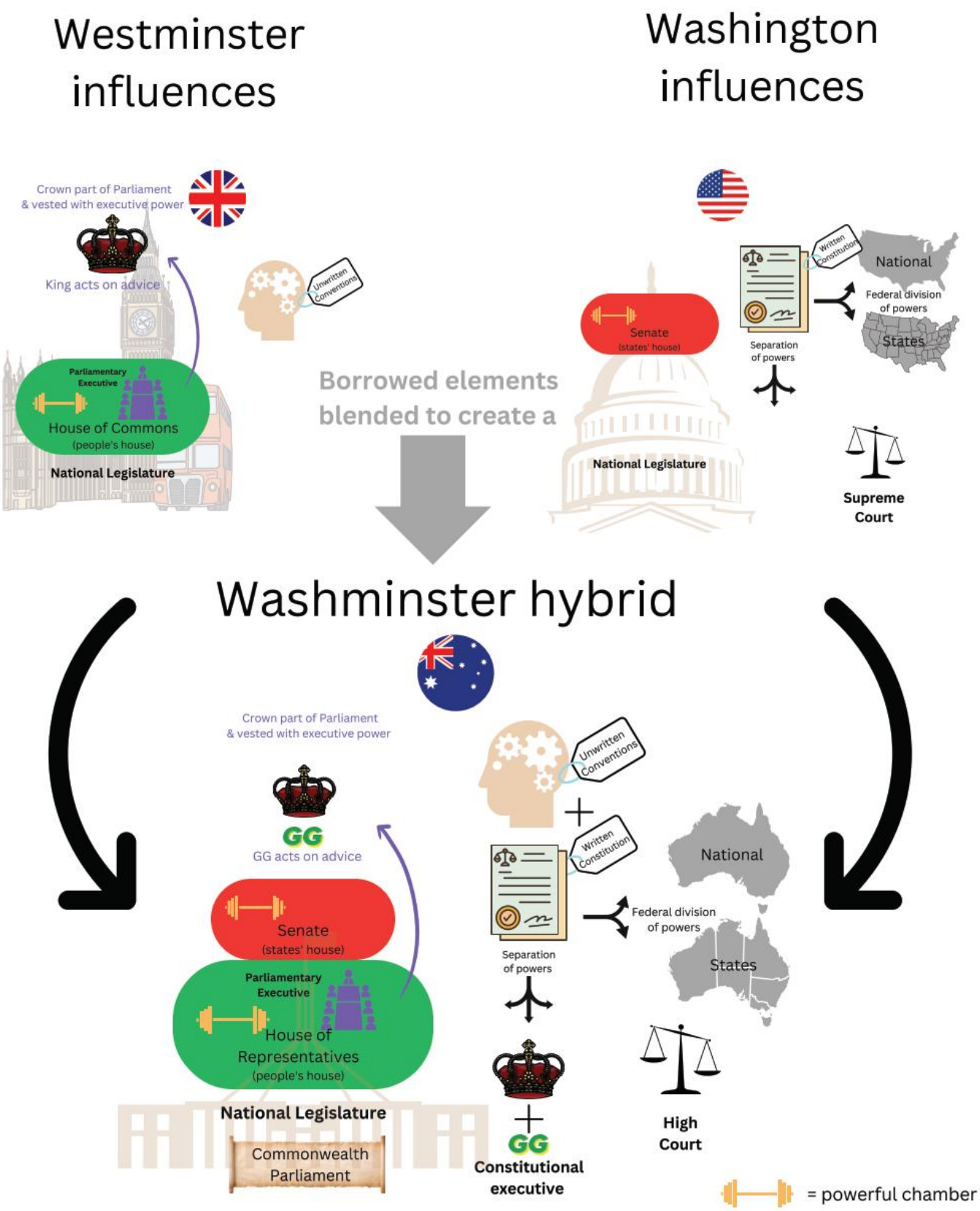
National Cabinet is a council of first ministers (the Prime Minister, State Premiers and Territory Chief Ministers) which meets regularly to discuss nationally important matters. National issues often require commonwealth and state powers and resources to address complex issues that arise between federal and state governments. Thus, both levels of government meet in National Cabinet to identify national issues and develop national policies through cooperation.

Usually, national issues need a combination of state powers and commonwealth money to be adequately addressed. To address national issues states can voluntarily refer powers to the commonwealth or pass 'uniform laws' to enable national action or simplify laws across jurisdictions. National Cabinet is the forum in which these matters are discussed.

However, the commonwealth has the power and money to coerce the states if cooperation fails. Coercion was a common feature of Australian federalism until the 21st century.

A series of Ministerial Councils – comprising federal and state and territory ministers with common **portfolios** – are also part of Australia's federal architecture. The Ministerial Council of Attorneys-General is an example. It cooperated over several years in the early 2020s to produce updated and uniform defamation laws in most states.

Ministerial Councils report to National Cabinet on their progress towards national goals.



■ Figure 3.15 — the Australian Washminster hybrid

Summary

- Australia was colonised by the British at six widely separate locations around the Australian coastline. By the mid to late 19th Century each had grown into self-governing colonies, each with its own parliament, government, and courts.
- Defence, economic integration, immigration, and identity were pushing the six colonies towards a form of union by the late 19th Century.
- Bringing six self-governing colonies into a political and legal union meant a new constitutional arrangement. It needed a national government while preserving regional autonomy. Federalism was the solution.
- The new commonwealth was based on the Westminster system and English common law. It was a constitutional monarchy with a bicameral parliament, a parliamentary executive, and a common law **adversarial** court system. The legislature and executive were fused, with **the Crown** being part of both the parliament and the executive. Westminster conventions limited the power of the Crown and placed real executive power in hands of executive officials, called ministers, drawn from the elected parliament.
- Australian federalism was adopted and adapted from the US model. It divides sovereign powers exclusively, concurrently, and residually between national and state governments. Federalism required a written constitution to achieve three goals.
    1. Create a national government and separate its three branches;
    2. Preserve state governments; and
    3. Divide legislative and financial powers between the two levels of government.
- The written constitution required a constitutional court, called the High Court, to settle disputes about how it should be interpreted.
- Federalism needs institutions that link the two levels of government, enabling cooperation and coordination between Australian governments. Today, this is achieved by National Cabinet and a series of Ministerial Councils.
- Canada adopted a very similar blend of the Westminster and Washington systems decades before Australia. Canada's Washminster hybrid provided a model to copy and confidence that a 'Washminster hybrid' could work.
- Swiss direct democracy and referenda were adopted as the method for formally changing the Constitution in Australia.

Exam practice questions

Short answer

1a. Outline **two** features of Australia's federation in 1901.

1b. Outline **three** factors that drove the process of federation.

1c. With reference to examples, discuss the issues that emerged in the path to federation.

2a. What is meant by the term 'British Westminster system'?

2b. Outline **three** influences, from the British Westminster system, adopted by the founding fathers.

2c. Discuss the extent to which the constitutional powers of the Governor-General operate in practice.

3a. Outline the role of Australia's bicameral parliament.

3b Outline **two** differences between the British Parliament and the Australian Commonwealth Parliament.

3c. Discuss the extent to which the Australian executive is modelled on the British system of responsible government.

4a. Outline what is meant by the term 'federalism.'

4b. Outline **two** ways, in which Westminster conventions limit executive power in Australia.

4c. Discuss **two** ideas, from the American system of government, that have influenced Australia's political and legal system.

Source analysis

Source 1 is adapted from: Intifar Chowdhury 16 February, *Young people may decide the outcome of the Voice referendum – here's why*, from https://theconversation.com/young-people-may-decide-the-outcome-of-the-voice-referendum-heres-why-199599

A referendum on a First Nations Voice to Parliament is set to be held in the second half of this year [2023]. Australians will be asked if they agree to a constitutional amendment *to give First Nations people a voice in government decisions that directly affect them.*

Historically, Australians have been reluctant to change the Constitution. Only eight out of 44 referendums carried, with no successful constitutional change since 1977.

The 1967 referendum had the highest 'yes' vote in history, garnering over 90% support.

But referendums are not bound to fail. Since the referendum is inherently an issue-based vote, the success in the past depended heavily on the issue. Previously, campaigns have been more successful when they focused on principles or outcomes, rather than on the technical and procedural issues concerning amendments.

For example, the 1967 referendum on Indigenous constitutional recognition scored the highest percentage of votes (90.77%) in favour of any referendum. In contrast, the 1999 referendum to change Australia from a constitutional monarchy to a republic *did not garner majority support from any state.*

Some young people, especially those affiliated with the Liberal Party, raise mixed views about the referendum, demanding more clarity on the proposal in its current form. That is, most do support the need to recognise the historical wrong done to Indigenous communities, but they are not supportive of the approach because, as a young Liberal said, isolating a group for benefits or harm "is inherently wrong and should be opposed".

Plus, there are both right and left-wing opponents of the Voice. Therefore, we must be cautious in thinking a progressive individual *will vote "yes".*

Young people – mostly those who haven't yet had a chance to participate in a referendum – already have a low level of understanding of constitutional matters. But given they are more likely to strongly support the Indigenous cause than their older counterparts, a transparent and thorough public education campaign is much needed to gather informed youth support.

Refer to Source 1:

5a. Outline what is meant by the term a 'double majority.'

5b. With reference to Source 1 explain, in your own words, **two** ways in which young people could decide the outcome of the Voice referendum.

5c. Discuss Swiss and Canadian influences on Australia's political and legal system.

5d. Evaluate the impact of **two** constitutional ideas on Australia's political and legal system.

Essay response

6. Evaluate the extent to which the United Kingdom and the United States were equally as significant in shaping Australia's political and legal system structure.

Investigation task 1

7. Students, individually or in small groups (depending on the number of students you have), are to debate which of the features Australia adopted from the British Westminster system has had the greatest impact on Australia's political and legal system structure.

Features to consider:

- Constitutional monarchy;
- Bicameralism;
- The Constitutional executive follows the advice of the political executive;
- Government must maintain majority in the House of Representatives ;
- The Prime Minister must be a member of the lower house, and Ministers must be elected members of parliament;
- **Individual Ministerial Responsibility**;
- Collective Ministerial Responsibility;
- The Governor- General retains executive powers, but these are rarely used;
- The Upper House cannot initiate or amend money bills (s53);
- A minimalist constitution that relies heavily on convention;
- Common law, where judges create **precedents** to be applied in similar cases;
- The second largest party or **coalition** in the lower house forms the (that is, alternative government).

As an extension to the activity, students could then evaluate the extent to which the features listed below were changed or rejected in creating Australia's political and legal system.

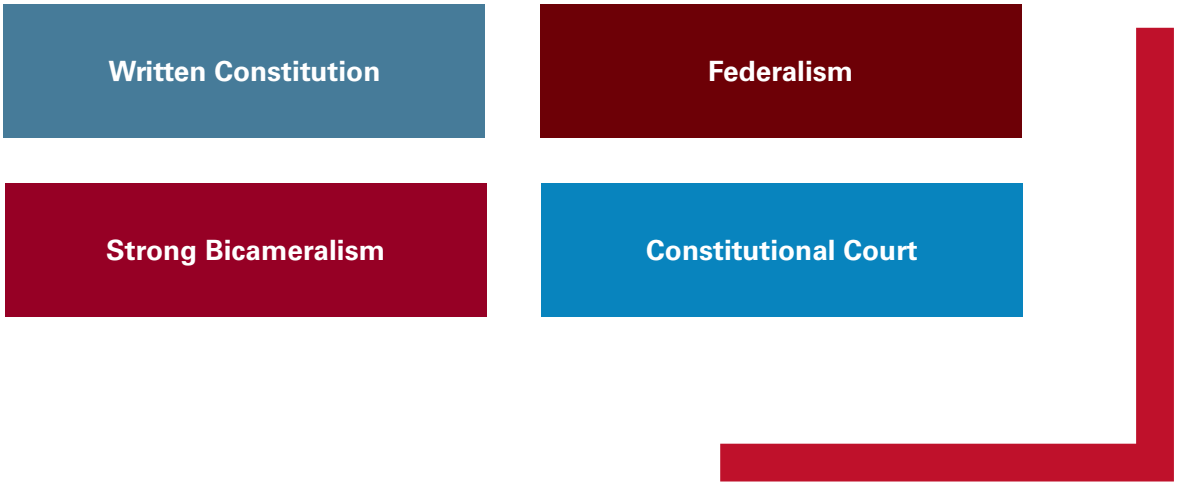
In addition, students could discuss issues that have emerged as a result of the adoption of these features:

- The Constitutional monarchy;
- Westminster system of responsible government;
- Bicameralism;
- **Representative government;** and
- Common law.

Investigation task 2

8. Students could debate the following question:

   With reference to the United States of America, what feature has had the most significant influence on Australia's system of government?



Sources

Figure 3.1 Source: Stephen King, 2024
Figure 3.2 Source: Charles Troedel, Aboriginal people fishing and camping on Merri Creek, 1864, Takver (user:tirin), <https://en.wikipedia.org/wiki/Wurundjeri#/media/File:Merri_Creek_Plenty_Ranges-Troedel.jpg> and <www.takver.com>, Public Domain, https://commons.wikimedia.org/w/index.php?curid=5199062
Figure 3.3 Source: Stephen King, 2024
Figure 3.4 Source: Stephen King, 2024
Figure 3.5 Source: http://whitlamdismissal.com/1975/11/11/kerr-letter-of-dismissal.html
Figure 3.6 Source: UK Government, https://en.wikipedia.org/wiki/House_of_Commons_of_the_United_Kingdom#/media/File:House_of_Commons_2010.jpg; <https://civilservicelocal.blog.gov.uk/2015/02/26/learning-about-the-workings-of-parliament/> and OGL 3, <https://commons.wikimedia.org/w/index.php?curid=61682470>
Figure 3.7 Source: Adrian Pingstone, 2004, <https://en.wikipedia.org/wiki/Courts_of_England_and_Wales#/media/File:Middlesex.guildhall.london.arp.jpg> and Arpingstone—Own work, Public Domain, https://commons.wikimedia.org/wc/index.php?curid=279609
Figure 3.8 Source: Nicol Davis, 2019
Figure 3.9 Source: Australian Government, https://www.pm.gov.au/, CC BY 4.0, https://commons.wikimedia.org/w/index.php?curid=147039260
Figure 3.10 Source: Stephen King, 2024
Figure 3.11 Source: Political and Legal Educators Association of Western Australia
Figure 3.12 Source: Constitution of the United States, page 1, 1787, <https://en.wikipedia.org/wiki/United_States_Constitution#/media/File:Constitution_of_the_United_States,_page_1.jpg> and Constitutional Convention - U.S. National Archives and Records Administration, Public Domain, <https://commons.wikimedia.org/w/index.php?curid=15795309>
Figure 3.13 Source: Adapted from Makarenko Andrey, Laundry, the Noun Project, <https://thenounproject.com/search/?q=washing%20machine&i=1304053>
Figure 3.14 Source: Parliamentary Education Office, www.peo.gov
Figure 3.15 Source: Stephen King, 2024

All sources last accessed 23/7/24

Democracy and autocracy

Essential understandings

- **Essential to the understanding of democracy and the rule of law are the separation of powers doctrine, constitutionalism and judicial independence.**

Syllabus points

- **Structures and processes of:**
  - **one democratic political and legal system**
  - **one non-democratic political and legal system with reference to the operating principles of liberal democracy**

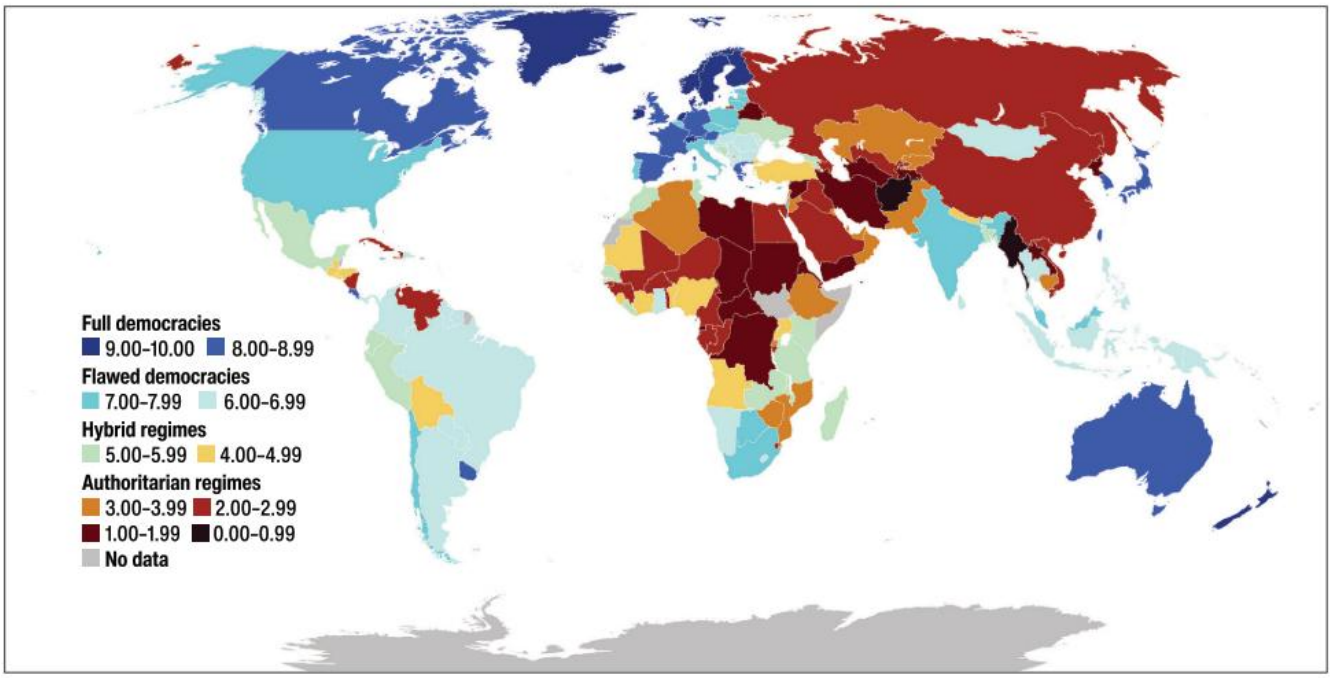


Figure 4.1 — The Economist Intelligence Unit's Democracy Index map for 2023. Bluer colours represent more democratic countries, as reported

It is often remembered that former British **Prime Minister** Sir Winston Churchill said, "many forms of **Government** have been tried, and... indeed, it has been said that **democracy** is the worst form of Government except [for] all those other forms that have been tried from time to time".[1]

Churchill was clearly defending democracy, but his words help us understand the challenges political and legal systems face when trying to govern.

The rise of democracy

Democracy began its march to prominence after the defeat of Nazi Germany and Imperial Japan in 1945. It accelerated following the 1991 collapse of the Soviet Union, a communist one-party dictatorship much like contemporary Communist China. Today some 45 per cent of countries in the world are democratic by some measure and almost 50 per cent of the world's population live in these countries.[2]

The Democracy Index classifies countries based on the degree to which their political and legal systems uphold the principles of democracy. The Index uses a range of criteria that are similar to the operating principles of **liberal democracy** studied earlier in Unit 1. Recall, these principles are:

- equality of political rights;
- majority rule;
- **political participation**; and
- **political freedom**.

According to Democracy Index, countries fall into one of the following four regime types:

1. **Full democracies** exhibit robust **separation of powers** and **checks and balances**, the **rule of law** and an independent **judiciary**. They possess a free media and a political culture that upholds political rights and freedoms to facilitate political participation. Executive power is accountable. Democratic institutions, including **electoral systems**, are robust and effective in achieving **majority rule** and **political representation**. People living in full democracies participate freely in government.
2. **Flawed democracies** may have functional election systems and a basic respect for civil and political rights and freedoms. However, they may experience low citizen participation rates or a lack of media diversity or **independence**. Electoral systems may suffer **gerrymandering** or onerous restrictions to the **franchise** or other factors that undermine majority rule and political representation.
3. **Hybrid regimes** incorporate some democratic elements, but serious problems persist. The executive often wields more **power** than the **legislature** or **courts**, undermining the rule of law. **Elections** may be unfair, preventing true majority rule and distorting political representation. Restrictive laws may suppress political rights and freedoms. Courts lack independence, the rule of law is weak, political opponents may face harassment and political corruption can be prevalent.

1 Prime Minister Winston Churchill, House of Commons, 11 November 1947, **Hansard** vol 444, cc203–321, <https://api.parliament.uk/historic-hansard/commons/1947/nov/11/parliament-bill>.

2 Economist Intelligence Unit, *Democracy Index 2020*, <https://www.eiu.com/topic/democracy-index>.

4. **Authoritarian regimes** have no tolerance for **opposition**, deny political rights and freedoms, lack checks on executive power and independent courts and suppress media freedom. They hold either no elections or manipulate elections – so the will of the majority is never truly known. There are few, if any, opportunities for meaningful political participation, which is stunted by persecution, censorship and apathy. Rule *by* – not *of* – law, is a feature and provides the means for executive rule by coercion. Majority rule is absent. Instead, the rule of one (for example, dictatorship, **absolute monarchy**) or an elite (for example military junta, theocracy) is common. People living in authoritarian regimes fear and endure government.

Regime type	No. of countries	% of countries	% of world population
Full democracies	24	14.4	7.8
Flawed democracies	50	29.9	37.6
Hybrid regimes	34	20.4	15.2
Authoritarian regimes	59	35.3	39.4

Table 4.1 — Democracy Index 2023 - rankings of 167 countries according to democratic criteria

Among the top full democracies in the Democracy Index 2020 are Norway, Iceland, Sweden, and New Zealand. Australia holds the equal 9th rank with the Netherlands. The US fell from the 21st in 2017 to 25th in 2020. It is classified as a flawed democracy due to growing distrust in its political system among American **citizens**. These countries uphold the operating principles of liberal democracy to high standard.

North Korea is the most autocratic country, while China, a one-party system, fell from 139th in 2017 to 151st in 2020, and Iran, a theocracy, is ranked 152nd. See *Case Study: Iran - a theocracy.*

The number of democratic nations has changed and will continue to change over time. Similarly, individual nations may transition between full democracies and flawed democracies or even regress into non-democratic systems. As Winston Churchill aptly stated:

> *"...and also how is that word 'democracy' to be interpreted? My idea of it is that the plain, humble, common man... marks his ballot paper, in strict secrecy, and then elected representatives meet and together decide what government, or even, in times of stress, what form of government they wish to have in their country. If that is democracy, I salute it. I espouse it. I would work for it."*[3]

Democracies

Australia is a liberal democracy with a **constitutional monarchy**, operating as a **federation** with a responsible parliamentary government. It's important that students should comprehensively understand the Australian political and legal system and recognise that it embodies all the foundational principles and democratic attributes that place it among the 24 countries ranked as full democracies in the 2022 Democracy Index.[4]

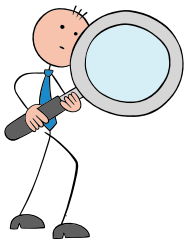
The democratic features of Australia's system include:

- The **Westminster system**;
- Constitutional monarchy;
- **Responsible government**;
- Bicameral legislature.

Australian citizens also enjoy political freedoms and equal political rights. Majority rule is established through fair and open elections for the **representative parliament**, forming the parliamentary executive.

Various approaches to achieving democracy exist beyond the Westminster-inspired model. For instance, the United States of America (US) follows a different approach, as do countries like France, Germany, Norway, and South Korea, among many others.

This section will briefly examine an in text Case Study—the US—using a democracy checklist that students can apply to evaluate the level of democracy in any governmental system.



Looking ahead: Evaluating how countries uphold democracy

Evaluating how Australia and one other country uphold or undermine democratic principles is a focus of Unit 4. As you progress through this topic, keep in mind how the political and legal systems of Australia and those of the United States of America, China and Russia

3 Prime Minister Winston Churchill, House of Commons, 8 December 1944, Hansard vol 406, cc908–1013, <https://api.parliament.uk/historic-hansard/commons/1944/dec/08/liberated-europe-british-intervention#S5CV0406P0_19441208_HOC_42> accessed 20 December 2023.

4 The Economist Intelligence Unit, The Democracy Index 2022, Frontline democracy and the battle for Ukraine. Table 2 Democracy Index 2022, page 7 of the report at: https://www.eiu.com/n/wp-content/uploads/2023/02/Democracy-Index-2022_FV2.pdf?li_fat_id=f1fbad7e-a282-4b9e-9f8f-6a6d5a9fe6b8

uphold or undermine the following principles:

- political representation… by concentrating on fairness of their electoral systems;
- popular participation… by noting the status of political rights and freedoms in each country;
- the rule of law… by observing how the **law** restrains power – especially executive power – in each country;
- judicial independence… by assessing the capacity of each country's courts and **judges** to act independently; and
- natural justice… by focussing on legal systems of each country to deliver fairness and due process.

Democracy checklist: Evaluating democratic government

Various indicators can be used to gauge the extent to which a **system of government** exhibits democratic principles. These democracy indicators encompass:

- Democratic Doctrines:
  - Does **constitutionalism** apply to constrain power?
  - Is there a robust separation of powers and effective checks and balances?
  - Is the rule of law upheld?
  - Is the government both representative and accountable?
  - Does majority rule prevail?
- Free and **Fair Elections**:
  - Can electors cast their ballots secretly?
  - Are the barriers to electoral registration low?
  - Are elections free of biases and interference?
  - Do electoral systems reflect the majority will and the diversity of political views?
- Citizen Participation and Pluralism:
  - Is there tolerance of political perspectives and interests?
  - Can diverse associations like political parties and advocacy groups engage in the process?
  - Are the individual political freedoms of citizens (such as conscience, speech, assembly, information access, and media) respected, along with the **equality of political rights** (voting and candidacy)?

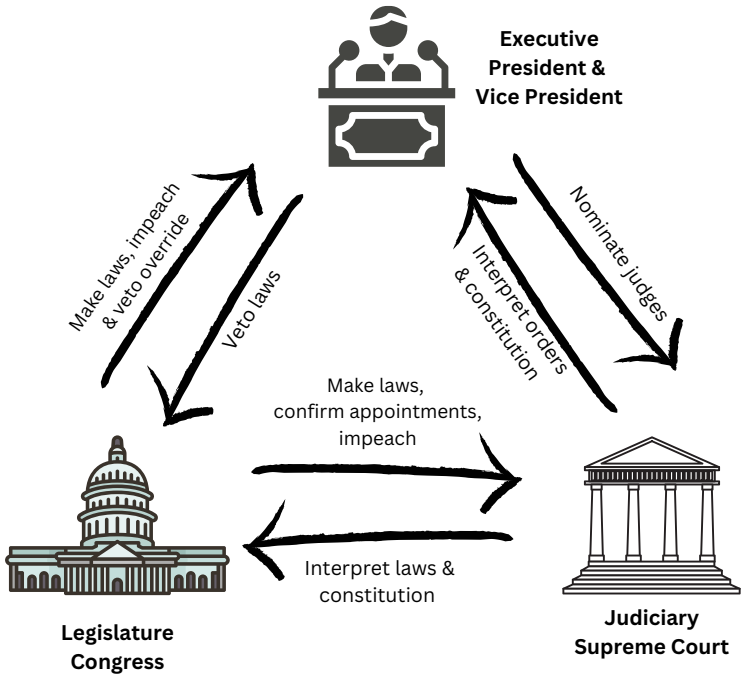
Pluralism signifies the presence of numerous viewpoints, ideas, groups, and **individuals** vying for political influence. In a pluralistic political framework, power is dispersed rather than concentrated. Pluralism harmonises with the core democratic tenets of separating power, respecting political rights and freedoms, and political participation. Instances of pluralism in Australia include:

- A diversity of viable:
  - Political parties, such as the Liberal and Labor Parties, and various **minor parties**.
  - **Pressure groups**, exemplified by organisations like Australians for Constitutional Monarchy and the Australian Republican Movement.
- Political freedoms enabling individuals to undertake political actions, including independent members of parliament and citizens of a country.

In Text Case Study: The US—A non-Westminster democracy

The US is a representative democracy organised as a federation with an executive presidential government.

The US democratic model has been adopted by other democracies. It is more common in countries that do not have a British political and legal heritage. Several South American and Asian democracies have systems based on US presidential democratic republicanism.



■ Figure 4.2 — The US system of government with separation of powers and check and balances

Figure 4.2 - The US system of government with separation of powers and check and balances Illustrates the separation of powers and strong checks and balances between them. The executive and legislative branches are directly and separately elected.

The following table outlines the US system of democratic government and evaluates it using the democracy checklist.

United States Political and legal system **Institutions, processes and organisation**	**Overview** **Features of the Unites States' political and legal system**	**Evaluation** **Democracy checklist** **+ = positive evaluation** **— = negative evaluation**
US Constitution	Constitution Article 1 creates and defines the powers of the Congress. Article 2 creates and defines the powers of the President and sets out processes for removing a President from office (impeachment). Article 3 creates and defines the powers of the judiciary. Article 4 divides the powers of government federally between Washington DC and the states. Article 5 sets out the process for constitutional change. Constitutional **Amendments** A 'Bill of Rights' protecting citizens' political freedoms and rights (and other rights) from government power forms the first 10 amendments to the Constitution.	+ Very strong constitutional limits to power. + A strict separation of powers is established by Articles 1, 2 and 3 of the Constitution. Very effective checks and balances are built into the US constitutional system. + Bill of Rights provides exceptional protection of and respect for rights.
Legislature—Congress	**Strong bicameralism**—both houses of Congress are co-equal in legislative power. **House of Representatives** 435 elected members from **electorates** across the country. Two-year terms. Senate 100 elected senators (two from each of the 50 states). Six-year terms (on rotation: 1/3 of the Senate is elected every two years with the whole of the House).	+ Congress is directly elected by the people providing for **representative government** and law-making. *(See Electoral Processes below in this table.)* + Frequent elections keep the Congress accountable to the will of the people. + Separation of powers and numerous checks and balances—for example, Congress may override Presidential orders.
Executive—President	Directly elected President and Vice-President Four-year term. Constitutional limit of two terms. May be impeached by Congress for "Treason, Bribery, or other High Crimes and Misdemeanours" (Article II, Section 4 Disqualification).	+ The President and Vice-President are directly elected by the people, providing for majority rule and **accountability**. *(See Electoral Processes below in this table.)* + Constitution limits terms, preventing a President becoming entrenched. + Accountable to Congress through law. + Separation of powers and checks and balances—President must agree to Congressional bills before they become law and may veto bills. Presidential veto can be overridden by Congress with a super-majority vote (which is 2/3rds of each chamber).
Judiciary—Courts	Strictly separate courts and judges Judges nominated by President. Nominated judges must be confirmed by Senate. No limit to term of appointment. Congress may impeach a judge only under exceptional circumstances specified in the Constitution. English **Common Law** provides the basis for fair trials using the **adversarial system** of trial, with the presumption of innocence and right to silence for the accused. The burden of proof is on the accuser.	+ The rule of law is ensured by a strongly independent judicial system with security of tenure for judges. + Bill of Rights makes rights capable of interpretation by Supreme Court and immune from Congress or the President. + Separation of powers and checks and balances. The Supreme Court is a constitutional court that may declare Presidential executive orders and Congressional laws unconstitutional.

Electoral processes *See CS12*	Congress Two-year cycle for House of Representatives; six-year cycle for Senate. House electorates represent people in 435 districts, with one member of Congress per district. Senators represent state citizens in federal government. Voting is voluntary and secret. Voter registration can be strictly limited in some states. Elections are run by states for federal Congress. States can manipulate electoral boundaries for political advantage (gerrymandering). President Four-year cycle with a two-term limit. Electors vote for state **delegates** to go to an Electoral College which elects the President according to the will of the majority voters in states. States with larger populations have more Electoral College votes to reflect proportionality in the election of the President. Voting is voluntary and secret. Voter registration can be difficult in some states.	+ Representativeness is achieved in Congress through voter choice in districts and states. + Majority rule is achieved in executive government by Electoral College votes reflecting the will of the people. + Accountability is achieved for both Congress and President by regular elections and Presidential term limits. + Voting is voluntary and secret, which respects political rights. — Political rights to vote are good but vary between states. This can unequally limit the rights of some due to strict voter registration laws. — Gerrymandering undermines representativeness, equality of political rights and fairness in the electoral system for Congress (explained in Unit 2 of this course). Some states have introduced independent redistricting commissions to draw and change electoral boundaries, which improves their representativeness. However, less than half of the states in the US use a redistricting commission. — Electoral College system for Presidential elections can result in a President being elected without a majority of the popular votes (because of the way the states are represented in the Electoral College). This undermines political rights, fairness and majority rule.
Citizen participation and pluralism	Two major political parties dominate the political system—the Republicans and the Democrats. A vast number of pressure groups of all sizes exist and lobby congressmen and women to make or change laws according to their interests. Constitutional Bill of Rights (1st Amendment) guarantees freedom of speech. Right to vote is widespread but can be limited in some states due to strict voter registration laws. Only US born citizens may be elected to Presidency.	+ Bill of Rights protects the basic requirement for political participation through the political right to freedom of speech. + Freedom of assembly and association allows citizens to organise collectively to amplify the effectiveness of political participation and demonstrates a tolerance of a range of political views and interests. + Political parties can be freely created and freely participate in elections. — Electoral system used makes it almost impossible for any party other than the Republicans or Democrats to win seats in Congress or the Presidency. This effectively limits the range of political views and interests represented in the political system. — Voter registration laws in some states unequally restrict the political right to vote, which undermines individual citizen's political freedoms and equality of political rights. — Supreme Court rulings (such as *Citizens United v Federal Election Commission*, 2010) have interpreted the 1st Amendment right to freedom of speech so that it applies to corporations, not just individuals. This has enabled money and wealth to undermine equality of political rights.

table continued overleaf

States state congresses state governors state judiciaries state electoral processes state citizen participation and pluralism	All 50 states of the United States reflect the basic systems described for the US federal level of government above. All have powers limited by the Constitution (which allocates state powers) and their own state constitutions. All have strictly separated arms of government. Several states elect their judges, which can politicise the judiciary. Some have overly restrictive voter registration laws that disproportionately disadvantage African American citizens. States control the electoral processes for federal officials, which can result in gerrymandering. All states, except Louisiana, use the English system of Common Law, which is well established and recognised as a fair system of trial that protects the rights of accused persons. Louisiana uses the European Civil Law system, which is also effective in achieving justice. The Republican and Democrat Parties dominate. Huge numbers of pressure groups exist.	+ Strong limits to power exist (the federal/state **division of power**). + Strong separation of powers and checks and balances are a feature of all states. + Rule of law is entrenched in states via independent courts and common law. — States, which elect judges, have a weaker rule of law. — Voter registration and electoral laws in some states undermine equality of political rights and representation. — Electoral system used in most states creates a 'two party system' and limits other parties from achieving representation, thus undermining representation. + The number and strength of pressure groups demonstrate a tolerance of views and interests and provides opportunities for citizens to exercise their political freedoms and rights.

Table 4.2 — United States political and legal system—overview and evaluation.

Background information: Donald Trump and US democracy

On 6 January 2021, a mass of supporters of then-President Donald Trump stormed the United States Capitol Building in Washington, DC. The crowd included members of paramilitary organisations like the Proud Boys and Oath Keepers.

The insurrection marked the most severe internal threat to American democracy since the Civil War and came dangerously close to disrupting the peaceful transfer of power to President-elect Joe Biden, which was taking place in Congress at the time of the assault. The insurrection was an example of election violence like that witnessed in hybrid regimes and flawed democracies such as Thailand.

Worryingly, the Republican Party continues to normalise the event, with a number of those seeking nomination as the party's 2024 Presidential candidate supporting Mr Trump and criticising the political and legal processes that followed the insurrection he inspired.

Congress formed the 'January 6th **Committee**' to investigate the insurrection. The committee conducted over 1,000 interviews and held ten public hearings. It recommended criminal charges against former President Donald Trump and made the following findings against him:

- Intentionally spreading false claims and plotting to overturn the 2020 election results;
- Aiming to corrupt the US Department of Justice by involving officials in making false statements and supporting his efforts to overturn the election;
- Summoned his supporters to Washington based on unfounded allegations of election theft;
- Making false claims that led to his supporters' violent actions on January 6; and
- Deliberately endorsing false information in federal court.

Following the Committee's report, the following legal actions were taken:

- Arrests and Charges:
  - Over 1,033 individuals were arrested for involvement in the insurrection.
  - Charges vary, spanning from obstruction of official proceedings to assault.
  - Two hundred seventy-seven defendants received prison sentences, particularly those involved in violence or threats.
  - Far-right Oath Keepers founder Stewart Rhodes received an 18-year prison sentence for seditious conspiracy related to directing the attack.
- Sentences and Convictions:
  - One hundred thirteen rioters were sentenced to home detention.
  - The majority of sentences included fines, community service, and probation

for misdemeanour offences like unauthorised entry and demonstrating within the Capitol.[5]

US academic Philip Gorski writes:

> *"the election of Donald Trump constitutes perhaps the greatest threat to American democracy since the Japanese attack on Pearl Harbor. There is a real and growing danger that representative government will be slowly but effectively supplanted by a populist form of authoritarian rule in the years to come. Media intimidation, mass propaganda, voter suppression, court packing, and even armed paramilitaries – many of the necessary and sufficient conditions for an authoritarian devolution are gradually falling into place. Whether America's political culture and institutions are resilient enough to withstand these developments is an open question."*[6]

Is this alarming assessment true?

At the time of print (November 2024), Donald Trump faced several civil and criminal cases that highlight the US's commitment to democratic principles such as the rule of law, regardless of the accused's status. These cases spanned various jurisdictions and allegations.[7]

- Hush-Money Payment Case Conviction: Mr Trump was convicted by a jury on 34 counts of falsifying business records to hide a $130,000 payment to stop a third party (Ms Stormy Daniels) from discussing salacious allegations against Mr Trump before the 2016 presidential election.
- Business Fraud Case in New York: The court ruled Mr Trump falsely inflated the value of assets to obtain loans. Mr Trump and his company were ordered to pay $354 million in fines, plus interest and restricted his business activities in New York.
- Defamation Case: The court ruled in a 2023 civil case that Mr Trump had defamed E. Jean Carroll. The court found Mr Trump had – on the balance of probabilities – sexually assaulted Ms Carroll (note, this is not a criminal conviction). The jury awarded $5 million damages, later increased to $83 because of continued defamation.

■ Figure 4.3 — On January 6, 2021, a mass of supporters of then-President Donald Trump stormed the United States Capitol Building in Washington, DC.

- Other Pending Legal Actions Relating to Abuse of Presidential Power:
  - January 6 2021, Insurrection: Mr Trump's role in the Capitol attack during the certification of Mr Biden as President. The case was delayed pending a lower court decision. Mr Trump asked the Supreme Court to decide if presidents have broad immunity from criminal prosecution while in office. The Court ruled that presidents do have immunity from criminal liability – but only for "official acts" while in office. The Supreme Court referred to the case to a lower court to decide if Mr Trump's actions during the January 6 Insurrection were "official acts". The case against Mr Trump hinges on the outcome of the lower court's ruling.
  - 2020 Election Interference: Allegations of interference in the 2020 election in the US state of Georgia. The Georgia courts were still examining the indictments at the time of writing.
  - Alleged mishandling of classified documents: This case was dismissed by a judge on a technicality, ruling the prosecutor was unlawfully appointed and lacked authority to prosecute the case.

The work of Congress in holding a President to account, the conviction of insurrectionists on serious charges up to and including sedition and the cases against Mr Trump himself highlight how the rule of law applies to all citizens, including former presidents. It also demonstrates the system of checks and balances in operation.

Finally, Mr Trump's legal challenges against the 2020 election result reflects the crucial role of the US's independent judiciary in upholding

5 *One Year Since the Jan. 6 Attack on the Capitol*. [online] Available at: <https://www.justice.gov/usao-dc/one-year-jan-6-attack-capitol> [Accessed 20 February 2022].

6 Why evangelicals voted for Trump: A critical cultural sociology. Article in American Journal of Cultural Sociology October 2017, accessed 20 December 2023.

7 The Cases Against Trump: A Guide - The Atlantic (no date). Available at: https://www.theatlantic.com/ideas/archive/2024/02/donald-trump-legal-cases-charges/675531/ (Accessed: 22 February 2024).

the rule of law. Notably, the former President appointed some of the judges who dismissed his lawsuits. Their exemplary conduct amid immense political and public pressure is evidence of the judicial system's independence in the US.

Non-democratic government

Non-democratic government is an all-encompassing term for all types of government that, in theory and/or practice, do not fulfil the criteria of being democratic. They are **nation states** that according to reliable and independent sources, such as the *Democracy Index*, are not classified as full democracies or flawed democracies.

Hence, hybrid regimes or authoritarian regimes are non-democratic. Most non-democratic governments are also classified as 'autocratic' because power resides, practically, with one person whose rule, control and influence in the political and legal system is unlimited.

Autocracies

Autocratic government comes in many forms:

- **Absolute monarchies** such as the Kingdom of Saudi Arabia;
- **Theocracies** that are ruled by clerics according to religious ideals and laws. The Islamic **Republic** of Iran is an example; *See CS11*
- **Dictatorships** are ruled by a single ruler with absolute power. Zimbabwe under Robert Mugabe is an example of a dictatorship;
- **Juntas** that are ruled by the military in transition or perpetuity. Fiji and Thailand are examples;
- **Rigid authoritarian** regimes may call themselves democratic but lack any of the criteria listed in the democracy checklist above. The Democratic Peoples' Republic of Korea (North Korea) is an example; and
- **Soft authoritarian** regimes are quite common. Turkey has become one in recent years following an attempted coup against President Recep Tayyip Erdoğan who, in response, has tightened his grip on power by undermining many criteria on the democracy checklist. Russia under Vladimir Putin is another example. These systems may exhibit some features listed in the democracy checklist, but they lack critical elements. Russia and Turkey are sometimes called 'illiberal democracies' because they lack full political rights and freedoms.

A common characteristic of autocracies is that **sovereignty** does not lie with the people. It lies with the King in Saudi Arabia, with the Supreme Leader in Iran, with the ruler in a dictatorship and with a political **ideology** represented by a single party in North Korea.

Another common feature is that fear and force are used to maintain power. There are no limits to power and no ways in which power can be peacefully transferred to a new government.

China—A one party authoritarian system

> *"The People's Republic of China is a socialist State under the people's democratic dictatorship led by the working class and based on the alliance of workers and peasants.*
>
> *The socialist system is the basic system of the People's Republic of China. The defining feature of **socialism** with Chinese characteristics is the leadership of the Communist Party of China. Disruption of the socialist system by any organisation or individual is prohibited."*
>
> Article 1, Constitution of the People's Republic of China

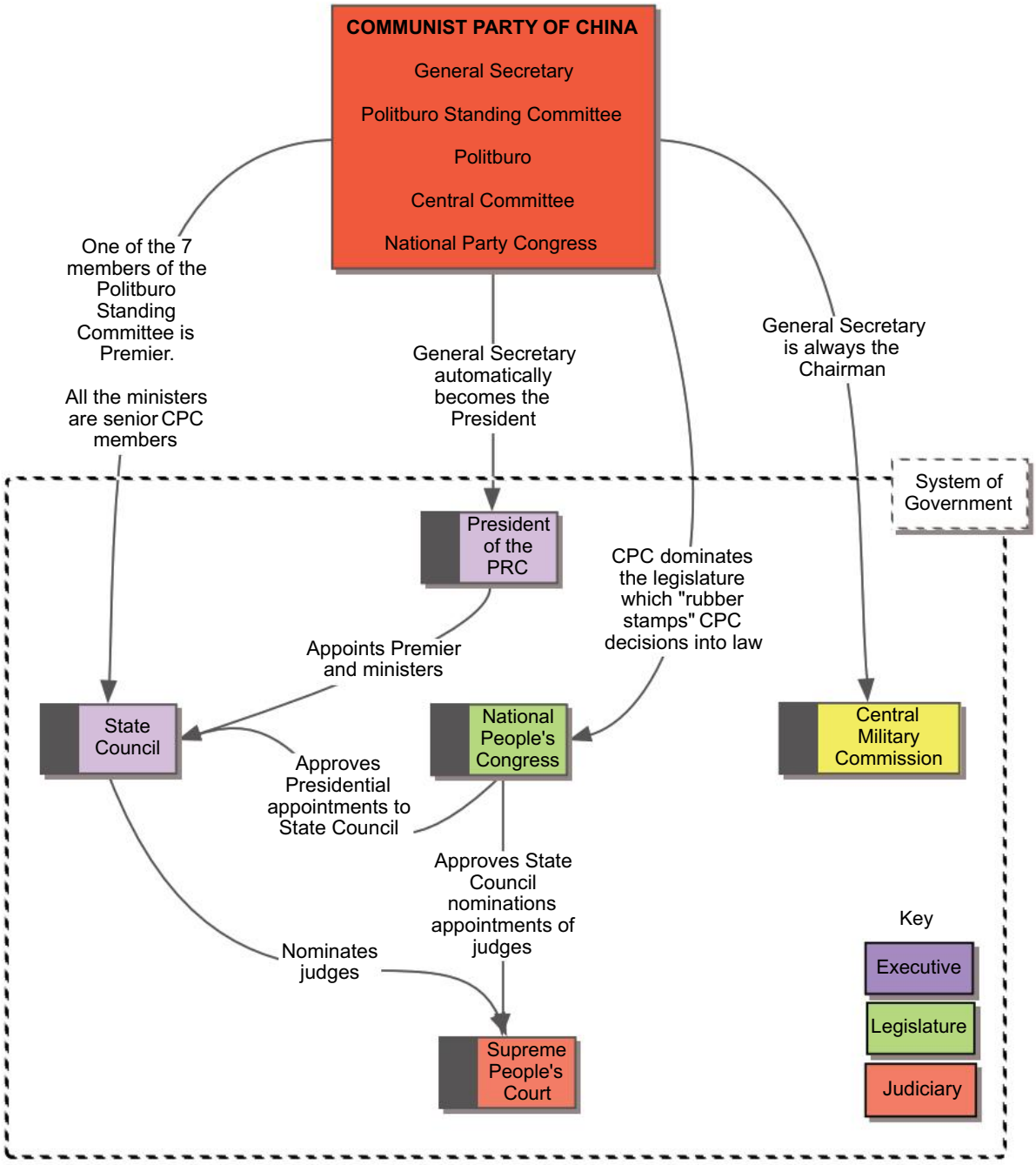
Socialism is an ideology (set of beliefs) that promotes the public ownership of resources. In a socialist state, factors of production (that is, land, labour, capital) are managed by the government, rather than individuals or corporations. The government prioritises the needs of the working class (for example, workers, peasants) with the goal of eliminating exploitation and promoting the common good.

China's socialist state is built on two fundamental principles: democratic centralism and a people's democratic dictatorship.

Democratic centralism requires elections to be held to allow for public representation in law and decision-making processes. Chinese legislatures – the National People's Congress (NPC) and Local People's Congresses (LPCs) – consist of elected representatives. Executive and judicial bodies, such as government agencies and courts, are established by these legislatures and accountable to them. Decisions of the national legislature (the NPC) are binding on all legislative, executive, and judicial bodies, creating a highly centralised system.

The 'people's democratic dictatorship' was coined by Mao Zedong, the founder of the Chinese Communist Party (CCP), who rejected liberal democracy as a flawed tool of the ruling class.[8] Mao argued that political rights should only be granted to individuals and groups that support the

8 Zedong, M. (1961) 'On the People's Democratic Dictatorship' in *Selected Works of Mao Zedong*, Volume 4, Elsevier, p. 417



■ Figure 4.4 — The Chinese System of Government.

Communist Party, which governs in the interests of the working class. Since 1949, the party has monopolised political power and suppressed dissent from 'enemies of the revolution'. In 2023, the party boasts 98 million members – roughly 6.95% of the Chinese population[9].

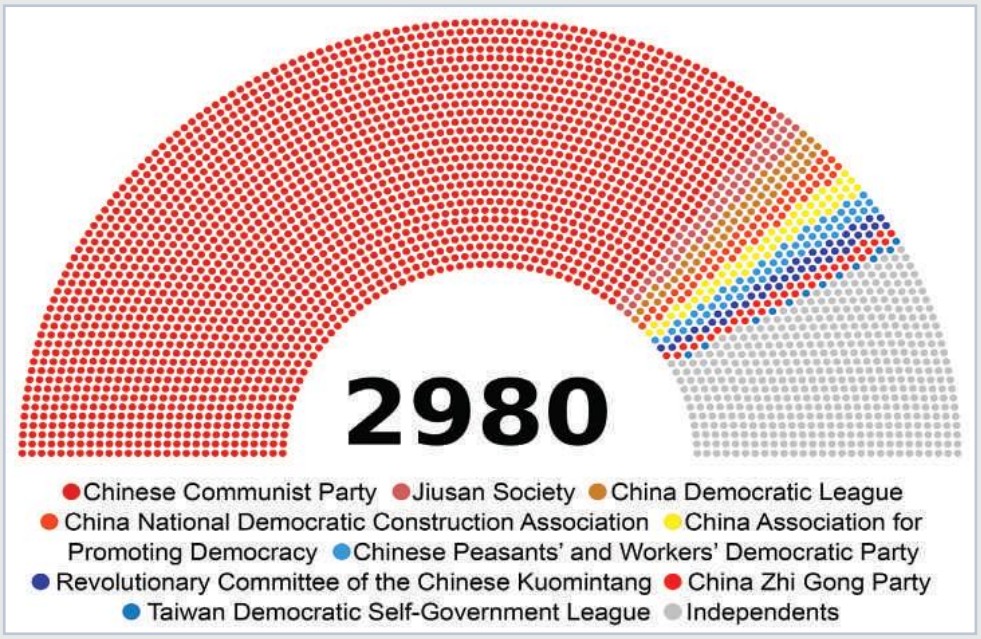
This diagram illustrates the dominance of the CCP over each arm of the Chinese government. While the constitution creates three arms of government, it does not provide for effective checks and balances between them. The Chinese government has become a 'rubber stamp' for the decisions of the CCP, which also exercises control over the military.

9 Communist Party of China (2023). Intra-Party Statistical Bulletin of the Communist Party of China. CCP Central Committee. Beijing, Xinhua News Agency http://www.qstheory.cn/yaowen/2023-06/30/c_1129725174.htm (English) accessed 20 December 2023.

Background Information: 13th National People's Congress (2018-2023)

The National People's Congress is the highest body of state power and serves as China's national legislature. The NPC meets annually to consider important legislation and endorse reports from government agencies. When in recess, legislative power is exercised by its Standing Committee (NPCSC), which meets every two months and is comprised of 175 representatives from the NPC.

The 13th NPC consisted of 2,980 deputies elected by legislatures in provinces, municipalities, and autonomous regions (for example, Tibet). Minor parties and independents comprised almost a third of the legislature but played a limited role in law-making. Alternative parties



■ Figure 4.5 — Composition of the 13th National People's Congress by Political Affiliation

■ Figure 4.6. — Current President of China, Xi Jinping, President since 2013

■ Figure 4.7 — National emblem of the People's Republic of China.

were vetted by the CCP and, though consulted in law-making, could not oppose them. For example:

- In 2018, the NPC amended Article 79 of the Constitution to remove the two, five-year term limits for the President and Vice President. Only two deputies, out of 2,963, voted against the amendment; and
- In 2021, the NPC passed the *Decision on Improving the Electoral System of the Hong Kong Special Administrative Region*. This forced Hong Kong's Legislative Council to amend its electoral laws, reducing the number of directly elected representatives and increasing the number of candidates appointed by the Hong Kong Election Committee, which largely acted in China's interests. Out of 2,896 deputies, zero voted against the bill.

According to Qin Qianhong, Professor of Law at Wuhan University, there "has never been a case where the NPC or NPCSC has rejected a bill that is endorsed by the [Communist Party], nor a case that a bill is passed into law... without the [Party's] approval"[10]. Due to its dominance in the legislature, the Communist Party effectively nominates all government officials and manipulates processes to guarantee a favourable outcome.[11]

10 Jiangyu, W., (2020) 'The Party in the Legislature and the Judiciary' in Yongnian, Z., & Gore, L. (eds.), The Communist Party in Action: Consolidating Party Rule. London, Routledge. pg. 186

11 See Articles 10 and 25 of the Organic Law of the National People's Congress of the People's Republic of China.

Political & Legal System Institutions, Processes and Organisation	Overview Features of Chinese political and legal system	Evaluation - Democracy checklist + = positive evaluation — = negative evaluation
The Constitution of the People's Republic of China	Chapter 1 establishes the political and economic principles that underpin the Chinese socialist state and the leadership of the CCP (for example, Article 1). Chapter 2 outlines a broad range of rights and duties for citizens. These include the right to vote (Article 34), the freedom of speech (Article 35) and the right to privacy (Article 40). Chapter 3 establishes the structure of the Chinese government and is divided into several sections. Section 1 establishes the NPC as the 'highest organ of State power' (Article 57). It consists of delegates from different provinces/regions, with a term of five years. Sections 2 and 3 establish the executive – the President and State Council. It is the highest organ of State administration. Section 4 establishes a Central Military Commission, which oversees the armed forces. Section 5 allows for the establishment of Local People's Congresses and People's Governments in administrative regions (for example, provinces) and sub-regions (for example, cities). Section 8 establishes the judiciary – the Supreme People's Court and local/specialist courts at lower levels of government. It also provides protections for legal rights (for example, the right to a defence).	— The constitution can be amended by a two-thirds majority of the NPC (Article 62). This creates weak constitutional limits on power. See: Background Information: 13th National People's Congress (2018-2023). — The constitution creates an ineffective separation of powers, with few checks and balances. So long as the CCP dominates the National People's Congress, it can control the judiciary and executive. — The Central Military Commission operates within the Chinese Communist Party and is chaired by the General Secretary – Xi Jinping. In turn, the Chinese military, with control over some 6.8 million personnel, is under party control, rather than government control. — The constitution provides the government significant discretion when interpreting or enforcing rights. For example, under Article 51, citizens "must not infringe upon the interests of the State, of society, or of the collective" when exercising rights.
Legislature – National People's Congress	A **unicameral** parliament with approximately 3,000 members elected by Local People's Congresses. Meets annually, with a Standing Committee (NPCSC) meeting every two months and acting in its absence. Decisions of the NPCSC can be altered or annulled by the NPC. Exercises a broad range of powers and functions under Articles 61-62: • Amending the constitution and enacting laws; • Appointing government officials (for example, President, Vice President, President of the Supreme People's Court); and • confirming State Council appointments made by President. Deciding questions of war and peace Minorities are guaranteed representation, including women (Article 6) and ethnic minorities (Article 18).	+ Ultimate law-making power is provided to an elected legislature. + NPC provides avenues for other political parties, and minority interests, to be represented. — NPC is dominated by Communist Party. Around 70% of deputies are members, with others being 'affiliated parties' that cannot lawfully oppose the CCP. — Representation is limited by executive dominance. Alternative political perspectives are actively sidelined by the NPCSC, who control the legislative agenda. — Legislative power is absolute and concentrated in the power of one body. This includes the power to alter the structure of the political and legal system via constitutional amendments.

continued overleaf

Electoral Processes	Local People's Congresses at a county level are directly elected. County representatives (deputies) then elect a Municipal People's Congress. Indirect elections continue until a National People's Congress is formed. Direct elections use first past the post voting for single-member districts. Elections are only valid if 'more than half of all voters in a district cast their votes' with the winner receiving an absolute majority. If this fails to produce a successful candidate, a second-round election is conducted, with the winner achieving a plurality. Elections are conducted in accordance with the Electoral Law of the National People's Congress, which is regularly updated by the NPC (for example, 2015, 2020). Elections for each People's Congress occur every five years and are administered by electoral committees within each congress. Under the Electoral Law they are responsible for reviewing preliminary candidates, selecting formal candidates, redistributing electoral boundaries and determining the validity of election results. According to the Electoral Law (Article 26), voter registration is compulsory for citizens over the age of 18, but voting is not. Voting requires identification, though the secrecy of the ballot is guaranteed by the Electoral Law (Article 36). Electoral law allows for proxy voting, where citizens can seek written authorisation to vote on behalf of up to three other eligible voters, who are absent during the election.	+ Voting is regular, voluntary and secret. Electoral processes strike a balance between participation and practicality, with a large voting population. + Elections follow established, regularly revised rules. + In theory, electoral processes require an absolute majority with a minimum turnout. This translates into majority rule in Local People's Congresses. — Electoral laws are determined by a legislature dominated by one party and enforced by partisan electoral committees. These committees can disqualify candidates on the basis of their political views and reputations. — Electoral committees can engage in gerrymandering, manipulating electoral boundaries to guarantee CCP success. Under Article 24 of the Electoral Law, for instance, they may choose to convert residential districts into districts based on 'local institutions or workplaces'. — Voter identification requirements discourage participation. — Proxy voting promotes participation but is vulnerable to exploitation. The CCP can target and mobilise a small number of party loyalists to vote on behalf of family or colleagues. — Article 8 of the Electoral Law provides that election funding can only be distributed by the State Treasury. This effectively defunds independent campaigns. — Independent candidates are subject to intimidation. In 2021, for instance, fourteen activists that sought to run for the Beijing People's Congress withdrew over concerns for their personal safety. All of them cited police intimidation. [12]
Executive – President & State Council	The President and Vice President are appointed by the National People's Congress. The President is the Head of State and represents China internationally. The General Secretary of the CCP is always the President. They appoint all members of the State Council, which is equivalent to a **Cabinet**. Members of the State Council oversee government departments. They are led by the Premier, currently Li Qiang, who serves as the head of government. They are responsible for the implementation of policies. According to Article 89, the State Council has a number of powers and functions. These include: • Making **regulations** (that is, **delegated legislation**) as allowed for by the Constitution other laws. • Submitting bills to the NPC and NPCSC • Overseeing government departments, including issuing directives and abrogating decisions. This also extends to lower levels of government. • Issuing a state of emergency and directing public security and judicial administration.	— The executive branch and leadership of the CCP mirror one another. Therefore, executive power is concentrated in the hands of the CCP Politburo Standing Committee, with few checks and balances in place. — Since the CCP dominates the NPC, they 'rubber stamp' appointments to the State Council. Representation and majority rule are not reflected in this body. + Due to the overlap between the CCP and executive, decision-making is efficient. No loss of function or efficiency occurs due to changes in government, and public servants benefit from extensive administrative experience. Xi Jinping, for instance, rose to General Secretary/President following four decades of work in local, regional and national positions. —The State Council is governed by informal power dynamics within the CCP. Senior members are accountable to one another – a form of circular accountability. Since accountability is not institutionalised, there is no rule of law governing power relations within the executive. — The power of the executive is heightened by its dominance in the NPC. Bills submitted to the NPCSC are guaranteed to pass, enabling the NPC to delegate significant law-making power to the State Council. In 2015, for example, the Ministry of Public Security announced a nationwide video surveillance network, with regulations for its use issued in 2016.

12 Feng, G. (2021) '14 Independents Withdraw from Beijing's Local Election Amid Pressure', VOA News, https://www.voanews.com/a/independents-withdraw-from-beijing-s-local-election-amid-pressure-/6301050.html accessed 20 December 2023.

Central Military Commission	A national defence organisation that encompasses the People's Liberation Army, counterterrorism police and military reserves. Operates under the government and CCP simultaneously, allowing the Party to issue directions to military leaders. Chaired by the General Secretary of the CCP, currently Xi Jinping	— Military power is concentrated in the CCP and, more specifically, the President. The Party may use this to suppress rebellions and quash dissent, such as the Tiananmen Square protests in 1989. Troops were deployed against thousands of student protestors that demanded greater transparency, constitutionalism and a broader range of democratic rights. This resulted in the death of thousands.
Judiciary – Supreme People's Court and People's Courts **Note:** For more information on the trial system used in China *See CS13 & CS14.*	Judicial power is exercised by People's Courts, which operate in a hierarchy. The Higher People's Court, for instance, hears major criminal, civil and administrative cases relating to an entire province, alongside **appeals** from the Intermediate People's Courts. Courts are not permitted to interpret the law. This power resides with the NPCSC, which delegates it to the Supreme People's Court. The legislature retains the power to issue authoritative **interpretations** of law. Judges are appointed by Peoples Congresses, which are dominated by the CCP. In turn, all judicial appointments are political appointments.	— Due to legislative oversight of judicial processes, including the appointment and dismissal of judges, there is little judicial independence. — Legal rights can be limited in cases that threaten the authority of the CCP. In turn, courts can be weaponised against dissidents. + Under Xi Jinping, efforts have been made to standardise trial processes and improve evidence law (for example, excluding coerced confessions). — Courts are largely used to resolve disputes between citizens. They do not engage in judicial review. In a 2019 interview, President Xi even dismissed "Western constitutionalism" and "judicial independence" as contrary to Chinese prosperity, suggesting judges were "loyal to the [Communist] Party, to the people and to the law. [13]"
Citizen Participation & Pluralism	China operates under a one-party system. No meaningful opposition can exist to the CCP, which monopolises political power and controls essential resources (for example, the military, election funding). The government exercises extensive control over the media, including social media platforms. This censorship restricts citizens' freedom of speech. The Cybersecurity Law of the People's Republic of China 2016, for instance, provides for the monitoring of online activities and the introduction of content restrictions for internet service providers. The freedom of association is undermined by restrictions placed on the activities of non-government organisations, unions and pressure groups that may be perceived as undermining "China's national unity" or harming "national interests" (Foreign NGO Law 2017). Direct elections are held every five years for Local People's Congresses. However, the CCP has several advantages (for example, mobilisation of membership, control of electoral committees, monopoly on candidacy). Religious and ethnic minorities, such as Falun Gong and the Uyghur people living in Xinjiang, have been deprived of their civil and political rights.	— Citizens cannot effectively exercise the political rights provided for in the Chinese constitution. Dissent is suppressed using broad provisions in the Constitution and statutes created by the NPC that focus on national security. + Participation is provided for in local elections, with a constitutionally enshrined right to vote. — The CCP uses a range of formal and informal mechanisms to guarantee its electoral success. Regardless of outcome, the views and interests of other parties must complement those of the Communist Party. In turn, no pluralism exists. — Citizens are not exposed to a range of views. Media outlets are tightly controlled, while an expansive and heavily resourced Propaganda Department push a pro-CCP agenda. Preliminary studies, using random surveys of Chinese citizens, suggest this includes strong anti-US sentiments. [14]

Table 4.3 — Political and Legal System of the People's Republic of China - Overview & Evaluation

13 Geo, C., (2019) 'Xi: China Must Never Adopt Constitutionalism, Separation of Powers, or Judicial Independence', *The Diplomat*, https://thediplomat.com/2019/02/xi-china-must-never-adopt-constitutionalism-separation-of-powers-or-judicial-independence/ accessed 20 December 2023.

14 Piao, L. & Wu, H.S., (2023) 'The Effect of the Chinese Government's Political Propaganda and Individual Characteristics on Anti-US Sentiment', *Asian Survey*, 63(3)

Russia — Authoritarian system of government.

In the wake of the dissolution of the Soviet Union (USSR) in 1991, Russia embarked on a journey of political transformation. Formerly a communist state, Russia was reborn as a new constitutional presidential democracy, with a strong sense of nationalism and a big focus on centralisation of government power.[15] The post-*perestroika (policy of restructuring of the stagnant former USSR)* period featured many turbulent years, marked by economic and social upheaval, and political uncertainty, set the stage for the ascent of the current president Vladimir Putin.

Figure 4.8 — Russia under the leadership of Vladimir Putin is an example of a soft authoritarian regime.

Over the last ten years, Russia has faced international criticism for the flaws in its democratic processes and its aggressive foreign policy. Whilst previously, scholars often described the Russian government as an 'anocracy', a hybrid regime, a mix between dictatorship and a democracy[16] in the post-COVID period the balance has shifted towards a full authoritarian regime. Allegations of election interference, national **referendum** fraud, restrictions and unlawful arrest of the political opposition, and broader limitations on civil liberties are some of the few concerns. Upon closer examination, the country's evolving political landscape, along with its historical context and constitutional framework have contributed significantly to these dynamics.

In 2021, the new Constitution came into effect with more than 60% of the original document undergoing significant changes. The most notable amendment was tabled by a former cosmonaut and member of the Duma Valentina Tereshkova, who proposed to annul President Putin's previous terms in office, similar, to China's Xi Jinping, removing the two-term limit on his country's presidency in 2018, this allows him to remain in power indefinitely. Putin has now also extended his presidential term until 2036, when he will be 83 years old. Putin has been in power in the position of President or as Prime Minister for more than 20 years wielding significant influence over other political and legal institutions, significantly undermining

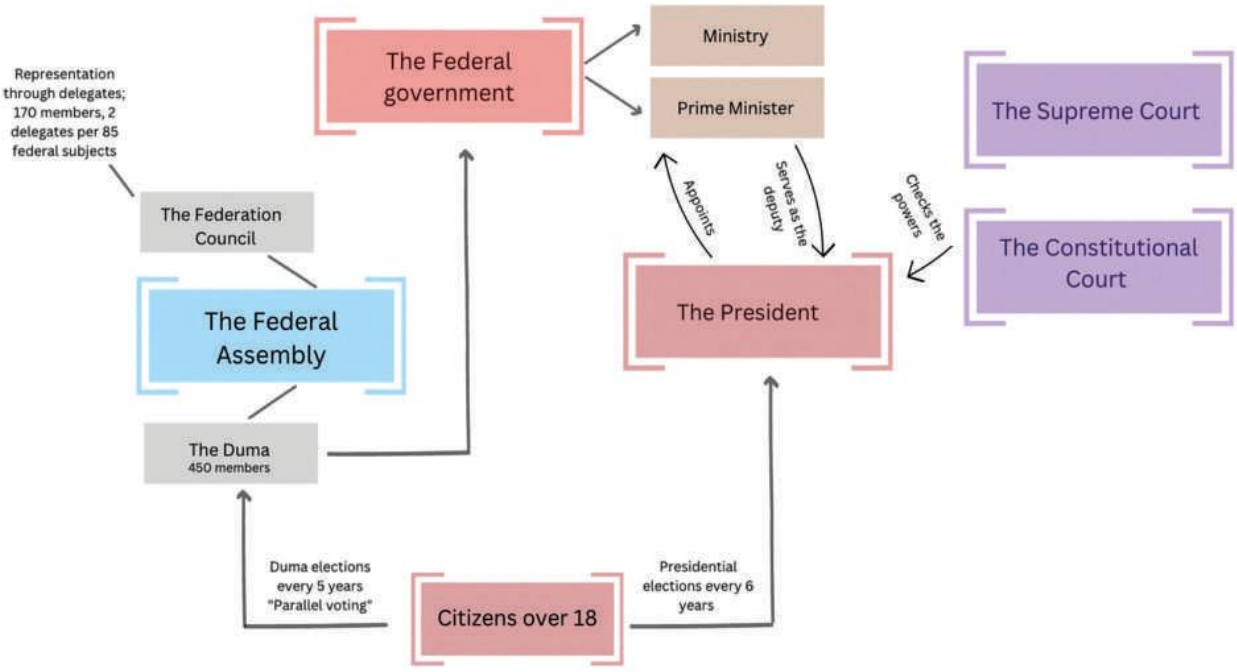


Figure 4.9 — Russian system of government

15 Bodrunova, S. S. (2021). Social Media and Political Dissent in Russia and Belarus: An Introduction to the Special Issue. Social Media + Society, 7(4). https://doi.org/10.1177/20563051211063470 accessed 20 December 2023

16 Political Regime – distinction democracies and full democracies. Herre, Bastian, *Democracy*, Our World in Data, https://ourworldindata.org/democracy accessed 13 February 2024.

SEPARATION OF POWERS

Article 10

"The state power in the Russian Federation shall be exercised on the basis of its division into legislative, executive and judicial power. The bodies of legislative, executive and judicial power shall be independent"

LEGISLATIVE

Bicameral Federal Assembly: the State Duma and the Federation Council.

EXECUTIVE

Elected President
The Prime Minister and Ministry

JUDICIARY

Constitutional court; Supreme Court and the hierarchy of courts

Figure 4.10 — Separation of Powers

the democratic principles and in particular, the separation of powers. According to Russian state sources, these constitutional amendments that were originally passed in 2020 were approved by over 73 percent of the population.

In practise, state power in Russia is exercised by the executive branch, led by the separately elected president. The Russian parliament, also known as the Federal Assembly, is a bicameral body consisting of the State Duma and the Federation Council. The State Duma, the lower house of parliament, consists of 450 deputies elected every five years. It plays a pivotal role in shaping the nation's legislation and political direction. Members are elected using a mixed electoral system, combining proportional representation for political parties with voter preferences for individual candidates. From the Duma, the federal government is formed, typically led by the party with a parliamentary majority. The president approves and appoints the prime minister and assigns **portfolios** and ministries with the Duma's approval. The president and prime minister usually align in terms of **political party** or values, which results in ineffective checks and balances on the actions of both parliament and the executive.

The United Russia party, which has maintained control of the Duma for the past two decades, currently commands over 72 percent of the seats. The Communist party serves as the second-largest political force, followed by the Liberal Democratic party and various smaller political factions. According to Freedom House, effective opposition and critical political discourse in Russia encounter significant barriers. Political dissent and protests in Russia are violently suppressed, and opponents of Putin are routinely arrested and jailed. Some are given lengthy prison sentences. The most prominent arrest in recent years occurred in 2022, when Alexei Navalny (leader of New People political party), the most prominent opposition leader in Russia, was given a nine year prison sentence after fraud conviction, in addition to his three and a half years for parole violations.

In contrast to the upper houses in the US and Australia, Russia's Federation Council does not comprise directly elected members. Instead, each state government designates two delegates, typically one from the executive branch and another from the legislative branch, representing over 85 federal subjects with over 170 members. This unique composition underscores the federal nature of the Russian Federation, where regional authorities maintain a substantial role in shaping national policies.

The following table outlines the Russian system of government and evaluates it using the democracy checklist:

see overleaf

Russian political and legal system Institutions, processes and organisation	Overview Features of the Russian political and legal system	Evaluation Democracy checklist + = positive evaluation — = negative evaluation evaluation
Russian Constitution	Original Constitution was adopted in 1993 after dissolution of USSR Significant changes made in 2021 - over 60% of the document being changed (41 amendments). **Chapter 1. The Fundamentals of the Constitutional System (Articles 1-16):** Defines Russia as a democratic federative law-governed state with a republican form of government (Article 1) Emphasizes the sovereignty of Russia over its entire territory (Article 4.1) **Chapter 2. Rights and Freedoms of Man and Citizen (Articles 17-64):** Ensures the equality of all before the law (Article 19) Affirms the right to life and human dignity (Article 20) Protects freedom of thought, speech, and expression (Article 29) **Chapter 3. The Federal Structure (Articles 65-79):** Describes the principles of the federal structure of the Russian Federation (Article 65) **Chapter 4. The President of the Russian Federation (Articles 80-93):** Details the role and powers of the President (Article 80) Sets presidential term limits, which were amended in 2020 (Article 81) Outlines the President's powers in foreign affairs (Article 91) **Chapter 5. The Federal Assembly (Articles 94-109):** Establishes the Federal Assembly as the legislative branch (Article 94) with the lower house – the Duma and its functions (Article 95) Outlines the role of the Federation Council (upper house) (Article 96). **Chapter 6. The Executive Government of the Russian Federation (Articles 110-117):** Defines the role and powers of the government (Article 110) Outlines the appointment and responsibilities of the Prime Minister. (Article 110) **Chapter 7. Judicial Power (Articles 118-129):** Details the independence and authority of the judiciary (Article 118) Establishes the Constitutional Court and its functions (Article 121) **Chapter 8. Local Self-government (Articles 130-133):** **Chapter 9. Constitutional Amendments and Review of the Constitution (Articles 134-137):** Art. 134: Explains the procedure for amending the Constitution (Article 134).	+ Explicit protection of rights of citizens (Chapter 2 Articles 17-64) + Article 10 of the Constitution establishes the separation of powers. + To pass any Constitutional Amendments or laws, a two-thirds majority of all parliament members is required. Written, yet minimalist document. Significant amendments in 2020 enhanced the president's scope of power, allowing for the dismissal of judges under certain circumstances. Undermining separation of powers. One party dominant parliament can easily pass any constitutional amendments. Extensive presidential powers that overlap with the legislative and judicial branches
Legislature - Federal Assembly	Elected every five years. 450 seats Bicameral Lower house – Duma Upper house – Federation Council (85 regions/states with 2 unelected delegates each) From the Duma, the federal government is formed, typically led by the party with a parliamentary majority. The president approves and appoints the prime minister and assigns portfolios and ministries with the Duma's approval. The president and prime minister usually align in terms of political party or values. Adoption of federal constitution and federal laws Control over the activity of the Russian government • Appointment and dismissal of heads of central bank, **Human Rights** Commissioner • Issues of international parliamentarian cooperation	+ Regional representation – Duma has little check on executive power + Can remove PM through two repeat votes and reject PM appointment + Impeachment of president involves Federal Assembly and Courts – President can dissolve Duma – Dominated by one party – United Russia (over 72% of seats are held)

Executive – roles and powers of the president.	**The roles and powers of the president include:** Head of State (Chapter 4 of the Constitution) Appoints PM with the approval of the Duma) Issues decrees that carry weight of law: Article 88 of the Russian Constitution grants the President the power to issue decrees and directives that have the force of law. Guarantor of the constitution, citizens' rights (Article 81) Dissolution of the Duma is outlined in Article 111 of the Constitution. Oversees foreign policy, region relations, and state security: a broad power derived from various articles, including Articles 80, 83, and 86. Commander in chief of armed forces role is detailed in Article 87 of the Russian Constitution.	Power is concentrated in the presidency, with the president having significant control over the executive branch, foreign policy, and the military. Extensive presidential power undermines separation of powers. Limited checks and balances No limit on presidential terms in practise
Judiciary	The Judiciary branch in Russia comprises several courts, with the Constitutional Court and the Supreme Court serving as key institutions. The Constitutional Court ensures the constitutionality of laws and resolves disputes, while the Supreme Court oversees the application of laws by lower courts. The Constitutional Court and the Supreme Court serve as checks and balances on the executive branch and enforce the Constitution. Judges to the Constitutional and the Supreme Court are appointed by the upper house of Parliament (the Federation council) on recommendation of the President. Federal judges are appointed by the President	Limit to the scope of power due to frequent constitutional changes Limitations to the independent judiciary through politicised appointments and affiliations with the United Russia Party and associations with Putin Russian constitutional court has the right to determine whether or not to enforce an international treaty / law in the domestic context. Allegations of non-enforcement of national courts' judgements. Politically motivated criminal convictions are common and are reflective of the politicisation of the judiciary and weak separation of powers.
Electoral processes	Non-compulsory voting Regular elections for political offices, including the President, the State Duma (lower house of parliament), and regional governors. Presidential elections are held every 6 years. The voting model in the Duma uses parallel voting, combining proportional representation for political parties with the preference of voters for candidates. A variety of political parties run their candidates in Federal and local elections. Opposition parties have faced challenges in participating in elections and gaining representation in the State Duma.	+ Regular elections Elections are managed to ensure the dominance of the ruling party (United Russia) and the preservation of the existing power structure. The government's control over the media and limitations on opposition candidates' access to the media impact the diversity of voices and political discourse in the electoral process.
Citizen participation and pluralism	Although officially, Russia has multi-party system, United Russia holds control over the legislative branch. Political opposition groups face significant barriers to participating in elections facing legal action against opposition figures. Online censorship in the digital media, restriction of free press and social media.	This limits the diversity of voices and representation in parliament. Limited to no practical opposition with arrests of notable leaders and protesters Government controls most media outlets significantly restricting freedom of political expression and the press.

Table 4.4 — Russian Federation political and legal system of government overview and evaluation

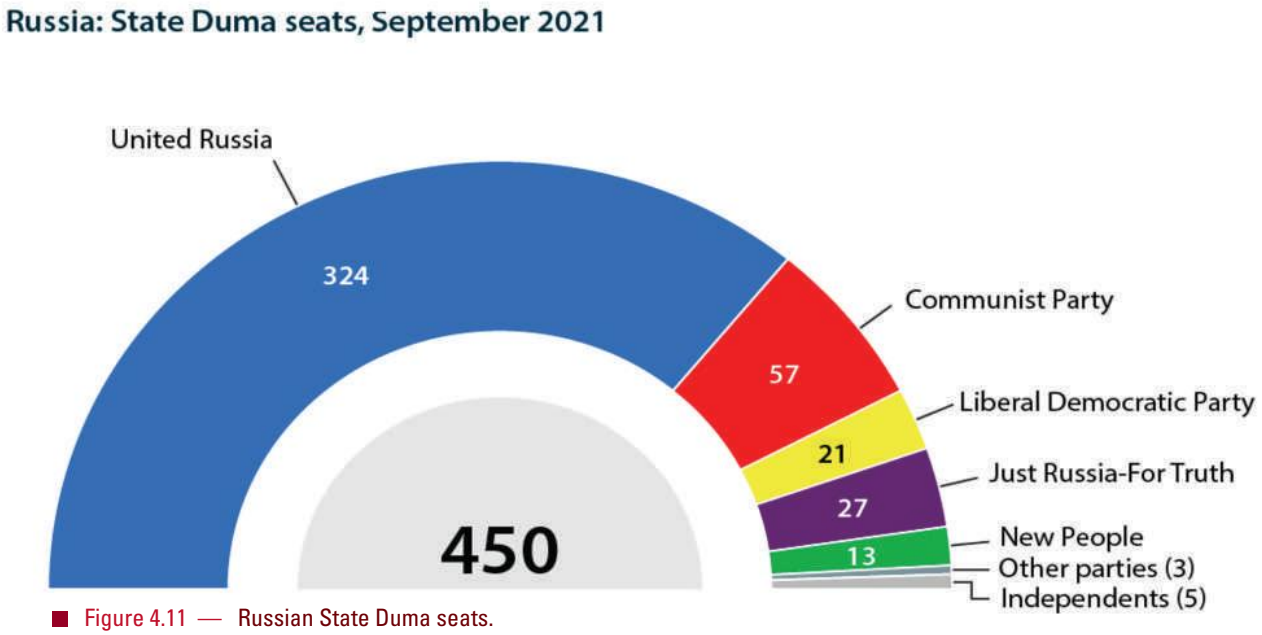


Figure 4.11 — Russian State Duma seats.

Russian President Vladimir Putin's party has won a parliamentary majority following an election marred by reports of fraud. Mr. Putin's biggest critics were barred from running, and there were reports of ballot stuffing and forced voting.

	The Economist Intelligence Unit's *Democracy Index 2022.* [17]		Freedom House's *Freedom in the World 2024.* [18]		World Justice Project's *2022-2023 Rule of Law Index.* [19]	
	Measures: • Electoral process and pluralism • Functioning of government • Political participation • Political culture • Civil liberties		Measures: • Political rights • Civil liberties including: - Press freedom - Internet freedom		Measures: • Government powers • Absence of corruption • Open government • Fundamental rights • Order and security • Regulatory enforcement • Civil justice • Criminal justice	
Australia	2017	2022	2018	2024	2017	2023
	8th 9.09/10 Full democracy	15th 8.71/10 Full democracy	Free 98/100	Free 95/100	10th 0.81/1	13th/142 0.82
	21st 7.98/10 Flawed democracy	30th 7.85/10 Flawed democracy	Free 86/100	Free 83/100	19th 0.73/1	28th/142 0.69/1
People's Republic of China	139th 3.1/10 Authoritarian	156th 3.1/10 Authoritarian	Not Free 14/100	Not Free 9/100	75th 0.5/1	134th/142 0.31/1
	167 countries total	167 countries total	/100	/100	113 countries total	142 countries

Table 4.5 — Evaluation snapshot of democratic and non-democratic systems by international organisations.

17 Economist Intelligence Unit, Democracy index 2017, http://www.eiu.com/topic/democracy-index, accessed 20 December 2023.

18 Freedom House, Freedom in the world 2018. Democracy in crisis, https://freedomhouse.org/report/freedom-world/freedom-world-2018 accessed 20 December 2023.

19 World Justice Project, 2017–2018 Rule of law index, https://worldjusticeproject.org/rule-of-law-index/global accessed 20 December 2023.

Democratic and non-democratic systems of government

Various forms of democracy and diverse kinds of non-democratic **autocracy**. Key concepts are summarised below:

1. No democratic system is perfect in fulfilling all the indicators on the democracy checklist.
2. Neither countries nor systems of governance remain fixed. They can evolve into more robust democracies, as South Korea has demonstrated over recent decades. Conversely, they might slide into authoritarianism, as seen in Turkey, Hungary, and Russia.
3. While Russia reconfigured itself as a constitutional presidential democracy after the fall of the Soviet Union in 1991, under President Putin its mix of dictatorship and democracy has shifted increasingly towards full authoritarianism undermining democratic principles, in particular, the separation of powers. The COVID 19 emergency and the new constitution of 2021 hastened this process.
4. Australia demonstrates all the metrics on the democracy checklist, albeit not all to the same high degree. Engaging in an evidence-based investigation on the strengths and weaknesses of Australia's democratic system could significantly enhance your comprehension for Unit 4.
5. The election of Donald Trump in 2024 as President of the United States raises arguments about his impact on the US democratic system. *See Background information: Donald Trump and US democracy.*
6. The Chinese system can be characterised as:
   - one of 'responsive authoritarianism', where a non-democratic government seeks to respond to the concerns of citizens to suppress opposition and maintain stability.
   - Under previous leaders (for example, Deng Xiaoping), political and economic reforms allowed for the controlled growth of businesses and entrepreneurs. They also addressed citizen demands for increased political freedoms, which culminated in the Tiananmen Square massacre in 1989.
   - Upon his election as General Secretary, Xi Jinping announced a renewed focus on *yifa zhiguo* (依法治国) – "governing the nation in accordance with the law." This informed a broad anti-corruption campaign, targeting rivals within the Chinese Communist Party while also addressing public calls for accountability.
   - However, this did not signal a turn towards the 'rule of law' in China, where the political and legal system remains unlikely to challenge its governing party. Despite the government's attempts to address public concerns, it may be more fitting to think of China as being 'ruled by law':
     - To what extent is responsive authoritarianism a valid alternative to full democracy?
     - Are democratic nations inherently less efficient than non-democratic nations?
     - Are flaws in the Chinese electoral system understandable given the size of their population?

Figure 4.12 — Some question whether President Donald Trump is a threat to American democracy.

Summary

- Various forms of government exist, and their classification is based on how well they embody democratic principles.
- Democracy is the predominant form of government in the contemporary world, encompassing around 45% of countries to some degree. Roughly half of the global population lives under some form of democracy.
- The Democracy Index is a valuable measure of democracy. It categorises Australia as a 'full' democracy alongside 18 other countries. This index uses democratic criteria to evaluate countries' political and legal systems. These criteria encompass the separation of powers, checks and balances, the rule of law, judicial independence, freedom of the press, adherence to political rights and freedoms, power accountability, and the strength of democratic institutions, such as electoral systems.
- Utilising the criteria above, the Democracy Index designates the US as a 'flawed' democracy.
- The US is a representative democracy, organised as a federation with an executive presidential government. Its constitution limits the powers of government by strongly separating them and incorporating robust checks and balances between them. Although the US system has numerous strengths, its electoral systems and processes weaken majority rule, and the distortion of political rights and freedoms by wealth and race undermines its democracy.
- Various forms of autocratic political and legal systems exist. They all share a concentration of power, weak checks, and balances, limited judicial independence, scant respect for political rights and freedoms, and a governance style based on **rule by law**, rather than the rule of law.
- China operates under a one-party system rooted in socialist ideology. While it features three arms of government, all legislative, executive, and judicial functions remain under the control of the Chinese Communist Party. Regular elections are conducted, but candidacy and voting processes are tightly controlled by the Party. Military operations are overseen by Party leaders, providing the means to suppress threats to their rule. Stringent media restrictions exist, along with legal limitations on political rights and freedoms, hindering pluralism and political dissent. Yet, despite these authoritarian traits, the Chinese government remains responsive to popular demands, seeking to free themselves from external criticism while obtaining a degree of democratic legitimacy.
- Russia is a constitutional presidential democracy with strong nationalism and centralisation of power. While it has some explicit rights protections and regular elections it has few checks on executive power and in recent times there has been a move towards a full authoritarian regime. Elections are managed to ensure the dominance of the ruling party, all forms of media are heavily censored, and political dissent and protests are violently suppressed. Putin's Russia has been criticised for the flaws in its democratic system and for its aggressive foreign policy.

Exam practice questions

Short Answer

1a. Outline what is meant by the term autocracy.

1b. Explain **two** principles of liberal democracy that are undermined in non-democratic political and legal systems.

1c. Discuss the extent to which the separation of powers is upheld in **one** democratic political and legal system.

2a. Outline the role of the judiciary in a liberal democracy.

2b. Explain **two** differences between democratic and non-democratic political and legal systems.

2c. Discuss **two** ways that the rule of law is undermined in non-democratic political and legal systems.

3a. Outline what is meant by 'constitutionalism'.

3b. Explain the purpose of judicial independence in a democratic political and legal system.

3c. Discuss the power of the legislature compared to that of the executive in **one** non-democratic political and legal system.

4a. What is meant by the term 'non-democratic'?

4b. With reference to examples, outline **two** features of the United States system of democratic government.

4c. Discuss the extent to which citizen participation and pluralism are upheld in the United States political and legal system.

Source Analysis

Read Table 4.3 – Political and Legal System of the People's Republic of China - Overview & Evaluation.

5a. Outline the feature created by Article 1 of the Constitution of the United States.

5b. With reference to Table 4.3 discuss, in your own words, **two** issues with constitutionalism in China.

5c. Discuss **two** ways that political participation is upheld in **one** non-democratic political and legal system.

5d. Evaluate the extent to which majority rule is undermined in **one** non-democratic political and legal system.

Essay Response

6. Analyse how, and to what extent, legislative and judicial powers in Australia and **one** non-democratic political and legal system are upheld.

7. 'In the functioning of democratic and non-democratic political and legal systems, there is a difference between theory and practice.' Evaluate this claim with reference to Australia and **one** non-democratic political and legal system.

Investigation and Discussion

8. Investigate **two** mechanisms for protecting political rights (for example, the right to vote, freedom of speech) in the United States and China. These could include constitutional and statutory protections. Evaluate the extent to which equality of political rights is provided for in **one** democratic and **one** non-democratic political and legal system.

Sources

Figure 4.1 Source: By INFIYNJTE and Mapchart.net - Mapchart.net, eiu.com, and powergame.gr, CC BY-SA 4.0, https://commons.wikimedia.org/w/index.php?curid=145379887
Figure 4.2 Source: Stephen King, 2018
Figure 4.3 Source: Greg Smith, 2021, < https://www.smithycartoons.com.au/>
Figure 4.4 Source: Stephen King, 2019
Figure 4.5 Source: FreeHK – Own work, CC0, https://upload.wikimedia.org/wikipedia/commons/thumb/7/7e/13th_National_People%27s_Congress_%28section%29.svg/2560px-13th_National_People%27s_Congress_%28section%29.svg.png, accessed 20 December 2023
Figure 4.6 Source: https://audiovisual.ec.europa.eu/en/photo/P-060812~2F00-21, Attribution, https://commons.wikimedia.org/w/index.php?curid=134961428
Figure 4.7 Source: https://en.wikipedia.org/wiki/China#/media/File:National_Emblem_of_the_People%27s_Republic_of_China_(2).svg
Figure 4.8 Source: Kremlin.ru, CC BY 4.0, <https://commons.wikimedia.org/w/index.php?curid=60759727> and Vladimir Putin, https://en.wikipedia.org/wiki/Vladimir_Putin#/media/File:Vladimir_Putin_(2017-07-08).jpg, accessed 20 December 2023.
Figure 4.9 Source: Elina Khvorostova 2024
Figure 4.10 Source: Elina Khvorostova 2024
Figure 4.11 Source: Elina Khvorostova 2024
Figure 4.12 Source: Alan Moir https://twitter.com/moir_alan/status/789785023771586560
Table 4.1 Source: Economist Intelligence EIU, 'Democracy Index: the Ukraine Challenge', Economist Intelligence website, 2021, https://www.eiu.com/n/campaigns/democracy-index-2021/
Table 4.2 Source: Stephen King 2023
Table 4.3 Source: Stephen King 2023
Table 4.4 Source: Stephen King 2023
Table 4.5 Source: Political and Legal Educators Association of Western Australia, 2019, Economist Intelligence EIU, 'Democracy Index: the Ukraine Challenge', Economist Intelligence website, 2021, https://www.eiu.com/n/campaigns/democracy-index-2021/

All sources last accessed 2/8/24

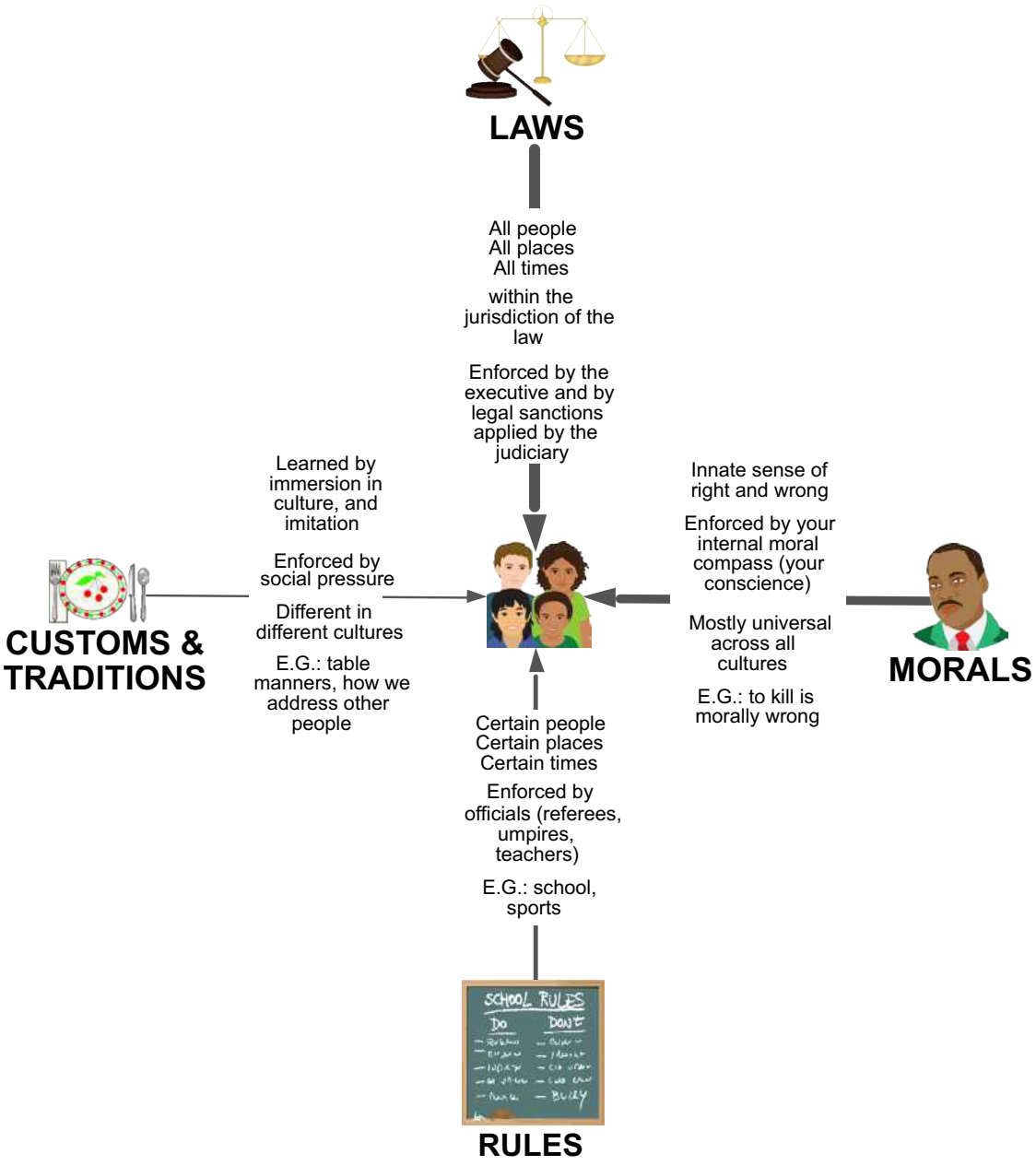
Parliament and the law

Syllabus points:

- **Types of laws made by parliaments and subordinate authorities**
- **Legislative processes at the Commonwealth level**
- **Essential to the understanding of democracy and the rule of law are the separation of powers doctrine and the sovereignty of parliament.**

Regulating Human Behaviour

Ways of influencing human behaviour in large groups fall into four distinct categories: customs and traditions, morals, rules, and **laws**.



■ Figure 5.1 — Factors influencing human behaviour.

In Figure 5.1 factors influencing human behaviour, line thickness shows strength of influence, with laws being the most powerful factor. The actual influence of each factor on a particular **individual** is highly variable and depends on personal character traits.

Customs and traditions vary among cultures, and their influence is lower in **progressive** multicultural societies like Australia, where tolerance and acceptance are valued. In such societies, diversity is embraced, reducing the significance of customs and traditions. However, in homogenous societies like Japan, customs like the tea ceremony and traditional dress like the kimono retain importance. Traditional societies, such as New Guinea's tribal villages or those governed by religious law, depend on customs and traditions.

Morals are unwritten codes that guide our understanding of right and wrong. They are almost universal. People lacking morals exhibit a lack of empathy and even sociopathic or psychopathic tendencies. One's internal conscience enforces morals. Morals motivate most people, even without specific laws or rules, to do the right thing. Various religions share similar moral teachings, such as the **Golden Rule**, which teaches us to treat others as ourselves.

Rules are codes of behaviour that apply to specific people, places, and times. For example, students must follow school rules while on campus during the school day. Authoritative figures enforce these rules, for example schoolteachers.

Laws, on the other hand, are written codes created by sovereign political entities like states or nation-states. They apply universally to all individuals within the law's jurisdiction and are established by the state's **legislature**. Laws are enforced by the executive and judicial branches of the **government**, and lawbreakers may face sanctions that lawfully restrict their rights, such as imprisonment.

Laws may encode and reinforce morals. For example, it is immoral to kill another person. The moral against killing is translated into the crime of murder when codified in law. Laws deter and punish those with weak morals or a lack of conscience. Laws provide an external moral compass for those who lack an internal one.

Laws may also regulate behaviour by codifying customs and traditions. For example, when cars replaced horses and carriages, managing motor traffic became necessary, so new laws were developed. Another example is the custom to 'keep left' which became the law in some countries while 'keep right' became law in others. Traffic laws allow people to safely use public spaces like roads while enhancing the right to movement.

Power

Power entails the capacity to compel others to behave in ways they may not choose voluntarily. Power is, therefore, coercive.

With customs and traditions, power is employed to ensure compliance. For example, parents might discipline a child for not eating properly (that is, according to custom) at the table. The child may prefer eating with their fingers instead of using a fork, but the fear of punishment -a form of power - motivates them to conform to customary behaviour.

Power ensures compliance with rules. In schools, detentions may be used to encourage students to obey rules. Since students would prefer not to be detained, the threat and issuing of detentions is an exercise of power.

Power is used to enforce laws. Sanctions include fines, intensive supervision orders, community-based orders, and imprisonment. The state imposes sanctions to deter or punish breaking the law.

Note that power is the essential attribute of government. In democracies, power is limited by laws like constitutions and statutes. It is separated, checked, and balanced to prevent abuse. The **rule of law** curbs power and prevents its arbitrary use by ensuring it is exercised within the bounds of the law. Democracies represent the popular will and translate it into law - so **citizens** live by laws they have shaped. Through these mechanisms, laws govern the power of governing authorities - that is, the executive - and the behaviour of governed individuals – that is citizens. Laws represent the most potent means by which a society influences and controls the actions of its members.

It is essential to consider several key concepts regarding law:

Laws apply to the population of a sovereign political entity with a territory and a **system of government** – that is a nation or state within a nation;

Laws are mostly made by a parliament, congress or legislative assembly – that is, the legislative branch of government;

Laws are administered by a government – that is, the executive branch of government;

Laws are interpreted by **courts** – that is, the judicial branch of government.

Laws are:

- applicable to areas – called jurisdictions (see below),
- applicable to everyone within a jurisdiction,
- applicable all the time, and
- backed by sanctions.

Jurisdiction refers to where the law speaks – that is, has authority. There are two types of jurisdictions:

- Geographical jurisdiction covers the land and sea areas where laws are applicable. In **unitary** states like New Zealand, this encompasses the entire country, while in federations like Australia, federal laws apply nationwide, while state laws are limited to specific subnational regions. Federal constitutions therefore allocate powers geographically.
- Legal jurisdiction refers to areas of law. **Family law** covers matters such as marriage, divorce, parenting, and joint assets. Trade laws deal with imports, exports, tariffs, and excise taxes. Federal constitutions, like Australia's, outline the legal jurisdictions of the different levels of government. For example, the

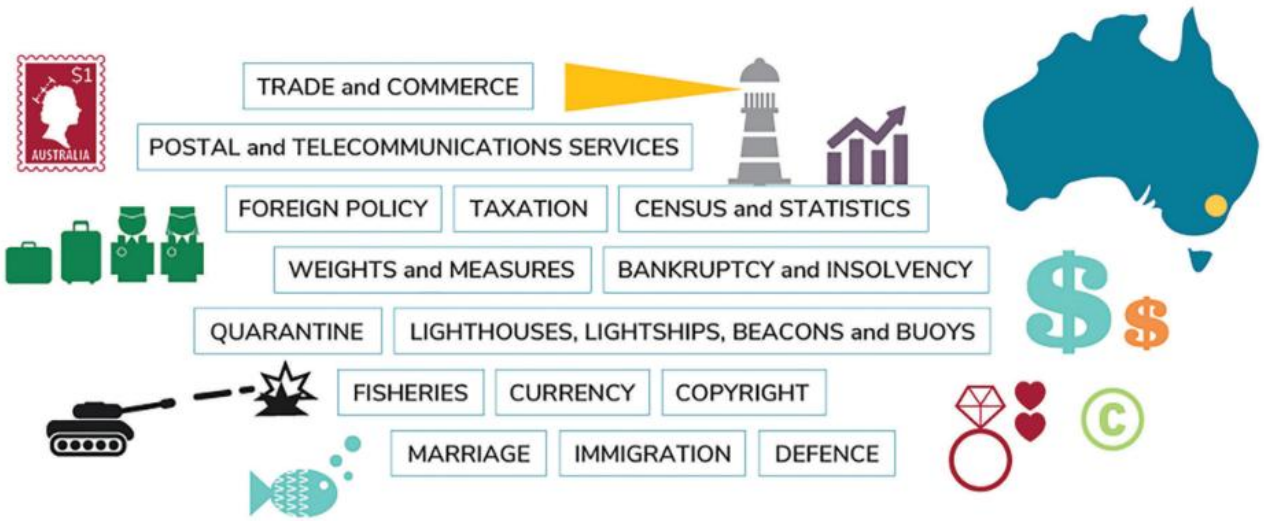


Figure 5.2 — Some areas of responsibilities of the Federal Parliament.

power to impose tariffs on traded goods falls exclusively to the **commonwealth**. Legislation concerning marriage and taxation falls under **concurrent powers**. Laws for land use and urban planning fall under **residual powers**.

Types of law

There are four main types of laws:

1. constitutional law,
2. **statute law** made by parliament,
3. common law made by **judges** in courts, and
4. **delegated legislation**—also called **regulations**, **ordinances**, and instruments—made by subordinate authorities.

Unit 1 is mainly concerned with statute law, **common law**, and delegated legislation. Constitutional law is covered briefly for the sake of encouraging greater understanding of **parliament** as a lawmaker.

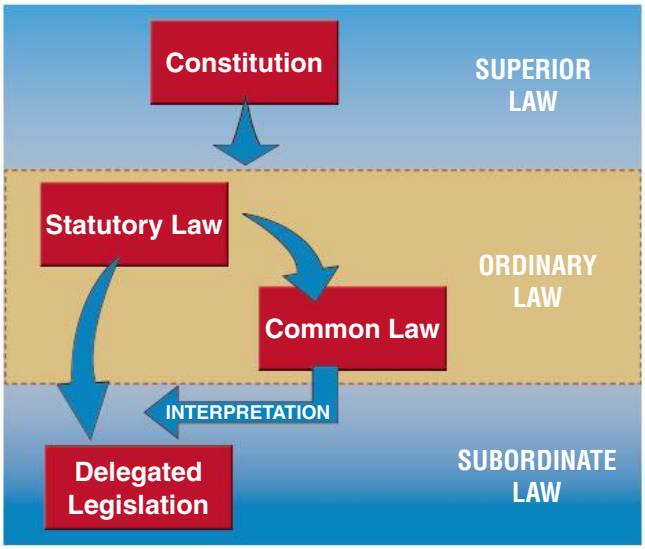


Figure 5.3 — Hierarchy of the sources of law.

Superior law: constitutional law

Constitutional law, also known as superior or fundamental law, serves several purposes:

- It establishes the jurisdiction of power (unitary or federal).
- It forms the three branches of government (legislative, executive and judicial).
- It outlines government processes (For example, that parliament must be "directly chosen by the people").
- It protects fundamental rights (For example, the right to vote).
- It codifies procedures for constitutional change.

Point 2 above is important for understanding parliament's role as lawmaker.

Constitutional law is distinct from ordinary laws made by parliaments and courts. Constitutions establish these two law-making bodies and define their powers – therefore, constitutions are superior to them and the laws they make.

The superiority of constitutional law necessitates unique processes for creating and amending it - in Australia's case, the process is **direct democracy** via **referendum**, specified by SECTION 128 of the Commonwealth Constitution (Australia).

Australia's Constitution was drafted by influential colonial politicians and **delegates** chosen by the six colonial parliaments. A prominent delegate was Queensland's Premier Sir Samuel Griffith, who would later become the first **Chief Justice** of the **High Court**. The delegates debated how to achieve federation during three constitutional **conventions** held in Melbourne and Sydney during the 1890s. Citizens of the six colonies voted to accept the Commonwealth Constitution

(Australia) drafted at the three conventions. Finally, it became constitutional law after being passed by the British Parliament.

The passage of the *Commonwealth Constitution (Australia) **Act** 1900 (Cth)* transferred **sovereignty** from Britain to the new Commonwealth of Australia and the six states by creating an "indissoluble federal Commonwealth" of the former colonies.

Laws require a source, or sources, of authority. The **preamble** to the Commonwealth Constitution (Australia) refers to three sources of authority - the people of the colonies, Almighty God, and **the Crown** – *See Background Information: Preamble to the Commonwealth Constitution (Australia).*

Background Information: Preamble to the Commonwealth Constitution (Australia)

"WHEREAS the people of New South Wales, Victoria, South Australia, Queensland, and Tasmania, humbly relying on the blessing of Almighty God, have agreed to unite in one indissoluble Federal Commonwealth under the Crown of the United Kingdom of Great Britain and Ireland, and under the Constitution hereby established:

And whereas it is expedient to provide for the admission into the Commonwealth of other Australasian Colonies and possessions of the Queen:

Be it therefore enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same..."[1]

Note: The reference to Almighty God reflects the more religious time in which the Constitution was drafted. The second and third sources of authority are important for our understanding of the political system the Constitution creates. It creates a **constitutional monarchy** and a **representative democracy**.

Australia's constitution is one of the world's oldest and most stable democratic constitutions. It was created by elected representatives and approved by the people through a direct vote. The strong democratic tradition is reflected in the process for formally changing the Constitution - a direct referendum vote by the people (SECTION 128 of the Commonwealth Constitution).

1 'Preamble, Commonwealth of Australia Constitution Act,' https://www.aph.gov.au/About_Parliament/Senate/Powers_practice_n_procedures/Constitution/preamble

Ordinary law—statute law

There are two types of ordinary law – laws made by parliaments and laws made by courts:

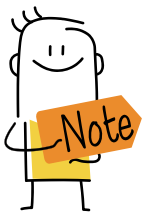
1. Parliaments create laws known as statutes - they are Acts of Parliament.
2. Courts establish law known as common law, case law, or **precedents**.

It is important to note that statutes (Acts) are superior to common law. If common law and statute law conflicts, statute law prevails. The reason for the superiority of statute law is that:

- Parliament is the legislative branch of government.
- Parliament represents the will of the majority.

Judges are not legislators and are appointed, not elected. It would breach the **separation of powers** doctrine if judges' lawmaking power was equivalent to Parliament's.

This chapter focuses on statutes – that is, Acts of Parliament - including their creation, purpose, and sources of authority. It also discusses laws made by subordinate authorities, which are lower-level laws made by the executive branch under the authority of Acts of Parliament.



Common law will be discussed in detail in the next chapter.

Parliament's functions and lawmaking

Parliament's primary function is lawmaking. However, lawmaking is influenced by parliament's other functions. Two additional functions that interact with parliament's lawmaking function are its:

1. Representative function:
    - Electing Members of Parliament (MPs) ensures laws reflect the will of the people.
    - Regular **elections** ensure the **accountability** of parliament and MPs for the laws they make.
2. Westminster function:
    - Forming the executive and holding it accountable to parliament ensures **majority rule**.

The parliamentary executive - that is, the government - introduces over 90% of bills in the **Commonwealth Parliament**.

Parts of Parliament

Parliaments have interconnected parts. Except for the **unicameral** Queensland and territory parliaments, all Australian parliaments,

including the Commonwealth Parliament, have three components all of which are active in the lawmaking function:

1. A lower house which:
    - represents people in geographic divisions called **electorates**, and
    - forms the government following **Westminster conventions**.
2. An upper house which:
    - represents regions. The regions are the six states and two territories in the Commonwealth Parliament, and state regional areas in state parliaments - For example, the Mining and Pastoral Region in Western Australia.
    - acts as a house of review to check and balance the lower house and the government formed within it.
3. The Crown:
    - The **Governor-General** in the Commonwealth, Governors in the states and Administrators in the territories represent the Crown or Monarch, currently King Charles III.
    - The Crown is **vested** with formal power. Their Australian representatives must give **Royal Assent** for a **bill** to become an Act of Parliament.
    - The Crown's power is limited by Westminster conventions, which ensures that royal powers are used only on the elected officials' advice.

> *making an Act involves all three components of parliament.*

Figure 5.4 — Parliament House, Canberra. AUSPIC Collection. Photographer: David Foote. Copyright© 2024 Commonwealth of Australia.

A bill is a proposed law. For a bill to become a statute, it must pass both houses in exactly the same form and receive Royal Assent. Thus, making an Act involves all three components of parliament.

Parliament's lawmaking process

The following is an overview of the legislative – or statutory – process.

Introduction of a Bill

- Any Member of Parliament (MP) can introduce a bill.
- Most bills commence in the lower house.
- Due to the government's dominance of the lower house, government bills will likely pass the **House of Representatives**.
- Non-government (That is, **private members** – see below Private Members of Parliament) bills rarely progress beyond the first reading.

Passed by Both Houses & Royal Assent

- A bill must pass both houses (House of Representatives and **Senate**) in the same form.
- If the second house makes **amendments**, the bill returns to the house of origin for agreement.
- The Governor-General gives Royal Assent.

Deadlock and Resolution

- If the two houses cannot agree on a bill, it is considered "blocked."
- SECTION 57 of the Constitution allows the **Prime Minister** to advise the Governor-General to dissolve both houses and call for a **double dissolution** election to resolve the deadlock.

Efficiency and Public Representation

- Most bills are dealt with efficiently, receiving little or no media reporting.
- Government policy legislation that is opposed by the **Opposition** may lead to significant debate, but it often passes in the House of Representatives.
- The Senate, which is rarely controlled by the government, often debates and forces compromise between government MPs, ministers, **crossbench** members, and opposition members.

Reflection on the Lawmaking Process

- Lawmaking in parliament is a deliberative process with thorough debate and scrutiny of bills.

- The lawmaking process aims to reflect and represent community values and needs.
- **Checks and balances** in the lawmaking process support the rule of law by ensuring laws are constructed through a democratic process.
- The government introduces most bills into parliament.
- In practice, the Senate is more deliberative than the House of Representatives because it is usually free of government control and more representative of Australia's diversity, which allows for debate and consensus.

Study the figure 5.5 keeping the following questions in mind:

1. Which stages are deliberative?
2. Where can citizens participate in the lawmaking process?
3. Where are the checks and balances in the legislative process?
4. Does the lawmaking process help parliament hold the government to account?

Ideas for new laws

■ Figure 5.5 — Ideas for new laws can come from many sources. The size of each source indicates strength of influence. (See below for more explanation.)

Government Policy

Before the May 2022 election, the Albanese Government campaigned for climate action, childcare, integrity in government, and other policies. When the Labor Party formed the government, it introduced the *Climate Change Act 2022*, the *Safeguard Mechanism Act 2023* and the *National Anti-Corruption Commission Act 2022*. It increased childcare subsidies by $9 billion in the federal budget bills.

In their election policy, the Labor Party indicated its intention to take the 2017 Uluru Statement From the Heart's call for a Voice to Parliament to a referendum in their first term. The *Constitution Alteration (Aboriginal and Torres Strait Islander Voice) Act 2023* was the result.

Public Service Submissions

Little reported, but **public service** submissions are very influential. The public service implements laws daily, and this experience is used to suggest ways to improve them. Many minor amendments to existing laws come from public service submissions. Submissions are made through ministers, who introduce amending bills into parliament to propose changes.

Pressure Groups

Pressure groups contribute significantly to lawmaking. They represent sectors of the economy and society, bringing expertise and specialized knowledge that helps parliament draft better laws to regulate the sectors they represent. They can exert significant influence through political advertising and social media campaigns, encouraging governments, MPs, and the public service to create laws that better suit their interests.

The Australian Council of Trade Unions influenced the 46th Parliament's legislative responses to the COVID-19 pandemic by assisting in the design of programs like JobKeeper. The Minerals Council of Australia, the Business Council of Australia, and the Pharmacy Guild are also very influential. In 2022-23, the Pharmacy Guild resisted new laws that would change how prescription medicines could be dispensed. It placed information and petitions in pharmacies nationwide to influence public opinion and pressure the government to alter its proposed laws.

Private Members of Parliament

Private members are all MPs who are not part of the **ministry**. This includes opposition MPs, **minor party** MPs, and independent MPs on the crossbenches of both houses.

■ Figure 5.6 — Dr Haines, the independent MP for Indi in Victoria, raised public awareness and helped make political integrity an election issue in 2022

Any private member can introduce a bill, although most fail to pass the first reading. However, they can still contribute to lawmaking less directly. Dr Helen Haines is an example.

Dr Haines, the independent MP for Indi in Victoria, worked hard to improve integrity in government. She drafted an integrity commission bill that failed in the House of Representatives in 2020. Nevertheless, her efforts raised public awareness and helped make political integrity an election issue in 2022. The Labor Party won the May election after promising to legislate for a national integrity commission. The Albanese Government consulted with Dr Haines and based much of its bill - the National Anti-Corruption Commission Bill 2022 - on Dr Haines' original private member's bill – the Australian Federal Integrity Commission Bill 2020.

The Australian Greens are a minor party whose MPs are private members and senators. During an ongoing rental crisis in 2023, they positioned themselves as the party representing renters. They used their Senate power to block the Albanese Government's Housing Australia Future Fund Bill 2023 to negotiate amendments favourable to renters. The Greens employed a similar strategy to amend the government's *Climate Change Act 2022* and *Safeguard Mechanism Act 2023*.

All private members participate in **committee** work – it is one of their main roles. Legislation is referred to parliamentary committees during the Consideration-in-Detail and Committee of the Whole stages in the House of Representatives and Senate. Private members contribute quietly behind the scenes to the construction of bills in these and other legislative committees.

One example is the Parliamentary **Joint Committee** on **Human Rights** (PJCHR). The MPs working on the PJCHR scrutinise bills to ensure compatibility with human rights. They issue 'Statements of Compatibility with Human Rights' which are included as appendices to the Explanatory Memorandums of bills. PJCHR recommendations for amendments often result in changes to bills.

Crises and Contingencies

Unpredictable or catastrophic events often require a legislative response. The COVID-19 pandemic is a prominent contemporary example. During this crisis, the 46th Parliament expedited emergency legislation to sustain the economy when states and territories utilized their health powers to impose lockdowns. Laws were introduced to close international borders, enter trade agreements for vaccine purchases, and stimulate the economy.

The Russian invasion of Ukraine resulted in the *Home Affairs Act 2023* passing in the 47th Parliament within 90 minutes. The Act revoked the Russian Federation's lease for the land on which it planned to build its Canberra embassy. Given Russia's aggression, the location of the proposed embassy was considered dangerously close to Parliament House and the Australian Defence Force headquarters.

Laws are passed to facilitate reconstruction after natural disasters like bushfires and floods. Economic crises such as the 2007 Global Financial Crisis (GFC) necessitate rapid legislative response to mitigate their impact. In the case of the GFC, the Rudd Government enacted legislation authorising substantial government spending to inject funds into the economy. Government spending offset a credit crisis caused by collapsing banks in the USA and is credited by some with saving Australia from an economic recession.

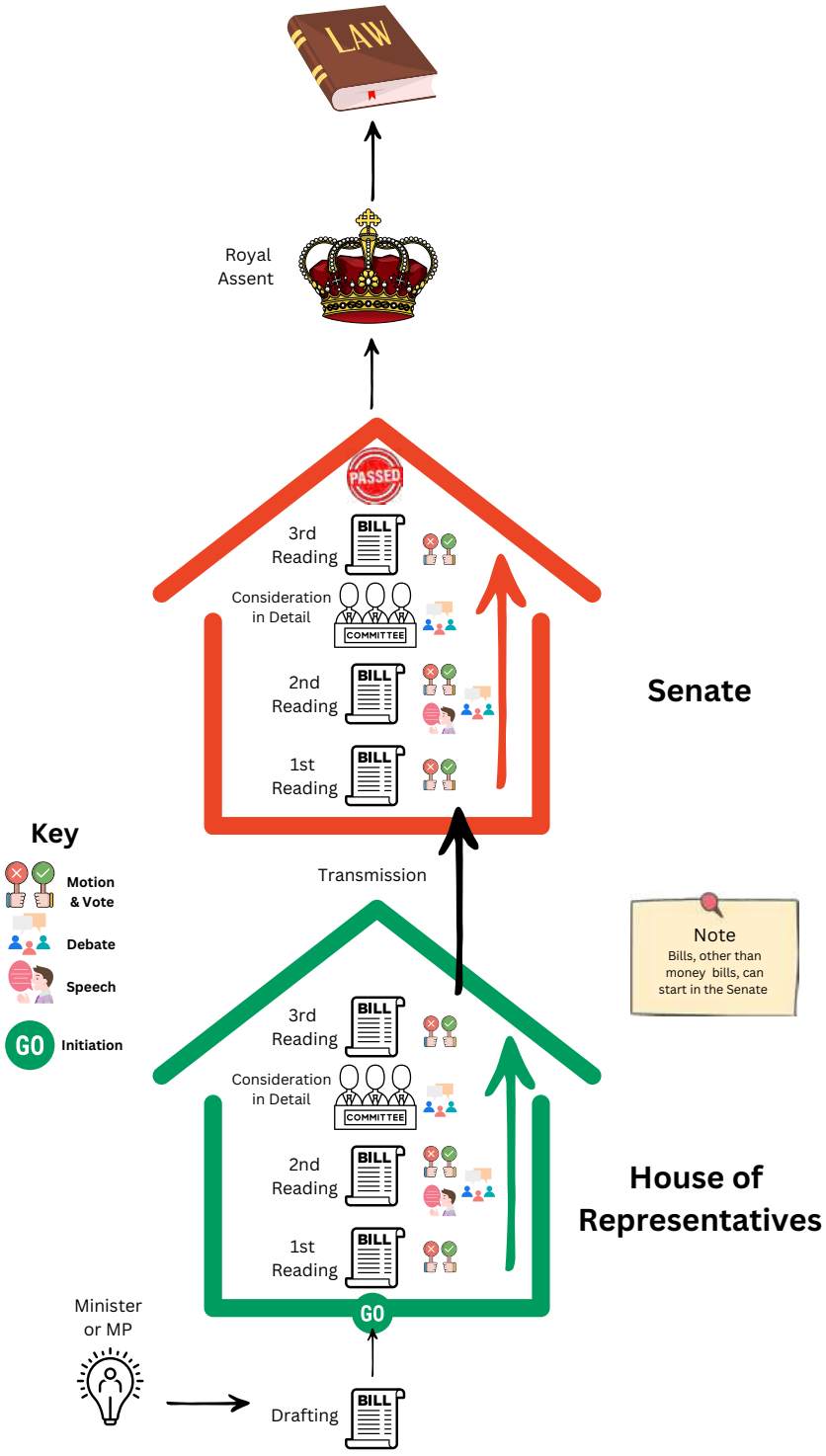
Citizens

Citizens vote for parties whose policies they support. However, they can also contribute ideas for laws by exercising their freedom of speech and assembly to protest and communicate political ideas.

Petitioning parliament is an ancient right. Women's right to vote was achieved mainly through protest and petitioning. The **2017 Uluru Statement From the Heart** was a petition to the parliament for a First Nations Voice to Parliament. In response, the 47th Parliament passed the *Constitution Alteration (Aboriginal and Torres Strait Islander Voice) Act 2023*, enabling a referendum on the issue. *See CS2.*

Citizens can write submissions to parliament's legislative committees. These committees often seek public submissions to gauge public opinion and canvass expert advice about bills. Citizens can contribute ideas through public submissions. An example is psephologist Antony Green, who regularly provides ideas to the Joint Standing Committee on Electoral Matters. His submissions have influenced electoral reforms, including the 2016 Senate voting reforms.

Law-making stages within the parliament



■ Figure 5.7 — Stages of the legislative process. All bills must pass both houses in identical form. The second reading and committee stages in each house are the most significant. They are the 'deliberative stages' where scrutiny and debate are richest.

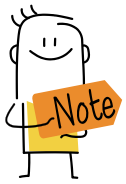
Statute law

Statutes have different purposes, which include:

- implementing government policies,
- authorising government spending through money bills,
- amending (changing) existing statutes,
- repealing (abolishing) statutes,
- consolidating old statutes, and
- establishing legal frameworks as part of cooperative **federalism**.

Statutes are sometimes used in response to courts' common law developments by:

- abrogating (overriding) common law,
- codifying and elevating common law into statute,
- defining judges' freedom or discretion - for example, the *Sentencing Act 1995 (WA)* defines sanctions and *Civil Liability Act 2002 (WA)* defines damages, and
- clarifying courts' **statutory interpretation** (statutory interpretation by the courts is covered in the next chapter).



Note that Acts can govern how the other two branches of government operate. For example, laws that implement executive policies or authorise spending directly impact the operations of the executive branch. Similarly, laws that respond to court decisions and common law affect the functioning of the judicial branch.

Consider each of the purposes of statutes concerning concepts such as:

1. The separation of powers:

- Checks and balances,
- The rule of law, and
- The sovereignty of parliament.

Sources of authority for statute law

Acts of parliament derive their authority from three sources – the Constitution, the Crown, and the people:

1. The Constitution

Heads of power in the Commonwealth Constitution (Australia) specify the Commonwealth Parliament's exclusive and concurrent legislative powers. Many are listed in SECTION 51.

State parliaments' legislative power is entrenched in SECTION 107 of the Commonwealth Constitution (Australia) and is unspecified (residual).

Territory parliament's legislative power is delegated by the Commonwealth Parliament.

2. The Crown

SECTION 1 of the Commonwealth Constitution (Australia) formally vests legislative power in the Crown as part of the Commonwealth Parliament. SECTION 58 makes Royal Assent necessary for a bill to become a statute.

3. The People

SECTIONS 7 and 24 of the Commonwealth Constitution (Australia) ensure each house is "directly chosen by the people". They make Australia a representative **democracy**. Therefore, parliamentarians are representative legislators, elected and held accountable through regular elections. Their power is delegated to them by the people.

The purpose of statute law

This section is an overview of the main types and purposes of statute.

Implementing government policy

According to the rule of law, governments must act within the bounds of the law. Thus, governments need parliament to make new laws or change old ones if they are to successfully carry out their agenda.

Governments have mandates, agendas, and goals. Political parties make promises to the electorate and hold core ideological beliefs regarding the nature of society and the role of government. They aim to win control of the House of Representatives and form a government. Being in government automatically gives political parties control of the lower house, enabling them to translate their beliefs into law- if they can persuade the Senate to agree.

■ Figure 5.8 — The Albanese Government faced challenges convincing Parliament to pass its Housing Australia Future Fund Bill 2023 (HAFF) because parties in the Senate, notably the Greens, refused to support it.

In 2022, the new Albanese Government persuaded parliament to pass new laws for its climate and political integrity policies and the Voice to Parliament referendum. These were election promises made by the Labor Party during the 2022 election campaign. After Labor formed the government, the 47th Parliament passed the *Climate Change Act 2022*, the *Safeguard Mechanism Act 2023, the National Anti-Corruption Commission Act 2022,* and the *Constitution Alteration (Aboriginal and Torres Strait Islander Voice) Act 2023.*

The Albanese Government faced challenges convincing parliament to pass its Housing Australia Future Fund Bill 2023 (HAFF) because parties in the Senate, notably the Greens, refused to support it. The HAFF example illustrates parliament's checks and balances on the executive branch and the importance of statute to the separation of powers.

Authorising expenditure by the executive

A significant function of parliament is scrutinising government spending to ensure accountability and checks and balances.

Governing involves executing laws, and governments require resources for this purpose. Budgets provide these resources.

Public service departments use the financial resources provided by budgets to deliver services. Public servants are employed and paid through budgets. Departments are audited to ensure good financial management and compliance with their governing statutes.

Delivering government services, such as pensions, healthcare and education, involve substantial expenditure of taxpayers' funds. The defence forces require significant financial resources to acquire and maintain military capabilities. Infrastructure projects, including roads, ports, and airports, are vital public goods funded by the government, sometimes in partnership with private companies.

Monitoring where and how public money is spent is a primary means of parliamentary scrutiny of the executive branch. Money bills and estimates committees are two significant forms of scrutiny. *See Looking Ahead*: *Senate Estimates Committees*.

Looking ahead: Senate Estimates Committees

The Senate has a robust committee system. The six estimates committees are part of the Senate committee system. Each estimates committee specialises in an area of government activity. Two examples are the Legal and Constitutional Affairs Committee and the Economics Committee.

Each estimates committee has six senators – three government senators, two opposition senators and one minor party or independent senator. Thus, they are independent of the government – which is important for accountability.

While the Senate cannot initiate or amend money bills it can scrutinise and, in exceptional circumstances, refuse to pass them. Senate estimates committees hold public hearings while the House of Representatives deals with the government's budget bills. The House sends budget memorandums to the Senate so that its estimates committees can inquire into spending before the money bills are transmitted to the upper house. This procedure allows the Senate to influence the money bills without breaching SECTION 53.

Senate estimates committees are significant for the accountability of the executive, which is studied in Unit 4.

SECTION 83 of the Constitution stipulates that "no money shall be drawn from the Treasury of the Commonwealth except under appropriation made by law". This means that government spending must receive prior approval by Parliament enacting money - or appropriation - bills.

SECTION 53 limits the creation of money bills to the House of Representatives. The Senate

Figure 5.9 — Senate Estimates in session.

cannot initiate or amend them. However, it can scrutinise and block them. There are three types of money bills affected by SECTION 53:

1. Taxation bills – for example, changing the rate of income tax.
2. Bills for particular spending – for example, purchasing COVID 19 vaccinations.
3. Bills for the "ordinary annual services of government" – for example, resourcing public service departments.

> *"no money shall be drawn from the Treasury of the Commonwealth except under appropriation made by law"*

The House and the Senate reached an agreement in 1965 – called the Compact of 1965 – that certain types of money bills would not fall within SECTION 53 because they were not for the "ordinary annual services of government". Grants to the states is one example. The Senate can amend this second class of money bills.

Statutes regulating government spending uphold the rule of law and the separation of powers by ensuring that governments cannot access taxpayers' money without legal authorisation. Parliament holds the executive branch responsible and accountable through the scrutiny of money bills.

Further, SECTION 54 provides that any bill appropriating money "for the ordinary annual services of government shall only deal with such appropriation". Thus, government money bills cannot be conditional on other matters unrelated to spending. Bills which fund the ordinary annual services of government are typically called the Appropriation Bill (No. 1), Appropriation Bill (No. 3) and Supply Bill (No. 1). These bills are not able to be amended by

> *Bills which fund the ordinary annual services of government are not able to be amended by the Senate*

the Senate as they cover the ordinary services of government.

The Budget

Every year, the Treasurer presents the government's annual budget, usually in May. It outlines expected tax revenues, proposed spending, and financial estimates for up to three years. This is a significant event in Australian **politics**.

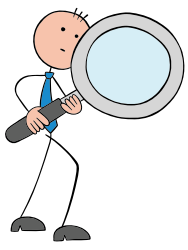
The Treasurer introduces money bills in the House of Representatives. The bills are debated, scrutinised, and potentially amended by House committees. The House of Representatives thoroughly examines government spending and approves the budget proposals by passing money bills. Due to the government's majority in the lower house, these bills generally pass easily, often with lower levels of accountability.

The money bills are typically named Appropriation Bill (No. 2), Appropriation Bill (No. 4), and Supply Bill (No. 2). These bills do not fall within the limitations of SECTION 53. The Senate may amend these bills under the Compact of 1965.

Example: Stage 3 Tax Cuts and the Carbon Tax

The budget may also include changes to taxes. For example, in 2018 the Turnbull Government legislated changes to income tax. Stage 3 of the tax cuts came into effect on 1 July 2024.

Economists and the Greens argued in 2022/23 that economic conditions have changed since 2018 due to COVID-19, inflation and deteriorating international relations, and the Stage 3 cuts were no longer justified. To stop Stage 3, the Albanese Government would have to legislate a new money bill to amend the *Income Tax Assessment Act 1997*.



Looking ahead: The 1975 Crisis

In 1975 a constitutional crisis gripped Australia. It was caused by deadlocked money bills, also known as supply bills. The crisis brought attention to the role of money bills in the Australian political system, as well as the interaction between unwritten Westminster conventions and the written Constitution.

■ Figure 5.10 — To stop Stage 3, the Albanese Government would have to legislate a new money bill to amend the *Income Tax Assessment Act 1997*

Supply bills authorise government spending and ensure the functioning of the government. In the 1975 crisis, the Senate used its power to block the Whitlam Government's supply bills by refusing to pass them. This created a constitutional crisis as the government began to run out of funds, threatening its ability to govern.

The **Westminster system** holds that the Senate may debate money bills but should always pass them. The convention maintains the Senate's role as a "house of review" while accepting the upper house is not the "house of government". However, unlike the weak House of Lords in Britain, the Constitution grants the Australian Senate power almost equal to the lower house. Therefore, it has the power to block money bills. The conflict between the powerful Australian Senate and the convention of not denying supply to the government led to the constitutional crisis.

In 1975, the Senate's refusal to pass supply bills triggered a constitutional crisis between the written Constitution and Westminster conventions. Mr Whitlam refused to resign or call an election because he still had the confidence of the House of Representatives - which is the convention that governs the formation and legitimacy of the executive.

■ Figure 5.11 — Governor-General Sir John Kerr dismissed the Whitlam Government.

To resolve the deadlock and restore the functioning of the government, Governor-General Sir John Kerr dismissed the Whitlam Government - despite it having never lost the

confidence of the House of Representatives. He used the **reserve powers** vested in the Governor-General by the Constitution. He then appointed the Opposition Leader, Malcolm Fraser, as a caretaker Prime Minister, on condition that he pass supply and call an immediate election.

The 1975 crisis illuminates the importance of supply in the Australian political system and the balance between the powers of the House of Representatives and the Senate. It also revealed the significance of Westminster conventions in guiding the behaviour of the parliament, the parliamentary executive, and the Governor-General. The crisis also highlighted the potential need for more explicit guidelines in the Constitution regarding the Senate's role in relation to supply bills.

The 1975 Crisis is studied in Units 3 and 4

Overall, the 1975 constitutional crisis emphasised the vital role of supply, the impact of Westminster conventions, and the complex interplay between the Constitution and political conventions in Australia's governance.

Amending and repealing existing law

Laws need to keep up to date with changing technology, community values and other forms of social change.

Three aspects of the rule of law are worthy of note when considering changes to law:

1. Law must be obeyed regardless of its merits,
2. Law must reflect community values or law abiding people may resist it, and
3. Law must be responsive to democratic pressures and processes.

Amending law

Recent changes to the Commonwealth *Marriage Act 1961* (the *Marriage Act*) are a good example of how laws come to change.

Social values regarding homosexuality have changed fundamentally over several decades. Homosexuality was criminalised in all states until the late 20th century when Australian states and territories progressively amended their legislation. Even after it was decriminalised it was still stigmatised, and lesbian, gay, bisexual, transgender, queer, questioning, and intersex (LGBTQI) people were discriminated against by other laws, including the *Marriage Act*. Laws denied LGBTQI people equality of rights to marriage, for example.

Community values evolved rapidly to the point at which a majority of Australians were in favour of changing the *Marriage Act*. There was some strong opposition to change from within some political parties and from powerful groups such as religious organisations. Despite this, a growing number of parliamentarians began to openly dispute their party positions and to argue in favour of change. Eventually a voluntary **postal survey** was conducted which asked qualified electors to express their opinion on this issue. This survey was the equivalent of a non-binding **plebiscite**. Electors were asked if they supported or opposed changing the *Marriage Act*. 12.7 million out of 16 million citizens or 79.5 per cent of eligible electors voted in the survey and a majority of 61.6 per cent of those supported this change to amend the *Marriage Act*.[2]

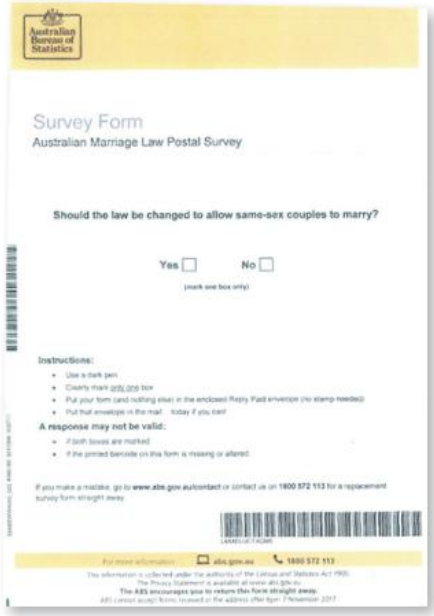

Survey Form
Australian Marriage Law Postal Survey
Should the law be changed to allow same-sex couples to marry?
Yes ☐ No ☐
Instructions:
A response may not be valid:

Figure 5.12 — A sample copy of the postal survey form sent to all qualified voters.

Shortly after the results of the survey were published the parliament amended the *Marriage Act* to allow for same-sex marriage, with parliamentarians in both major political parties and some minor parties exercising a **conscience vote**.

In this example, the *Marriage Act* is the 'principal Act' and the *Marriage Amendment (Definition and Religious Freedoms) Act 2017* is the 'amending Act'.

For further information on this issue *see Example: Changes to the Marriage Act* and the *Case Study: The Religious Discrimination Bills.*

Repealing laws

When the Abbott Government came to power in 2013 it acted quickly to fulfil its key election promise to repeal the Carbon Tax introduced in the previous parliament under the Gillard Government.

2 Australian Bureau of Statistics, *1800.0—Australian marriage law postal survey 2017*, <http://www.abs.gov.au/ausstats/abs@.nsf/mf/1800.0>. accessed 27 January 2024.

Bills to repeal the Carbon Tax were introduced into the House of Representatives and eventually passed through the Senate. After receiving Royal Assent, these bills abolished the Carbon Tax. The Gillard Government's Minerals Resource Rent Tax—first introduced as the Resource Super Profit Tax by the Rudd Government—was also repealed within a year of the Abbott Government winning office.

The Abbott Government also introduced an annual cycle of repealing old laws that no longer served their purpose or put a drag on economic activity by forcing businesses to carry out meaningless activities in order to comply with outdated law. These special days were called 'Red Tape **Repeal Days**' and saw blocks of outdated laws abolished at the stroke of a pen by amending Acts.

Example: Changes to the *Marriage Act*

Australia is a **liberal democracy** that officially recognises and protects individual rights and freedoms. However, the history of certain groups' rights reveals that they have not always enjoyed equality. One area where this has been evident is recognising same-sex couples and their right to marry.

According to the Commonwealth Constitution (Australia), marriage is a concurrent power. Section 109 means the Commonwealth *Marriage Act 1961* will invalidate conflicting state marriage laws. The Commonwealth Act defined marriage as being between a man and a woman. The definition invalidated a Tasmanian law that attempted to legalise same-sex marriage.

Until 2004, both major political parties in Australia officially opposed same-sex marriage. The Australian Labor Party (ALP) allowed its members a conscience vote on the issue in 2011, while minor left-wing parties such as the Greens were quicker to support same-sex marriage. The socially conservative Liberal Party of Australia did not allow a conscience vote until 2017. Neither **major party** had the political will to legislate for marriage reform.

Australian Marriage Equality was a pressure group formed in 2004 to advocate for same-sex marriage.

Public support for same-sex marriage grew due to international and domestic pressures. Court decisions in other countries, such as Canada and the United States, legalising same-sex marriage influenced public opinion in Australia. In 2015, Ireland held a referendum that led to the legalisation of same-sex marriage. Support for same-sex marriage also came from prominent figures in both major parties and business leaders.

Private members of parliament attempted to introduce legislation for same-sex marriage, but they were unsuccessful. In 2017, the Turnbull government proposed a plebiscite to gauge public opinion. It was to be administered through a postal survey. The parliament delegated authority to the Australian Bureau of Statistics to conduct the postal survey.

The YES campaign – another pressure group – held public gatherings and marches across Australia in support of marriage reform.

The postal survey – a voluntary vote – returned 61.6% in favour.

In response to the survey results, Western Australian Liberal Senator Dean Smith introduced the Marriage Amendment (Definition and Religious Freedoms) Bill 2017. Senator Smith's bill was a private senator's bill to amend the *Marriage Act 1961* to allow same-sex marriage. The bill passed the Senate with several amendments and was transmitted to the House of Representatives. Political parties allowed their members in the House the choice to vote – either according to their conscience as a **trustee** representative or according to their electorate's views as a delegate representative. The bill passed the House. After Royal Assent and **Proclamation**, the Act legalised same-sex marriage.

Legalising same-sex marriage in Australia was a long and arduous journey. High levels of **political participation** through pressure groups, protest assemblies, and political communication played significant roles. Individuals and pressure groups drove the legislative reform. The two major political parties had points of view on the issue but lacked the will to legislate without public support. The issue engaged the full range of liberal democratic rights and freedoms in the pursuit of a group of Australians' right to freedom from discrimination.

Consolidating laws

Consolidating laws is essential for upholding the rule of law. Laws need to be clear and coherent. Outdated or confusing laws can undermine the rule of law.

Periodically, parliament repeals old Acts that may cover similar areas and replaces them with a consolidating Act. This process simplifies and updates laws, ensuring that statutes

remain current. Consolidating legislation helps streamline the law, reducing complications and inefficiencies.

Since 1901, there have been at least four major commonwealth consolidations. They took place in 1911, 1935, 1959, and 1973.

A consolidation of welfare Acts took place in 1947 following a successful referendum that added SECTION 51(XXXIIIA) to the Constitution. The change gave the commonwealth power to pay more social welfare payments. Before this, the commonwealth could only pay invalid pensions and age pensions. The 1946 referendum expanded the range of welfare payments to include maternity allowances, child endowments, unemployment benefits, sickness benefits, benefits to students, and other forms of welfare. Consequently, new laws were required.

> *Passing an Act to abrogate (or override) a court interpretation is parliament's way of asserting its authority as the supreme law maker.*

Instead of creating separate Acts for each new form of welfare, the Commonwealth Parliament repealed the *Invalid and Old-Age Pension Act 1908*. The *Social Services Act 1947* consolidated all forms of welfare in a single statute.

A more recent example is the *Social Security (International Agreements) Bill 1999* which consolidated existing social security international agreements into a separate Act.

Responding to court decisions

Courts play a crucial role in interpreting the law and resolving disputes. When cases are brought before them, courts make decisions based on the facts and the law.

When resolving disputes, courts consider:

- The facts of the case, that is, the evidence.
- The law.

Every case involves unique facts, and in most instances, there will already be existing statutes or common law that apply to the case. *See Background information*: *Courts and the law – the basics*.

Background information: Courts and the law – the basics

The following chapter provides an overview of how courts interpret and apply the law in individual cases.

Interpreting the law, also known as adjudication, involves courts determining how the law should be applied to the unique circumstances of each case. While courts cannot change the actual wording of a law, they can offer different **interpretations** of its provisions. A different interpretation can alter the meaning of a word, thereby impacting the interpretation of an entire Act.

No law may directly apply to a case in rare circumstances. However, courts must still resolve the issue. In these situations, the court's decision creates new law. Laws made by judges in such cases are known as common law, case law or judge-made law. Detailed information about this process will be covered in the subsequent chapter.

For now, students need to understand that courts:

- Interpret the meaning of statutes when deciding cases.
- Occasionally create new common law if there is a gap in the law.

Parliament takes note of landmark court decisions. It assesses how landmark decisions affect the way statutes operate. Parliament may disapprove of judicial interpretations that alter the meaning of statute. At times, parliament may wish to clarify common law. Passing an Act to **abrogate** (or override) a court interpretation is parliament's way of asserting its authority as the supreme law maker.

When statute and common law apply in an identical area, the statute overrules the common law. An Act can expand an existing area of common law and vice versa. At times, Parliament enacts legislation that completely replaces common law.

Statutes regulate future activities, but parliament cannot foresee every future situation. Therefore, cases sometimes require courts to determine the meaning of an Act within the context of that case. The court's interpretation, in conjunction with the Act itself, forms the law, about that particular subject. For example, the law regarding native title is not solely contained within the *Native Title Act 1993*. It is

■ Figure 5.13 — The High Court altered common law by overturning *terra nullius*.

a combination of law expressed in the Act and judgments made by the Federal Court and High Court concerning matters governed by the Act, like compensation for loss of native title rights. The *Timber Creek Case* [2018] is an example. In *Timber Creek*, the Federal Court interpreted "compensation" to include damages for loss of spiritual and cultural values associated with native title. The interpretation broadened the meaning of "compensation". The parliament accepted the interpretation, and so it still stands.

Other recent cases involved the meaning of "casual work". The Federal Court broadened the common law definition of "casual work" in *Skene* [2018]. It held that workers were entitled to permanent work if the conditions of their casual work were sufficiently like that of permanent workers. Following *Skene*, the court ruled in *Rossato* [2020], that casual workers like Mr Skene, were entitled to backpay from the time their working conditions became like permanent work. The parliament rejected these interpretations and overruled *Skene* and *Rossato* by inserting a definition of casual work in the *Fair Work Act*.

Occasionally, a court ruling establishes new common law principles or discovers rights that the Parliament intends to endorse, reinforce, or clarify.

A significant historical example is *Mabo v Queensland (No.2)* [1992]. This landmark High Court case had far-reaching implications for the legal framework in Australia. The Queensland Parliament had declared the Torres Strait Islands as Crown property, invoking the legal principle of ***terra nullius***, which deemed the islands as belonging to no one at the time of European colonisation. Eddie Mabo, an indigenous man from Meriam Island in the Torres Strait, challenged the Queensland Government's claim. He argued that he and his people had inhabited Meriam Island since ancient times and possessed a form of "native title" to the land.

In a landmark decision, the High Court ruled in favour of Eddie Mabo. The ruling abolished the concept of *terra nullius* and established common law recognition of "native title" throughout Australia, significantly impacting land laws.

The Commonwealth Parliament was faced with a choice. It could override *Mabo* to reinstate *terra nullius*, or it could enact legislation to support *Mabo*, providing clarity on "native title" and its interaction with existing land laws.

The parliament viewed the Mabo decision favourably as it rectified an historic injustice. Consequently, it passed the *Native Title Act 1993* to endorse and clarify the High Court's *Mabo* ruling. The Act defines native title, specifies who is eligible to make claims, and outlines the required evidentiary standards for proving claims. Additionally, the Act established the Native Title Tribunal, a specialised body responsible for hearing and resolving native title claims.

Background information: Parliamentary committees and lawmaking

The Commonwealth Parliament has 227 representatives and legislators who perform its legislative function. To support this function, private members and senators work in specialised committees that review proposed bills, investigate issues and make recommendations to parliament.

Committees are formed by either one house or the other - That is, House of Representatives or Senate committees; or both houses jointly - that is, joint committees. They focus on specific areas of lawmaking, which enables a high degree of specialisation. Specialisation promotes efficiency by distributing a Parliament's workload and improving the competency of MPs working on specialised committees. Committees typically have six to eight members. Many MPs serve on more than one committee.

The 47th Parliament has:

- 16 House of Representatives committees
- 22 Senate committees
- 22 Joint committees

Most MPs are members of political parties, so the composition of parliamentary committees reflects the party composition of the house(s) in which they are formed. For example,

House of Representatives committees are dominated by MPs from the governing party or parties, while Senate committees are more diverse due to the absence of partisan dominance.

Committees can be either standing or select committees.

- Standing committees form when a new Parliament is elected and last for the duration of that parliament. They are often re-established by the next parliament.
- Select committees form for a specific purpose and dissolve once that purpose is fulfilled.

Committees serve various purposes, such as inquiring into legislation, specialising in specific areas of legislation, investigating particular issues, or scrutinising government departments and agencies. Most but not all committees are directly involved in parliament's legislative function.

Both houses of parliament may refer bills to committees as part of the lawmaking process. For example, during the 43rd Parliament, 192 bills were referred to committees in the House of Representatives. The 43rd Parliament was an assertive parliament due to the Gillard Government being a **minority government** unable to dominate the House to the usual extent. Referrals of bills by parliaments with a **majority government** are much less common. The 44th Parliament only referred ten bills, the 45th referred 25 bills, and the 46th referred 29 bills. These statistics are evidence that parliament's legislative process is more deliberative when governments are relatively weak and cannot overtly dominate the House of Representatives.

Committees conduct their work primarily behind the scenes, away from public and media attention. This environment reduces partisan political point-scoring and encourages effective collaboration across party lines. Committee members can engage in deliberative scrutiny and debate, seeking to represent the public interest in statutes. To assist them, committees gather public submissions, consult experts, canvass local concerns and travel to areas affected by proposed laws. They draft detailed reports and table them in Parliament.

Ministers cannot serve on parliamentary committees. Barring ministers from committees is one way Australia's political system upholds the separation of powers in a Westminster system where the legislative and executive branches are fused.

Committees allow all parliamentarians, particularly private members without executive roles, to participate in parliamentary proceedings. By engaging in committees, they contribute to the business of the parliament and represent their constituents' interests.

The role of private members in law-making

All members of parliament are legislators and are expected to participate in the legislative process. Ministers often dominate lawmaking because they introduce most bills, but private members can shape bills at different stages of the legislative process. They can influence the statutes in several ways:

1. Voting on bills:
    - MPs vote on bills at different stages of the lawmaking process, including the first reading, second reading, committee stage, and third reading.
2. Serving on parliamentary committees:
    - MPs can be appointed to various committees within the parliament. Committees play a vital role in reviewing bills. Through committees, MPs can use their life experience and professional knowledge to provide insights and perspectives on legislation.
3. Initiating private members' bills:
    - Private members of parliament are MPs who are not in the Ministry. They include government **backbenchers**, the entire opposition, and the crossbench. Private members can introduce private members' bills. These bills allow individual MPs to address specific issues or propose legislation on matters that may not have been prioritised by the government. Private member's bills often reflect the personal beliefs, concerns of constituents, or broader community interests, providing an avenue for diverse perspectives to be heard. Note: a private senator is the upper house equivalent of a private member.

Private members' bills are particularly significant when they address social issues or topics on which political parties lack the political will to take policy positions. These bills can reflect the ideological or moral stance of the sponsoring MP or align with the will of their electorate or the wider community. Collaboration between MPs

from different political parties is also possible when they find common ground on an issue and work together to propose a mutually acceptable solution or amendments.

When a private member's bill garners support from the government and other political parties, or when members are allowed to have a conscience vote, it increases the likelihood of the bill being moved for a second reading. It will then be debated and referred to a committee.

Senator Dean Smith's Marriage Amendment (Definition and Religious Freedoms) Bill 2017 legalised same-sex marriage and is a potent example of a private senators' bill.

Most private members' bills do not progress far in the legislative process. The government's control over the notice paper and the majority of votes in the lower house often limits the opportunity for these bills. As a result, only a tiny percentage of proposed private members' bills become law at the commonwealth level.

Government dominance of the legislative process is particularly evident in the House of Representatives. The executive, formed by the **political party** or parties with majority support in the lower house, tends to exert control over the legislative function. This can be observed through tactics such as the **gag**, **guillotine**, and **floodgating**, which are employed to expedite the passage of bills or limit scrutiny.

A gag motion is used to cut short debate on a bill, typically during the second reading stage. Since the government usually enjoys a majority in the House of Representatives, these motions are often successful, thereby preventing further discussion and denying MPs the opportunity to voice their perspectives on the bill.

The guillotine is another tactic employed by the government. It involves setting a predetermined time limit for debate on a bill. Once the allotted time expires, usually two hours, the debate is halted, and an immediate vote is taken.

Gags and guillotines control the time for debate and enable the government to control the pace at which bills progress through the legislative process.

Floodgating occurs when the government introduces a large number of bills simultaneously into the House of Representatives. This tactic can overwhelm the deliberative procedures of the lawmaking process, potentially hindering thorough scrutiny and diverse input. In some cases, floodgating may be combined with gag and guillotine tactics to expedite the passage of legislation.

At times, urgency may be necessary. For example, the Albanese Government's Home Affairs Bill 2023, to terminate Russia's lease of sensitive land in Canberra, passed both houses in 90 minutes. However, when processes are abused to silence opposition and crossbench perspectives, gags, guillotines, and floodgating may come at the expense of careful examination and comprehensive discussion.

While government tactics such as those explained above are used in the House of Representatives, they are less prevalent in the Senate due to its independence and a larger crossbench. The Senate's composition, where no party usually holds an outright majority, fosters a more balanced and deliberative approach to lawmaking. Bills are subjected to more extensive scrutiny, and both opposition and crossbench senators have a greater opportunity to influence and amend legislation. The independence of the Senate befits its house of review function and benefits the legislative process.

The issue of executive dominance raises concerns about the level of scrutiny and diversity of input in the legislative process. Critics argue that these tactics can limit meaningful debate and hinder the ability of MPs to represent their constituents' interests effectively. On the other hand, proponents argue that these tactics are necessary for governments to fulfil their mandates and ensure the efficient functioning of parliament.

Voting trends are reducing the size of government majorities. One-third of voters now vote for minor parties and independents. The 47th Parliament has the largest crossbench in history. The last government with an unassailable and secure majority was the Abbott Government in 2013. These trends will weaken the executive dominance of the House of Representatives and enhance the legislative process.

Ultimately, achieving a balance between executive dominance and robust parliamentary scrutiny is crucial for maintaining the integrity of the legislative process. It requires ongoing examination and evaluation of parliamentary procedures to ensure that all members of parliament can effectively contribute to lawmaking and that diverse perspectives are adequately considered in the development of legislation.

See Table 5.1 for a complete list of successful private member's bills. Students should look for patterns in these bills, such as the nature of the issues they address.

1901–1949	1950–1999	2000–
Life Assurance Companies Act 1905	*Matrimonial Causes Act 1955*	*Therapeutic Goods Amendment (Repeal of Ministerial responsibility for approval of RU486) Act 2006*
*Commonwealth Conciliation and **Arbitration** Act 1909*	*Australian Capital Territory Evidence (Temporary Provisions) Act 1971*	*Prohibition of Human Cloning for Reproduction and the Regulation of Human Embryo Research Amendment Act 2006*
*Electoral (**Compulsory Voting**) Act 1924*	*Parliament Act 1974*	*Evidence Amendment (Journalists' Privilege) Act 2011*
Defence (No.2) Act 1939	*Wireless Telegraphy Amendment Act 1980*	*Auditor-General Amendment Act 2011*
Supply and Development (No.2) Act 1939	*Senate Elections (Queensland) Act 1982*	*Safety, Rehabilitation and Compensation Amendment (Fair Protection for Firefighters) Act 2011*
	Income Tax Assessment Amendment Act 1984 [No.2]	*Territories Self-Government Legislation Amendment (Disallowance and Amendment of Laws) Act 2011*
	Smoking and Tobacco Products Advertisements (Prohibition) Act 1989	*Low Aromatic Fuel Act 2013*
	Parliamentary Presiding Officers Amendment Act 1992	*Marriage Amendment (Definition and Religious Freedoms) Act 2017*
	Euthanasia Laws Act 1997	
	Adelaide Airport Curfew Act 2000	

■ Table 5.1 — Successful private members' and private senators' Acts of the Commonwealth Parliament 1901–2018. Of over 1,300 private members' and private senators' bills proposed in parliament since **Federation**, only 24 have successfully passed both houses and received assent from the Governor-General. [3]

Delegated legislation

Subordinate authorities

'Subordinate' refers to being under the control or authority of another entity. Subordinate authorities in Australia include:

1. Public service departments operate under the *Public Service Act.* Their function is to provide government services - the Departments of Home Affairs and Services Australia are examples.
2. Specialist agencies, such as security and intelligence services like the Australian Security and Intelligence Organisation (ASIO), are created to perform technical functions related to nationhood.
3. Statutory authorities are established by Acts of Parliament to perform functions independently of government. The Reserve Bank of Australia and the Australian Electoral Commission are examples.
4. Senior Executive Service (SES) officials are senior public servants with significant decision-making authority, for example, the Secretary of the Department of Defence. They are appointed by the parliamentary executive to head the organisations listed 1-3 above. The SES provides advice to and works under the direction of ministers.
5. Ministers are members of the parliamentary executive - that is, the Ministry. All are members of the Ministry. Senior '**cabinet**-rank ministers' are members of the Cabinet, which is a committee of the executive. Ministers are chosen by the Prime Minister, who is the Head of Government (that is, the executive branch) and chairperson of the Cabinet. The Governor-General appoints ministers under SECTION 64 of the Commonwealth Constitution (Australia) to take responsibility for the organisations listed 1 to 3 above. Ministers are accountable and subordinate to parliament. For example, the Treasurer is a cabinet-rank **minister** responsible to parliament. Members of the Ministry are automatically members of the Federal Executive Council - the body that advises the Governor-General.

Note: The Governor-General is vested with the executive power of the commonwealth by SECTION 60 of the Constitution. The legal executive power of all the organisations and individuals listed 1 to 5 above flows from the Governor-General.

The executive branch - outlined above - is subordinate to the parliament, either by laws or by Westminster conventions.

Superior authorities 'delegate' power to subordinate entities. Delegation entails trust and accountability. Any organisation or individual

3 Table 5.1 does not include successful private members' or private senators' bills introduced by the presiding officers in each house.

to whom power is delegated can exercise that power on behalf of the superior authority under conditions set by it. The superior authority may revoke delegated power.

In the context of delegated legislation:

- The superior authority is parliament, whose legislative power is vested in it by SECTION 1 of the Commonwealth Constitution (Australia) and specified in SECTION 51 and other sections.
- The subordinate authorities are the executive organisations and individuals listed 1 to 5 above. They have no legislative power.
- Legislative power is delegated to the executive by Acts of Parliament - called primary Acts.
- Laws made by the executive under the authority of primary Acts are called regulations. The terms ordinances, determinations and instruments may also describe delegated legislation.

Delegated legislation illustrates several democratic principles:

- Parliamentary sovereignty - the principle that parliament is the highest institution within the government system. All institutions, except the Constitution, are subordinate to parliament.
- The rule of law - the executive is governed by statute.
- The separation of powers doctrine - parliament retains ultimate legislative power because it can revoke - or disallow - regulations.

Parliament delegates law-making power to the executive for two main reasons:

1. Efficiency: To relieve the burden of lawmaking, parliament makes statutes to establish legal frameworks and delegates details to the executive.
2. Responsiveness: Governments must respond quickly to changing circumstances or emergencies for which parliament's deliberative legislative process is ill-suited. Furthermore, at times individual circumstances are too variable for Acts to deal with - that is, more flexibility is needed than can be written into an Act.

Efficiency

Many statutes establish legal frameworks and delegate the details to the executive. For example, the *Social Security Act 1991* and the *Social Security (Administration) Act 1999* establish Australia's welfare system and **entitlements**.

Meanwhile, Australia makes welfare agreements with other countries. They entitle some migrants to Australian welfare payments. In return, Australians who emigrate to other countries may be entitled to foreign welfare.

The *Social Security (International Agreements) Act 1999* delegates power to the Minister to vary international social security agreements by regulation. Thus, new international agreements can be signed and added to Australia's welfare laws by regulation. Parliament does not have to legislate these agreements.

■ Figure 5.14 — Scrutiny of COVID-19 instruments, the Governor-General declared that a human biosecurity emergency exists.

Responsiveness

The COVID-19 pandemic provides an outstanding example of the types of events for which deliberative lawmaking in parliament is ill-suited. To cope with the unfolding "human biosecurity emergency", parliament delegated power to the executive through nearly 1000 instruments. Scan the QR code to see the complete list.

Claims for asylum are made by people fleeing persecution or human-made or natural disasters. Each person seeking refuge in Australia has unique circumstances which need to be considered before granting a visa. SECTION 29 of the *Migration Act 1958* delegates power to the Minister for Home Affairs "to grant a non-citizen permission, to be known as a visa, to do either or both of the following:

a) travel to and enter Australia; and

b) remain in Australia."

SECTION 133C of the Act gives the Minister power to cancel a person's visa - a power which must be used personally by the Minister and not delegated to others by him or her.

The powers in SECTIONS 29 and 133C of the *Migration Act* are very broad but necessary for the timely consideration of the highly individual circumstances of each applicant.

Figure 5.15 — The Albanese Government rushed through changes to the *Migration Act (1958)* in response to the NZYQ Decision of the High Court.

How law-making power is delegated to subordinate authorities

Parliament delegates law-making power to subordinate authorities through Acts of parliament. The power to make Acts, or statutes, always lies with parliament. Parliament writes into some of its Acts its wish to delegate law-making power.

Parliamentary oversight of delegated legislation

Subordinate authorities utilise delegated legislative power to create regulations. Regulations have the same legal force as the primary Act.

For example, suppose the Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs used regulations to add a foreign country to the list of countries with which Australia has an international welfare agreement. In that case, the Minister's regulation has the same force as the *Social Security (International Agreements) Act.*

Regulations made by subordinate authorities can have a significant impact on Australians. Therefore, the executive must be accountable to parliament for its regulations.

Parliament oversees delegated legislation. The Senate Standing Committee for the Scrutiny of Delegated Legislation (CSDL) monitors regulations, ordinances, instruments, and determinations made by the executive branch. The CSDL publishes the Delegated Legislation Monitor every week. The Monitor contains the CSDL's findings and recommendations.

The CSDL is how parliament holds the executive accountable for delegated legislation. It may

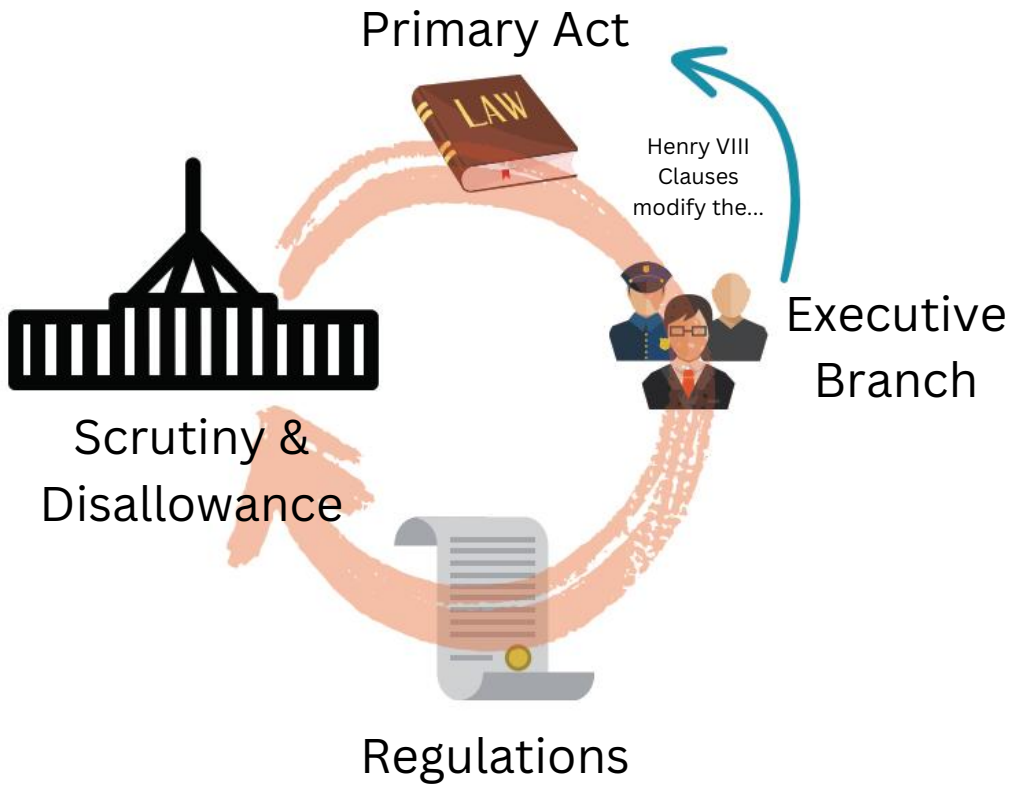


Figure 5.16 — The Commonwealth Parliament delegates legislative power to the executive to make regulations, which parliament holds to account, preserving the separation of powers. Henry VIII clauses may undermine the separation of powers.

recommend regulations be disallowed if they exceed the conditions in the primary Act. Most disallowance recommendations result in disallowance motions.

Henry VIII clauses and the separation of powers

Henry VIII clauses in primary Acts may undermine the separation of powers. These clauses allow the executive to make regulations that modify the primary Act without parliament's approval. They originated in the time of King Henry VIII with the *Statute of Sewers 1531* and the *Statute of Proclamations 1539*. These statutes gave the King (that is, the person vested with executive power) the power to modify Acts and make proclamations with the legal force of statute law.

In *Victorian Stevedoring & General Contracting Co Pty Ltd & Meakes v Dignan (Dignan's Case)* [1931], the High Court ruled that Henry VIII clauses cannot be used to make laws beyond the legislative power of the parliament. In *Capital Duplicators Pty Ltd v Australian Capital Territory (No 1)* [1992], the High Court held that Henry VIII clauses are constitutional so long as parliament could repeal or amend the primary Act. These cases impose broad limits on Henry VIII clauses and do not support a strong separation of powers.

Worse, Henry VIII clauses often provide scant information about the power they grant the executive - leaving a wide margin for interpretation. Courts regard Henry VIII clauses unfavourably because they provide such little guidance for interpretation, and they also have little power to invalidate them because of the High Court's binding judgements in *Dignan's Case* and *Capital Duplicators*. [4]

Note that Henry VIII clauses threaten the separation of powers because they allow the executive to usurp parliament's legislative power, with the only limits being the constitutional boundaries of the parliament's legislative power and its capacity to repeal or amend the primary Act. The only safeguard is parliament itself. Parliaments that the executive dominates cannot be relied upon to provide that safeguard because they often lack the will and power necessary to hold the executive to account.

Figure 5.16 illustrates how Acts of Parliament delegate lawmaking power to subordinate authorities and how parliament oversees their use. The executive branch creates regulations under a primary Act. Regulations have the same legal force as the Act. The Senate Scrutiny of Delegated Legislation Committees oversees regulations and reports to parliament, which may disallow them.

4 Henry VIII clauses and the rule of law (draft), Rule of Law Institute of Australia, https://www.ruleoflaw.org.au/wp-content/uploads/2012/08/Reports-and-Pres-4-11-Henry-VIII-Clauses-the-rule-of-law1.pdf (Accessed 6 June 2023)

Summary

- Law is the ultimate means of social control available to a state. It complements other forms of behavioural influence such as customs, morals and rules. It overrides all other forms of behavioural influence because it is backed by the authority and power of the State.
- The rule of law is an essential principle of democracy. Law controls the use of power and protects citizens from each other and from excessive use of government power. Law is universal within its geographic and legal jurisdictions.
- There are different forms of law in Australia. In order of superiority, they are:
  - constitutional law, which is fundamental and beyond the power of normal law-making institutions to alter. It may be in the form of written law or unwritten conventions;
  - statute law, which is made by parliament under heads of power specified by the Constitution. Some law-making powers are exclusive to the commonwealth, others are shared concurrently between the commonwealth and the states, and many are unspecified residual powers reserved for the states;
  - common law, which is made by judges in courts in both the federal and state court hierarchies; and
  - delegated legislation, which are regulations, ordinances and instruments made by the executive and its agencies under authority of statute and overseen by parliament.
- Statute law is made in parliament following a deliberative procedure known as the statutory or legislative process. A proposed law is called a bill. Bills undergo close scrutiny and MPs may represent the interests of constituents in the passage of a bill. The legislative process contains the following stages:
  - an idea for a law is formed;
  - the idea is drafted into a bill;
  - the MP, usually a minister in the House of Representatives, initiates the bill;
  - the bill is a read a first time and voted upon;
  - the bill is read a second time, a speech is made by the MP or minister introducing the bill, it is debated and voted upon;
  - the bill goes through the consideration in detail process (or the committee of the whole in the Senate);
  - the bill is possibly referred to a specialised committee for scrutiny and amendment;
  - the bill is read a third time and voted upon;
  - the bill is transferred 'to the other house', usually the Senate;
  - the process of first and second reading, committee stage and third reading is repeated in the second house;
  - the bill receives Royal Assent from the Governor-General; and
  - the bill is proclaimed and becomes law.

continued overleaf

- Statute law sources its authority from democratic legitimacy and constitutional law.
- Statute law has many purposes including:
  - enacting government policy;
  - authorising government spending through supply and budget bills;
  - amending existing statutes;
  - repealing existing statutes;
  - consolidating several statutes; and
  - responding to court decisions by abrogating or codifying common law.
- Subordinate authorities are agencies and departments of the executive. They are often granted law-making power by parliament through statute. The purpose of subordinate legislation (called regulations, ordinances, and instruments) is to enable the law to adapt without parliament being required to pass new Acts. Giving the executive law-making power is efficient and allows government to respond to crises.
- Delegated legislation is always under close parliamentary scrutiny via the Senate's Standing Committee on Regulations and Ordinances. The committee may recommend the Senate disallow regulations if it finds the executive has overreached its power or threatens rights and liberties.

Exam practice questions

Short answer

1a. What is meant by the term 'law'?

1b. Outline **three** purposes of constitutional law.

1c. Discuss **one** advantage and **one** disadvantage of the law-making process.

2a. What is meant by the term '**bicameral** parliament'?

2b. Outline **two** purposes of the second reading stage of the legislative process.

2c. Discuss the extent to which statute law is superior to common law.

3a. Outline the purpose of SECTION 57 of the Australian (Commonwealth) Constitution.

3b. Explain **two** ways citizens can participate in the law-making process.

3c. Discuss the extent to which the legislative process is dominated by the executive.

4a. Outline **one** purpose of statute law.

4b. Explain the role of the Governor-General of Australia in the legislative process.

4c. Discuss **two** issues that arose from the 1975 constitutional crisis.

Source analysis

Source 1 is adapted from: Michelle Grattan June 19, 2023.

Government's housing fund legislation delayed by Greens-Coalition alliance from https://theconversation.com/governments-housing-fund-legislation-delayed-by-greens-coalition-alliance-208016, accessed 27 January 2024

The Greens and the Coalition have teamed up again to present a vote being taken on the government's $10 billion Housing Australia Future Fund.

The Minister for Housing, Julie Collins, said "there is a cost to these delays.

"Every day of delay is more than $1.3 million that does not go to housing for people that need it. If this bill gets delayed until October, the Greens political party and the Liberals would have succeeded in delaying it for more than six months. Every six months is $250 million that could have gone to building more homes."

This is the second time the Greens and Coalition have prevented a vote on the legislation. The proposed $10 billion fund would produce $500 million a year for social and affordable rental housing.

Finance Minister Katy Gallagher said the fund was "an important piece of national infrastructure".

Opposition leader in the Senate Simon Birmingham told Sky the Coalition had "always thought that adding these billions of dollars extra to government debt for no immediate impact on the housing market was a bad idea, especially so for a policy that has no benefit in terms of addressing rates of home ownership in Australia".

The Senate's action prompted speculation that the deferral could form the initial step to having the bill qualify as double dissolution legislation. Special Minister of State Don Farrell said: "If the Senate defers bills to October, the government will regard this as the Senate failing to pass the bill, and I'm sure you understand the consequences of that".

Greens leader Adam Bandt said that "it says a lot about the government that they'd rather tout this as a double dissolution trigger rather than negotiating to pass their own bill".

The Constitution's SECTION 57 provides that if the House of Representatives passes a bill and the Senate "rejects or fails to pass it" and after three months the lower house again

continued overleaf

passes the bill and the Senate again rejects or fails to pass it, it can become the basis for a dissolution of both houses.

Sydney University constitutional expert Anne Twomey said the High Court has previously held that the Senate needs a reasonable amount of time to debate and ***deliberate*** *upon a bill.*

"This may include sending it to a parliamentary committee. But in this case, the delay is not due to a need to deliberate. It is for the purpose of waiting to see if the Albanese Government will change its policy and negotiate an agreement in National Cabinet which suits the policy aim of the Greens," Twomey said.

Refer to Source 1:

5a. What is meant by 'statute law'?

5b. With reference to Source 1 discuss, in your own words, **two** issues facing the successful passage of the government's Housing Fund legislation.

5c. Discuss the role of Private Members in the law-making process.

5d. Evaluate the impact of **one** contemporary issue involving the legislative process on the Commonwealth Parliament's ability to fulfil its legislative function.

Essay response

6. Evaluate the extent to which statute law can respond to changes in society.

7. Evaluate the extent to which parliament can respond to the legal system.

Investigation

8. Investigate the current composition of the House of Representatives and the Senate.

https://www.aph.gov.au/senators_and_members/members, accessed 27 January 2024.

https://www.aph.gov.au/Senators_and_Members/Senators/Senate_composition, accessed 27 January 2024.

8a. How effective has the current parliament been in passing legislation?

8b. How have the political parties and members of the crossbench used their power to affect the law-making of the parliament.

https://www.aph.gov.au/parliamentary_business/bills_legislation, accessed 27 January 2024.

Sources

Figure 5.1 Source: Stephen King, 2018
Figure 5.2 Source: PEO.GOV.AU
Figure 5.3 Source: Nicol Davis, 2018
Figure 5.4 Source: Department of Parliamentary Services - auspic@aph.gov.au
Figure 5.5 Source: Stephen King 2023
Figure 5.6 Source: Matt Golding, 2023, <https://www.smh.com.au/national/nsw/what-have-we-done-to-our-young-the-great-australian-dream-is-dead-20230215-p5ckno.html>
Figure 5.7 Source: Stephen King, 2023
Figure 5.8 Source: Matt Golding, 2024, https://www.smh.com.au/national/nsw/what-have-we-done-to-our-young-the-great-australian-dream-is-dead-20230215-p5ckno.html
Figure 5.9 Source: AAP Senate Estimates: https://photos.aap.com.au
Figure 5.10 Source: Alan Moir, 1992, https://www.nma.gov.au/exhibitions/off-the-walls/historical-milestones
Figure 5.11 Source: Mike Brown, Australian News and Information Bureau, John Kerr in 1965, Public Domain, <https://en.wikipedia.org/wiki/John_Kerr_(governor-general)#/media/File:John_Kerr_1965.jpg>
Figure 5.12 Source: Australian Bureau of Statistics, Commonwealth of Australia: https://www.abs.gov.au/statistics
Figure 5.13 Source: Alan Moir, 1992, https://www.nma.gov.au/exhibitions/off-the-walls/historical-milestones
Figure 5.14 Source: https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Scrutiny_of_Delegated_Legislation/Scrutiny_of_COVID-19_instruments
Figure 5.15 Source: Matt Golding, 2023, https://x.com/GoldingCartoons/status/1772932113735496072/photo/1
Figure 5.16 Source: Stephen King, 2023
Table 5.1 Source: Muller, Damon, 'The passage of private members' and senators' bills through the Parliament', FlagPost, Parliamentary Library, 2017, <https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/FlagPost/2017/December/Private_Members_and_Senators_Bills>accessed 27 January 2024.

All sources last accessed 31/7/24

Courts and the law

Syllabus points:

- **Types of laws made by courts**
- **The court hierarchy, methods of statutory interpretation and the doctrine of precedent**
- **Essential to the understanding of democracy and the rule of law are the separation of powers doctrine and the sovereignty of parliament**

The third arm of **government**, and the focus of this chapter, is the **judiciary**. Its role in the political and legal system is essential to the proper function of the **separation of powers** and the **rule of law**. The hierarchy of state and federal courts make up the judiciary in Australia's legal system. The courts play a fundamental role in holding the parliament and **executive** to account by reviewing the constitutional validity of legislation and the lawfulness of administrative decisions.

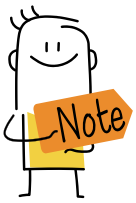
The **power** and **independence** of the courts are both crucial for a healthy **liberal democracy**. Judicial power is essential for the rule of law because it makes all parties subject to law whatever their importance, wealth, or power. Judicial power is the third form of power exercised within systems of government, alongside legislative power, and executive power. Even the other two arms of government are legally bound by court decisions. This means that courts, through judicial power, check and balance legislative and executive power. Courts hold the parliament to account, for example, by hearing disputes and determining the constitutional validity of laws that it purports to make. Courts also hold the executive to account by hearing disputes about the lawfulness of government decisions.

The focus of this chapter is on one of the key roles of the courts – lawmaking. At first glance, it is odd to consider the courts as having a lawmaking role when that function is traditionally considered to be undertaken exclusively by the parliament. In fact, in political and legal systems like Australia's, the courts do act as lawmakers, and this is achieved through the courts' development of the **common law** and role in interpreting the meaning of statutes.

Judicial power

The role of any court is to resolve disputes between parties. The power to hear and determine disputes is called **judicial power**. If there is no dispute (or what the **Commonwealth** Constitution refers to as a 'matter'), a court has no jurisdiction or authority to do anything at all. In resolving disputes, courts follow clear processes (which you will study in Chapter 7) to ensure that the decision is arrived at fairly. The resolution of any dispute will invariably involve the court making a legally binding order such as declaring a statute invalid, ordering one party to pay compensation to another or entering a conviction for a person charged with a criminal offence. The making of these legally binding orders is a key aspect of the courts' exercise of judicial power.

■ Figure 6.2 — Gavels are used as a symbol of a judge's authority.



■ Figure 6.1 — The Supreme Court of Western Australia.

Australia's common law legal system

There are two major legal systems in the world today:

1. The civil law system; and
2. The **common law system**.

There are other legal systems, but they are much less important in terms of their spread throughout the world. Canon law (Christian church law), sharia law (Islamic law derived from the Koran and the Prophet Mohammed) and customary law (typical of traditional societies such as Australia's indigenous cultures) are some examples.

Unlike many European countries which are civil law systems, Australia inherited the British legal tradition of common law when it was settled in 1788.

For the purposes of this chapter, the primary difference between civil law and common law systems is that the lawmaking role of courts in common law systems is given prominence. In civil law systems, the role of the courts is far more preoccupied with the application of detailed codified statutes passed by legislatures, whereas in common law systems like Australia's, the courts have the responsibility of developing and managing entire bodies of law that operate entirely outside of the statute law.

Figure 6.3 — Everyone is equal before the law.

Figure 6.4 — Civil law has its roots in Roman law.

Civil law systems

Modern civil law (the *Corpus Juris Civilis* or 'Body of Civil Law') is derived from the Roman *Laws of the Twelve Tables* and the *Codex Justinianus*, issued by Emperor Justinian in the 6th century BCE.

Empires spread ideas. They also spread legal systems. The Roman Empire spread Roman civil law throughout its mainly continental European domains and its provinces in Asia Minor and North Africa. Rome did take possession of Britannia, the island of Britain, but its influence in this far-flung island on the very edge of its empire was short-lived, and the Roman civil law did not take root there.

Civil law is the dominant legal system throughout most of Europe and those countries colonised by non-British European powers. Examples include Indonesia, (colonised by The Netherlands), Brazil (colonised by Portugal), Vietnam (colonised by France) and most of South America (colonised by Spain).

Common law systems

Britain was invaded by the Normans, who came from France, in 1066 CE. William the Conqueror, who became the English King, William I, imposed Norman rule on Britain, but he did not impose European civil law. Remarkably for an autocratic ruler, he instead sent Norman **judges** throughout his new kingdom with instructions to decide cases using local English laws. Over time, a system was developed whereby judges operating throughout the kingdom would send summaries of the cases they heard to London where they were developed into a 'common' set of legal principles. William's judges recorded and published their decisions in 'law reports' that became available to other judges in the future. It became the practice to consult the law reports for older cases that were similar to contemporary cases and use those previous decisions as a guide to resolving new cases.

In this way, a common law developed as disputes that later occurred in different parts of the kingdom which were similar to disputes that arose in the past could be managed and dealt with consistently. This ingenious system formed the modern operation of the common law.

Background Information: Common law in the world—beyond Australia

The English common law is one of Australia's great British inheritances. It is also one of the world's great inheritances. It is the legal system of 80 countries as diverse as Hong Kong (which is part of China), Pakistan (which is an Islamic country), India (the world's largest **democracy** and one of its oldest civilisations), Singapore (an advanced country in Asia with a less than fully democratic **system of government**) and the US (the world's greatest power and the leading **nation state** of the western world).

All these countries and many others from Barbados to South Africa, Malaysia, Canada, New Zealand and, of course, the four nations within Great Britain itself, all share this inheritance. They share the common law because of their historical membership of one of the largest and most influential political and legal organisations in human history—the British Empire.

These countries not only share the common law, they also contribute to its development across the entire common law world. The common law system is international and links these countries' legal systems in ways that have survived the collapse of the Empire. Decisions in US superior courts may be influential in Australian, British, Canadian, New Zealand and Indian courts because of these continuing links.

The common law is not just a British inheritance. It is a global phenomenon. Why have countries that fought for liberation from the British Empire retained their coloniser's legal system? Even

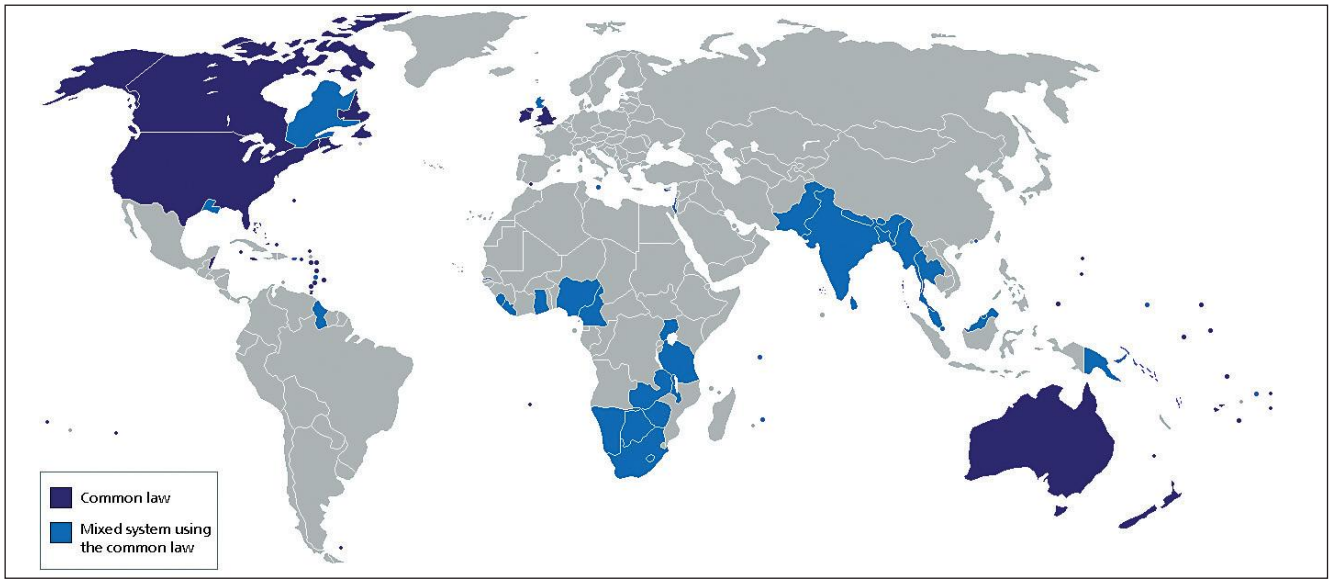


Figure 6.5 — Countries throughout the world that use common law.

those countries like the US that discarded the British Westminster political system retained its common law legal system.

Why has it been so successful? It is because it provides fairness, predictability, consistency, and flexibility in law. It meets the requirements of the rule of law. It protects rights and restrains the abuse of power by governments. It is a legal system that is complementary to democratic political systems.

Common law system at work

How exactly do courts create law? To answer that question, we must first examine the most important features of Australia's system of common law.

A common law system requires the following to operate:

- an overarching principle that underpins the system;
- a doctrine that is applied by courts in every case;
- a record of reasons for decisions;
- a hierarchy of courts within which to operate; and
- a set of rules governing the relationships between the courts in a court hierarchy.

The overarching principle—stare decisis

Stare decisis is a Latin phrase well known to all lawyers. It means 'to stand by what has been decided'. *Stare* is pronounced "star-ray".

Stare decisis is the bedrock idea upon which common law systems are built. *Stare decisis* ensures judicial thinking (reasoning) is similar in similar factual circumstances.

Following and applying the reasoning of past judges means that cases with similar facts will receive similar judgments. *Stare decisis* results in:

- fairness—parties can expect to be treated the same as other parties in similar cases;
- predictability—a party can be reasonably assured about how a court will judge their case based on past judgments in similar cases;
- consistency—similar cases get similar outcomes; and
- flexibility—if a court is convinced no similar case exists, it may be free to create new common law to resolve a case. The new judgment becomes part of the expanding body of case law.

Fairness is a principle of **natural justice** and is fundamental to any legal system. Predictability and consistency make the law clear and coherent. Legal clarity and coherence are essential features of the rule of law. Flexibility allows the law to adapt to new circumstances. The rule of law requires the law to be capable of change to reflect a changing society. These are some reasons why the common law has been so successful.

During a **trial**, parties may refer to both statute and case law they think should be applied in their case. Parties arguing why case law should apply will try to convince the court a previous case is sufficiently similar to their case that the court should 'stand by' the previous judgment. If they are successful, old case law will apply and no new case law will be created. Parties arguing against applying case law must convince the court that the current case is different from any previous case and, therefore, the court should

not 'stand by' a previous judgment. Instead, it should make a new decision. If they are successful, new case law will be created.

Stare decisis ensures natural justice and upholds the rule of law—two more reasons why the common law has been so successful.

The doctrine of precedent

A doctrine is a policy or practice. It is an established way of doing something. The **doctrine of precedent** is the way courts 'stand by what has been decided'.

Courts have two options in a case involving existing case law:

1. abide by *stare decisis* and apply existing case law if it exists; or
2. recognise a case is different from any existing case law and create new precedent.

When judges decide a case where no previous case law applies, they create a **precedent**. A precedent is a new decision, not the reapplication of an old decision.

In plain English, 'precedent' means "an earlier event or action that is regarded as an example or guide to be considered in subsequent similar circumstances".[1] In the context of common law, the 'event or action' is a judgment in a case creating new case law.

Importantly, a precedent is a law. This is because if a similar situation were to occur in the future, the doctrine of precedent requires a court to follow that precedent when determining the outcome. Consider the example of poor student behaviour that comes to the attention of school administration. The way in which the school responds to the behaviour effectively creates a new rule – or a 'precedent' – which it should be bound by if students engage in similar behaviour in the future. The common law is nothing more than the body of the many thousands of precedents developed by courts over time.

How do we know the decision of a judge? Judges must explain why and how they decide a case. They must explain their judicial reasoning. Doing so enhances the openness and transparency of justice, which is a feature of natural justice or fairness. Judges often write lengthy judgments which explain how they have come to their decision. These judgments often involve discussion of previous precedents, and an assessment of whether the facts are sufficiently similar to warrant the application of that previous precedent. Where there is no precedent, or in circumstances where a judge elects not to follow a previous precedent, a judge must carefully explain the legal principles they have used to come to their decision. In doing this, a judge will be conscious of the fact that they are creating new common law by setting a new precedent that will guide future judges. Lawyers and judges are well trained in reviewing law reports to find previous decisions to advise clients and make decisions on how to determine disputes that arise in the future.

The court hierarchy

The doctrine of precedent needs an environment within which to operate. A ranked hierarchy of courts is that environment. There must be higher courts capable of creating new common law and lower courts that must follow or apply the common law.

A court hierarchy is defined as the arrangement and ranking of state and federal courts. An understanding of court hierarchy is essential to understand how courts use the doctrine of precedent to create and develop the common law. Each court in the federal and state hierarchies has **jurisdiction** – the authority to hear and determine – certain types of disputes. Generally speaking, federal courts have jurisdiction to hear disputes that arise under Commonwealth laws and state courts have jurisdiction to hear disputes arising under state laws. Examples of disputes which would be appropriately dealt with by the Federal court hierarchy include immigration or intellectual property disputes, whereas state courts deal with a broad range of matters including most crimes and common law causes of action such as contract law and the tort of negligence.

Within all court hierarchies there are:

1. **inferior courts** with limited jurisdiction (for example Magistrates Court);
2. **intermediate courts** with jurisdiction over a greater range of disputes (for example District Courts and specialist courts such as the Children's Court of Western Australia); and
3. **superior courts** with general jurisdiction to hear disputes or **appeals** on a wide range of matters (for example the **High Court of Australia**, Federal Court and state/territory Supreme Courts and other specialist superior courts such as the Western Australian Court of Appeal).

1 'Precedent', *English Oxford* living dictionary, <https://en.oxforddictionaries.com/definition/precedent>.

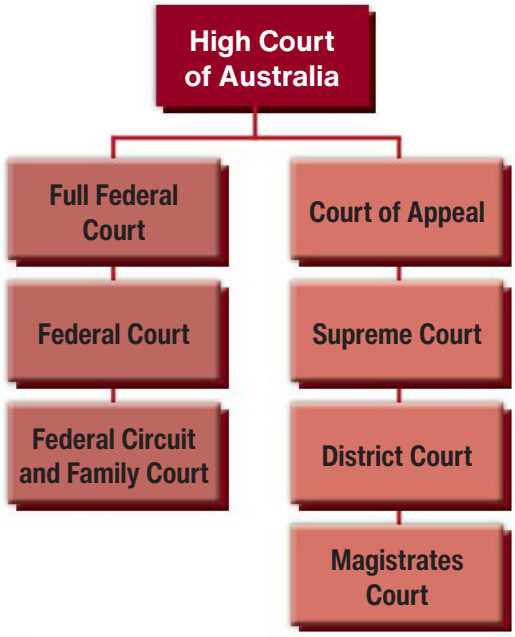


Figure 6.6 — A simplified Federal and Western Australian court hierarchy.

Figure 6.6 shows the Australian federal hierarchy alongside the Western Australian court hierarchy. It is greatly simplified as there are many more courts with specialist jurisdiction.

Courts lower in the hierarchy – often called inferior or intermediate courts – have limited jurisdiction. For example, the Magistrates Court in Western Australia only has jurisdiction to hear civil cases where the dispute relates to sums of money up to $75,000 or simple criminal offences such as common assault or stealing. A Magistrate in Western Australia, for example, has no jurisdiction to put a person on trial for a murder charge. The Supreme Court of each state, on the other hand, is a superior court with general jurisdiction to hear all disputes that may arise in its respective state.

Courts may also have **original jurisdiction** which is the authority to hear and determine a dispute for the first time – ordinarily after a trial or a hearing – or **appellate jurisdiction** which is a more limited type of jurisdiction which allows a more superior court to review the decision made by a court lower in the hierarchy and make a finding whether that decision was affected by an error.

An interesting Western Australian court with **special jurisdiction** is the Coroner's Court. The role of this court is limited to the investigation of unexpected or suspicious deaths, called 'reportable deaths'. It is the only type of court in Australia which does not use the **adversarial** trial system. Instead, the Coroner's Court uses an **inquisitorial** process to find the truth concerning reportable deaths.

Figure 6.9 provides a more detailed illustration of the Western Australian court hierarchy. While the High Court of Australia is a federal court, it is part of the hierarchy of each state and territory given its role as the final court of appeal. The illustration includes several examples of courts with a special jurisdiction and where they fit within the court hierarchy. Note – in Western Australia, the Supreme Court is split into 1) the General Division and 2) the Court of Appeal. Colloquially, lawyers simply refer to them as though they are separate courts.

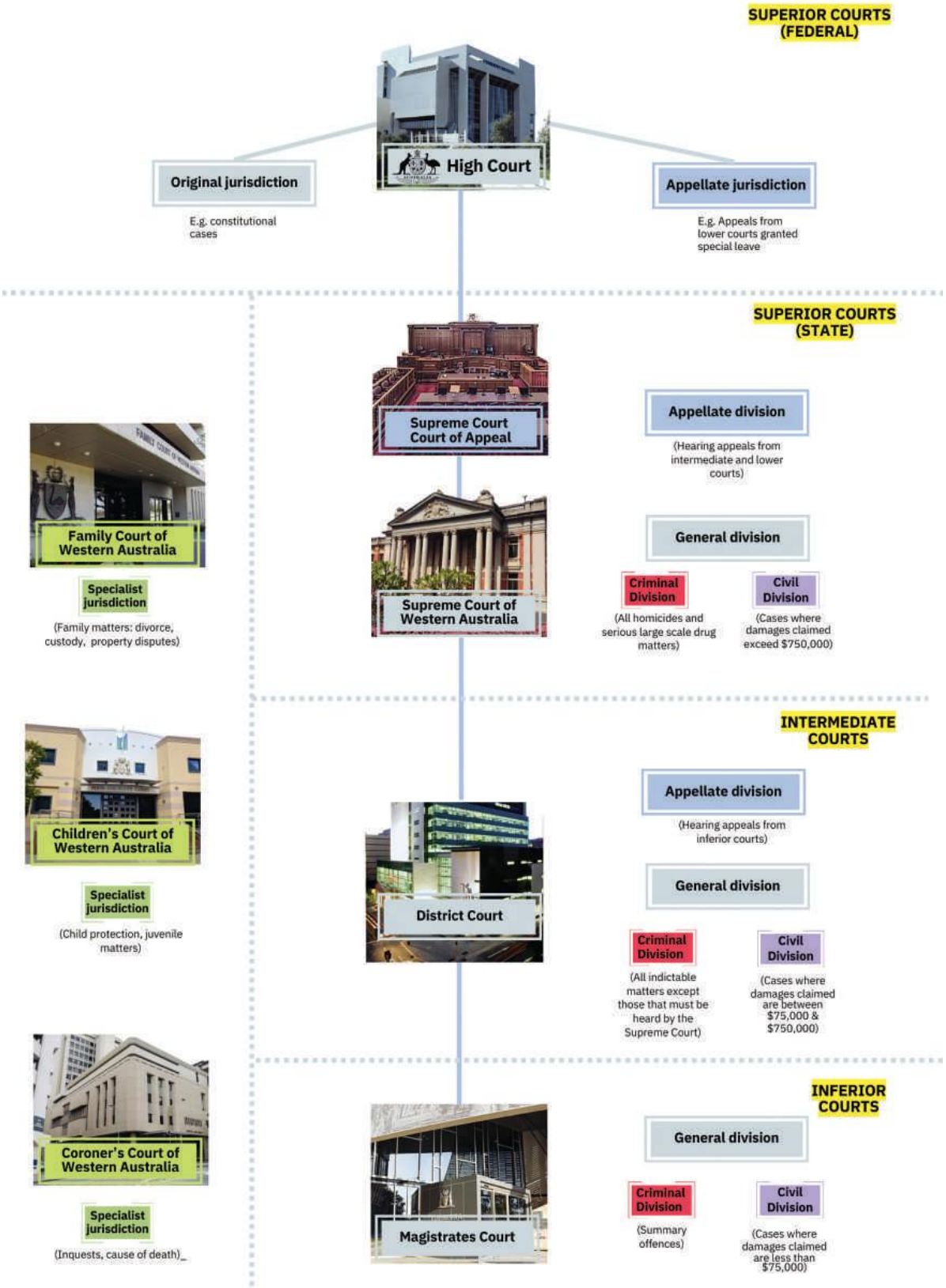
The doctrine of precedent and the court hierarchy

At its most basic level, courts lower in the hierarchy are required to follow precedent set by courts higher in the hierarchy. This is the core principle of the doctrine of precedent. The doctrine does not require courts to follow precedent set by courts at the same level or lower in the hierarchy, but courts may choose to do so out of respect for their judicial colleagues, especially where they do not think the decision was clearly wrong.

Binding precedent refers to a decision which is binding on a court. Figure 6.8 shows the way binding and persuasive precedent operates within the Australian court hierarchy. The doctrine of precedent requires that a court must follow the decisions of higher courts. If a court refuses to follow a binding precedent, a litigant is entitled to appeal to a higher court to have that decision overturned. It is important to understand that only the ***ratio decidendi*** – the reasons for the court's decision – are binding. *Ratio decidendi* is Latin for 'reason for decision'. It is the judge's reasoning that is the critical component of precedent. A judge must decide if the reasoning of a judge in a past case applies in their present case. If it does, then *stare decisis* requires 'standing by' the *ratio decidendi* of the past case. The *ratio* is often the specific legal principle which the judge relies on to make their decision.

This application of binding precedent is demonstrated by the red arrows in Figure 6.8. A binding precedent means that all lower courts must apply the same reasoning as higher courts in similar cases increasing fairness, predictability, and consistency in resolving legal disputes. High Court precedents are nationally and internationally significant, binding on all state, territory and federal courts in Australia and being persuasive across the entire common law world.

Persuasive precedent refers to a decision which a court is not required to follow. A precedent will be persuasive, rather than binding, if it is set by the same court or a lower court in the hierarchy. For example, one judge sitting on the Supreme Court might find a similar decision made by a second judge on the Supreme Court to be persuasive rather than binding. Furthermore, decisions from other jurisdictions are persuasive but never binding. For example, the Western Australian Court of Appeal may be interested to see how the Victorian Court of Appeal dealt with a difficult legal issue or the High Court of Australia may choose to give some regard to a decision of the Supreme Court of the United Kingdom – in both cases, those precedents are not binding.



■ Figure 6.7 — A simplified diagram showing the types of courts in the Western Australian court hierarchy. The High Court is a federal court. The Supreme, District and Magistrates Courts are courts with general jurisdiction.

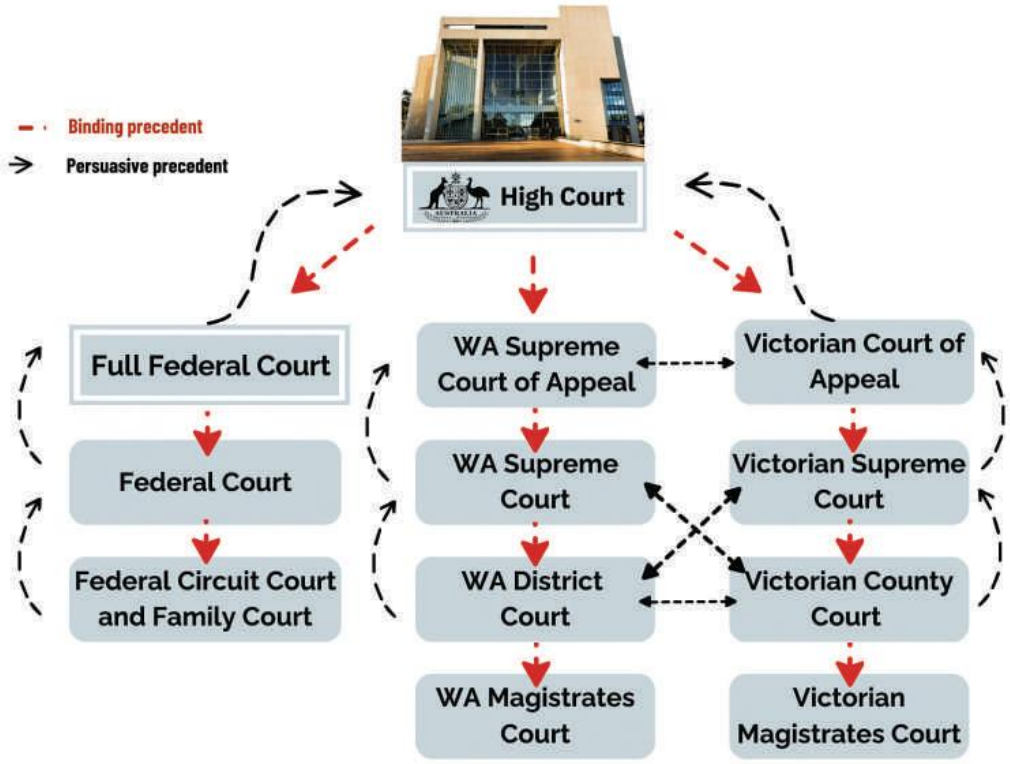


Figure 6.8 — The operation of binding and persuasive precedent within the Australian common law hierarchy.

It is also important to understand that in the course of developing their reasoning, many judges refer to alternate examples or include additional discussion which strictly speaking was not required to reach their decision – this is ***obiter dicta*** and is never binding. These other comments are known as 'sayings by the way'— in Latin, *obiter dicta*.

A judge may choose to follow a persuasive precedent – even if they were tempted to make a contradictory decision. This is because of the overriding desire of creating fairness, predictability, and consistency in the resolution of legal disputes.

The High Court, at the apex of all state, territory, and federal hierarchies, unifies the entire common law system in Australia because its precedents bind all courts throughout the country. For clarity, only two states are shown. An appeal may result in an old precedent being overturned or reversed. Overturning old precedents and reversing lower court judgments allows higher courts to create new precedents. The common law can evolve through this process. Note how an appeal in the District Court of WA may result in a new precedent binding the entire Australian judiciary if the appeal is heard and upheld by the High Court.

Evolution of the common law

One of the most remarkable aspects to the common law is that it is capable of evolving over time. The fact that new precedents can be developed, replace old precedents, and can adapt to changing or novel circumstances enables the common law to evolve. The process of change is incremental, organic, and evolutionary. It happens on a case by case basis. Every time a court hears a case and considers the applicability of previous precedent, it develops new legal principles and approaches which slowly change the content of the law over time. The capacity of the common law to adapt, self-correct and evolve to fit changing circumstances over time and in different cultures is another reason why it is so enduring and successful.

Judges tend to resist 'legislating' by creating wildly new or radical precedents. Most judges in Australia recognise the destabilising effect this can have and recognise that it is beyond the role of the judge to use the common law in such a way. The evolution of common law is therefore gradual and conservative. While there are landmark decisions – such as ***Mabo (No 2)*** – which suddenly advance the common law in novel and sometimes unexpected ways – the pace of change within the common law is often much slower and more discrete. This is in sharp contrast to statute made by parliament. Statute can change rapidly according to the will of the parliament (which of course reflects the will of the people).

In practice, courts develop the common law each time they consider the applicability of previous

precedent. Courts may advance the common law more suddenly by creating entirely new precedents in the resolution of disputes where no precedent existed before or in circumstances where the court chooses not to follow a previous precedent. On the other hand, courts may develop the common law more gradually where they simply apply previous precedent in a new context or develop new legal principles which expand upon a pre-existing precedent.

As courts consider the applicability of previous precedent, they may choose to:

- **follow** the precedent;
- **distinguish** a case from any previous case;
- **overturn** an old precedent deemed out of date;
- **reverse** a lower court's decision on appeal; and
- **disapprove** a binding precedent.

Following precedent

A court which applies the same reasoning – the *ratio decidendi* – of a previous and similar factual scenario is said to have 'followed' that precedent. While a court that follows precedent is acting in a way that is consistent with the current state of the law, there is still scope for the common law to develop over time. This is because courts regularly apply precedents to slightly new contexts or factual situations or develop new rules or legal principles when applying the precedents. When courts do this, they are helping the common law to slowly change over time. The table at the end of this section discusses a number of useful illustrative examples of this in practice.

Students should refer to Figure 6.8 again as they read and study the following section.

Distinguishing precedent

Stare decisis is the principle by which judges stand by what has been decided and apply past reasoning in current similar cases. But what if the judge is convinced the facts of the case before them are not similar enough to any previous case? In other words, the judge believes there is no previous decision by which to stand. In the judge's mind, there may simply be no precedent to follow, and they may be required to make a new decision which may form a precedent in the future.

How is a judge convinced of this? Parties to a case argue about the facts and how the law should be applied. If one party thinks the facts are different enough from all previous cases, they are in fact arguing that no precedent exists. Such a party is seeking to convince the judge to **distinguish** the case from previous cases because no precedent in the existing body of common law is applicable. The resulting *ratio decidendi* will be new because it does not stand by previous decisions. A new *ratio* is a new precedent and, thus, new common law.

Example: Donoghue v Stephenson [1932]

The famous case of *Donoghue v Stevenson* [1932], heard by the British Privy Council, is perhaps the most famous common law decision. It was a fundamental case that created an entirely new body of law – the tort of negligence based on the concept of 'duty of care'. Negligence and duty of care are two enormously important areas of law across the entire common law world. They stem from this single case, which was distinguished from prior cases.

Mrs May Donoghue consumed a bottle of ginger beer manufactured by Mr David Stevenson. The ginger beer was purchased for her by her friend. The opaque bottle meant the drink could not be seen before being consumed. The bottle contained the decomposed remains of a snail—giving the case its popular name, 'the snail in the bottle case'. Mrs Donoghue suffered both physical and psychological symptoms from ingesting the contaminated drink. She attempted to sue Stevenson, but a court found Stevenson was not liable for her injuries under existing contract law. Why? Because she didn't purchase the drink, her friend did, meaning the contract was between Stevenson and Mrs Donoghue's friend.

There was no precedent for a court to award damages in *Donoghue v Stevenson*. There had been a series of prior cases[2] that were similar, but all had resulted in the manufacturer of faulty products being found not liable for damages because of the lack of a legal contract and no legal duty of care. The Scottish Court of Sessions, Scotland's highest court, had already dismissed Mrs Donoghue's

2 Prior case law leading up to the 1932 Privy Council case, *Donoghue v Stevenson*:
- *Langridge v Levy* [1837] (An exploding gun injured the son of the gun owner. No liability under contract law because the son did not buy the gun.)
- *Winterbottom v Wright* [1842] (A mail coach was serviced. The axle of the coach later broke injuring the driver. No liability under contract law because the driver was an employee of the coach owner who had contracted the service.)
- *George v Skivington* [1896] (Hair wash purchased by a husband for his wife caused her hair loss and a scalp condition. No liability under contract law because the husband was the purchaser.)
- *Heaven v Pender* [1883] (A ship painter fell from the side of a ship due to a faulty platform at Pender's shipyard. No liability under contract law because the painter was an employee of a ship painting company that had the contract with Pender to paint ships.)

case on the grounds of no precedent. She applied for leave to appeal this decision to the Privy Council, Britain's highest court and, as such, a court not bound by any precedent.

In deciding the appeal case, Lord Atkin deemed the existing case law was unjust and no longer reflected community values and expectations. He distinguished Donoghue's case from *Langridge v Levy, Winterbottom v Wright, George v Skivington* and *Heaven v Pender*, thus avoiding these precedents. Lord Atkin's *ratio decidendi* created a new common law imposing a duty of care upon manufacturers of goods. They had to keep in mind those who might be affected by their goods, not just those who had contracted to buy them. Manufacturers of faulty products causing injury could now be held liable under the new common law tort of negligence if they failed to take adequate care and that lack of care resulted in 'loss' to a consumer (not just a purchaser).

Lord Atkin's *ratio decidendi* for *Donoghue v Stevenson* [1932] is printed below.

> You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law is my neighbour? The answer seems to be persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being affected when I am directing my mind to the acts or omissions which are called in question.

Lord Atkin's *ratio* is interesting for another reason. His reasoning refers to 'neighbours'. He argued that the principle of 'love thy neighbour' should be the basis of our duty to care for others. Lord Atkins' new legal concept is now known as the 'neighbour principle' and illustrates how the law should reflect community values. Students should note the ability of common law to evolve in step with changes in values—an additional reason why it has been so successful. The rule of law dictates that law should reflect values so that most people can agree with the law.

Overruling precedent

Common law has been developed by English courts for centuries and Australian courts for at least 100 years. Its long history of incremental development means there are thousands of decisions making up the common law. With such a long and rich history of decisions, it is hard to imagine a case would not be similar enough to at least one past case for an existing decision to apply.

Indeed, in some cases the doctrine of precedent may require an old decision to be binding. However, societies change. New societal values and attitudes emerge, new technologies are invented, new ways of doing business are created. The law must adapt and evolve or risk becoming a 'straightjacket' for society. The rule of law requires the laws to reflect community values for fear of people not obeying them.

The doctrine of precedent provides superior appellate courts with the power to **overrule** outdated precedents to overcome the problem of stagnation and injustice resulting from outdated common law. The overruling of precedent is not done lightly. As the High Court of Australia is at the top of the hierarchy, it is often this court which takes the responsibility of overruling the most significant and longstanding precedents if it thinks they are wrongly decided or completely out of step with modern values. It is often politically contentious to overrule precedent as it risks the court stepping into what is often more appropriately the role of the legislature.

Example: Mabo and Others v Queensland (No. 2) [1992]

Mabo and Others v Queensland (No. 2) [1992] (*Mabo* 1992)[3] is an example of a superior appellate court overruling an outdated precedent. Eddie Mabo challenged a Queensland law founded on the old common law principle of *terra nullius*. *Terra nullius* was a 19th century legal concept that the Australian continent was land 'belonging to no one' and, therefore, able to be legally claimed by the British Crown—and later state governments—without any recognition of previous ownership by Aboriginal and Torres Strait Islander peoples. *Terra nullius* meant there was no legal need for a treaty or any compensation to be paid to those whose land was taken.

Terra nullius had been affirmed as common law in the case called R v *Murrell and Bummaree* (1836), decided in the New South Wales (NSW) Supreme Court during colonial times when racial values and attitudes were very different.

After losing his first case in the Queensland Supreme Court, Eddie Mabo appealed to the High Court. He argued that he and his people had always possessed their land,

3 Mabo and Others v Queensland (No.2) [1992] HCA 23; [1992] 175 CLR 1. F.C. 92/01.

an island called Mer, and part of the Murray Islands in the Torres Strait, under a form of land title called 'native title'. The Queensland Government argued that *terra nullius* meant no native title could exist.

The High Court could have followed the principle of *stare decisis* and stood by the 1836 decision in *Murrell*, thus upholding *terra nullius*. However, to do so would have been contrary to emerging values and attitudes of respect and reconciliation towards indigenous peoples. The High Court instead decided by a six to one majority to overrule *Murrell*, abolishing *terra nullius* and creating a new common law called native title. *Mabo* 1992 altered the entire legal basis of Australian land law by sweeping away *terra nullius*, not just on the island of Mer, but for the whole Australian continent. This was because the High Court's ruling would be binding across the length and breadth of Australia. Few Australian cases have had such an impact.

Students will recognise that *Mabo* 1992 was an activist decision because it effectively 'legislated' important new law into existence. The High Court knew, of course, that the ultimate power over land title law lay with the parliament because of the principle of parliamentary supremacy. The parliament could merely re-establish *terra nullius* by legislation, thereby abrogating the *Mabo* native title precedent if it wished. The superiority of parliament would ultimately ensure a democratic outcome, not one forced on Australia by unelected judges.

The Commonwealth Parliament did, in fact, legislate, but not to restore *terra nullius*. It passed the *Native Title Act 1993* to clarify and support the High Court's native title precedent. *Mabo* 1992 is a superb example of the previously described positive feedback loop between courts and parliament.

Reversing precedent

A court may choose to reverse a decision of a lower court when it hears an appeal. Appeals fulfil several vital requirements of justice and the rule of law. Appeals:

- allow parties to have a case reviewed by a superior court;
- check judgments are fair and legal;
- keep lower courts accountable to higher courts; and
- allow higher courts to review and, if necessary, replace *the ratio decidendi* from lower courts.

Every case has a losing party who may wish to challenge the original decision. Some cases have a winning party who wants a better outcome. Both parties to a case can appeal to courts with appellate jurisdiction if they consider the lower court made an error in coming to its decision.

When superior appellate courts hear appeals, they do not re-run the entire trial from the beginning. Instead, the appellate court reviews the evidence and the judicial reasoning, the *ratio decidendi*, used to make the initial judgment. If the appeal court decides that the court at first instance made an error in making its decision, it can substitute its own *ratio decidendi* for that of the original lower court judge.

The result of a higher court substituting its *ratio* in place of a lower court's *ratio* is to **reverse** the original decision. The effect of reversing a *ratio* is to abolish the original *ratio* and remove it from any further consideration in future similar cases. Therefore, reversing a *ratio* changes the common law by preventing a future court from standing by the original incorrect decision. It is as if the original decision never existed.

Example: Wilson v Bauer Media Pty Ltd [2017 and 2018]

In 2017 Australian actor, Rebel Wilson, won a civil defamation case[4] against some media publications for printing false and misleading stories about her that caused her to suffer a loss of reputation and future earnings as an actor.

Figure 6.9 — Australian actor and comedian, Rebel Wilson.

4 *Wilson v Bauer Media Pty Ltd & Anor* (2017) VSC 521; and *Bauer Media Pty Ltd and Bauer Media Australia Pty Ltd v Rebel Melanie Elizabeth Wilson (No.2)* (2018) VSCA 154.

The Victorian Supreme Court awarded her $650,000 in 'general' damages and 'aggravated' damages (for non-economic loss) and $3.9 million in 'special' damages (for future economic loss due to her loss of future film earnings because of damage to her reputation). The total damages of $4.55 million was the largest damages award in Australian history. The defendant, Bauer Media, appealed the case arguing that compensation should be limited to the $389,500 cap set by the *Defamation Act 2005 (Vic)*.

The only way the legislated cap can be exceeded is if the court believes an award of aggravated damages is warranted. The Victorian Supreme Court decided aggravated damages were appropriate in Wilson's case, opening the option to award special damages considerably over $389,500. The defendant, Bauer Media, argued special damages were unwarranted.

In June 2018 the Victorian Court of Appeal reversed Justice Dixon's Supreme Court decision awarding special damages. The Court of Appeal upheld the decision to award general and aggravated damages, and Wilson was ordered to repay $4.1 million (the original $3.9 million in special damages plus Bauer Media's costs). A new *ratio* replaced the original *ratio*, and the historic decision will effectively disappear from the common law. No judges in future cases will be able to apply the *stare decisis* and stand by Dixon's decision. *See CS9.*

Disapproving precedent

Lower court judges are bound by the precedents of higher courts within their hierarchy. This means that they often must stand by decisions of which they disapprove.

In these cases, judges in lower courts may express **disapproval** of a precedent despite having to apply it. Their *ratio* will outline the reasons why they think the law is unjust. In effect, these judges are inviting a party to appeal to a higher court with the power to overrule the precedent. Alternatively, the court may be making an invitation to the parliament to introduce legislation to change the state of the law. Even a superior court, which may not be bound by a precedent, may begrudgingly follow a precedent which it does not agree with because of the overarching importance of *stare decisis* and the respect for the doctrine of precedent. If the losing party appeals and wins, the act of disapproving will have indirectly contributed to a change in the common law.

Evolution of the common law – case illustrations

A review of several leading decisions following the historic case of *Donoghue v Stevenson* can help to demonstrate precisely how the common law has evolved over time.

The court in ***Donoghue v Stevenson*** created a revolutionary precedent which stated that people can be held liable if their negligent actions (or failures to act) cause harm to others. While this was decision was profound, Lord Atkin actually said very little. All that was said was that the law requires us to take reasonable care not to cause harm to our 'neighbour', without defining what that meant. Who is our neighbour and what exactly do we need to do to ensure that we do not cause them harm? The 'neighbour principle' was rudimentary and lacking detail.

It has been almost 100 years since this historic decision. In that time, the neighbour principle has been applied in countless situations. Each time courts have followed this precedent, they have slightly altered the content of the law of negligence. The original neighbourhood principle has now been adapted, stretched, tweaked, limited, and modified to a point where the modern common law of negligence is now a large living and breathing body of law which governs and regulates many aspects of our lives. Closely study the cases below to see how the law of negligence has changed over time.

Case	Summary of the facts	How did the common law evolve?
Donoghue v Stevenson* [1932] *(House of Lords)	Mrs Donoghue experienced harm when she consumed a bottle of ginger beer negligently manufactured by Mr Stevenson. Refer to the example on page 117.	The English common law distinguished previous case law and recognised that a person can be held liable for harm caused to another person in contexts where there is no binding contract between them. Stare decisis and the doctrine of precedent
Grant v Australian Knitting Mills* [1936] *(High Court)	Dr Grant (the plaintiff) bought underpants manufactured by Australian Knitting Mills Ltd (the defendant). Dr Grant wore the underpants and subsequently contracted dermatitis (itchiness and a nasty rash). Dr Grant argued the underpants were defective because of the presence of excess sulphite. Dr Grant said he suffered harm and was not able to work for weeks. The court found that the manufacturer had been negligent in carelessly leaving the sulphite in the garment during the manufacturing process.	For the first time, an Australian court followed the precedent set in *Donoghue*. The law of negligence was now incorporated into Australian common law.
Overseas Tankship (UK) Ltd v Morts Dock and Engineering Co Ltd* [1961] *('Wagon Mound case') (Privy Council – which at this time was able to take appeals from the High Court)	The defendants were loading oil onto their ship, the Wagon Mound, in Sydney harbour. The workers loading the oil carelessly spilt a large quantity of it into the harbour which then floated beneath the plaintiff's wharf. The plaintiff was separately undertaking welding work on their wharf. Remarkably, a spark flew from the welding and landed on a piece of cotton waste that was floating on the oil beneath the wharf. This ignited the oil on the water and significantly damaged the plaintiff's wharf.	The Privy Council reversed the High Court's decision and found that the plaintiff was not liable in negligence for the loss caused to the defendant. In so doing, the Privy Council developed the principle of 'remoteness' which is a highly significant legal principle which limits the operation of the tort of negligence. The principle states that a person acting negligently can only be held liable for losses which are reasonably foreseeable.
Hedley Byrne & Co v Heller & Partners* [1964] *(House of Lords)	Advertising agents Hedley Byrne (the plaintiff) relied on financial advice from a merchant banker, Heller & Partners (the defendant). The plaintiffs were not able to sue the merchant banker for a breach of contract but were instead able to prove that the defendant was negligent in the preparation of the financial advice and that they suffered financial harm as a result. This was a novel situation which was pushing the tort of negligence to its limits.	*Hedley Byrne* marked a significant development in the tort of negligence. For the first time, a court considered that a defendant could be liable for negligent words (rather than negligent acts or omissions) and for causing 'non-economic losses'. Traditionally, the common law only considered that a defendant should be liable to pay compensation for more tangible forms of loss, such as physical injuries caused by negligence. This decision now forms part of Australian common law.
Rogers v Whitaker* [1992] *(High Court)	Ms Whitaker (the plaintiff) sued Mr Rogers (the defendant), an ophthalmic surgeon, for failing to warn her of a rare surgical complication (a 1 in 14,000 chance) which can cause blindness. While Mr Rogers performed the surgery appropriately and professionally, the rare complication unfortunately did arise, and Ms Whitaker suffered blindness.	In finding that Mr Rogers was negligent, the High Court expanded the common law by requiring all medical professionals to advise patients of any material risks of procedures (even if those risks were very low) and thereby developed the principle of informed consent. In so doing, the High Court now clearly extended the application of the 'neighbour principle' to include doctors. Today, the common law has now evolved further to recognise duties owed by even more groups (teachers, drivers, lawyers, occupiers, parents and many others).

continued overleaf

Nagle v Rottnest Island Authority* [1993] *(High Court)	Mr Nagle struck a submerged rock and became a quadriplegic after diving from a partially submerged rock ledge on Rottnest Island. Mr Nagle sued the Rottnest Island Authority for failing to warn individuals that the ledge was unsafe when it knew, or should have known, that it was unsafe.	The High Court now clearly recognised that a **statutory authority** (a body established by statute for a public purpose) can now owe a duty of care. Traditionally, only natural and artificial people (corporations) were considered capable of owing another person a duty of care. In coming to this decision, the High Court overruled the Supreme Court of WA's decision. The High Court first held that statutory authorities could owe a duty of care in ***Sutherland Shire Council v Heyman* [1985]** and now firmly established the principle in ***Nagle***. In Prast v Town of Cottesloe [2000], the Western Australian Court of Appeal distinguished ***Nagle*** in finding that the Town of Cottesloe was not liable for an injury suffered by Mr Prast when he was dumped by a wave at Cottesloe beach. In making this finding, the court continued to develop an important legal principle that a duty of care does not extend to warning individuals of 'obvious risks'.
Modbury Triangle Shopping Centre v Anzil* [2000] *High Court	Mr Anzil (the plaintiff) was employed by a video shop. After finishing his shift at 10pm, he was attacked in the carpark by three assailants and suffered significant personal injuries. Mr Anzil sued the owner of the shopping centre, Modbury Triangle Shopping Centre, and argued that it was negligent for not providing sufficient lighting in the carpark.	In dismissing Mr Anzil's case, the High Court developed an important legal principle that stated that while an occupier of land does ordinarily owe a duty of care, that duty did not extend to protecting individuals from harm caused by criminal behaviour. This important principle now limits the scope of the tort of negligence.
Sharma v Minister for the Environment* [2021] *(Federal Court)	Ms Sharma, one of eight young people living in Australia, argued that Sussan Ley, the Federal **Minister** of Environment at the time, was negligent in the development of climate policy. Ms Sharma argued that the Minister owed young people a duty to protect them from the harmful consequences of climate change and that the duty was breached given the Minister's support for projects which cause high levels of carbon emissions.	The Federal Court found in favour of Ms Sharma and significantly expanded the common law by recognising that a minister owes a duty of care in these circumstances. This was short-lived as the Full Federal Court reversed the Federal Court's decision on appeal. This reversal has now set a new precedent that a minister does not owe a duty of care in these circumstances. The Full Federal Court was critical of the Federal Court's attempt to significantly expand the common law in this novel way.

Table 6.1 — Cases of Negligence 1932-2021.

Statutory interpretation

The courts have a second dimension to their lawmaking role – **statutory interpretation**. As you studied in Chapter 5, statutes are laws made by parliament through the legislative process. After drafting, a bill enters one of the two houses of parliament, usually the **House of Representatives**, and undergoes intense debate and scrutiny through the various stages of the lawmaking process. The second reading and **committee** stages are especially important in fine-tuning a bill, so it is precise, clear and expresses parliament's intentions. Review of the bill by the second chamber, usually the Senate, further ensures it expresses parliament's intent.

The need for interpretation

In theory, statutes should be clear and unambiguous after such a rigorous process. In practice, despite the intense process described above, the meaning of a statute is often open to interpretation. Students of English Australian Tertiary Admission Rank (ATAR) or General will appreciate that the written word is capable of alternative readings or meanings. For example, feminist, modernist or Marxist readings of the

same novel often result in different meanings being found in the text. An author may try to encode meaning in text, but meaning is constructed in the mind of the reader through their interpretation of words, sentences, paragraphs and so on. The same applies to written laws.

Consider a statute law which prohibits the driving of any vehicle in parks. The term 'vehicle' may be abundantly clear if one is considering an individual driving a car through a park. This is because a car is arguably at the very centre, or core, of the concept of a 'vehicle'. However, consider an individual who instead rides an electric scooter through the same park and then attracts the attention of police. Has this person breached the law by riding an electric scooter through the park? In this context, the term 'vehicle' now appears to be somewhat vague. The role of the judge is to engage in a deeper inquiry into the meaning of vehicle to determine its limits before the law can be appropriately applied.

When drafting legislation, specialist government lawyers called parliamentary counsel use precise language to be as clear as possible and so reduce the degree or range of interpretations in law. The rule of law demands the law be clear and coherent—it needs to be understood so that people know their rights and obligations. Despite precise drafting by the Office of Parliamentary Counsel and exhaustive lawmaking processes in both houses of parliament, different interpretations of statute will inevitably arise. Language evolves. Words can change their meaning over time. Moreover, language is imprecise. Despite the best efforts to be specific, in law there will often be room for alternative meanings. This means that courts will inevitably be called upon to interpret the meaning of words in statutes to resolve disputes.

The process that courts go through to give meaning to words in statutes is called statutory interpretation. The court's goal in interpreting a statute is to determine the 'parliamentary intention' of the words that are used. That is, what parliament wanted its words to mean. This chapter deals with precisely how courts go about the difficult task of interpreting statutes. The courts themselves develop principles which they use to assist them in this task and the parliament supplements this role with additional statutory rules. Often a dispute is about which interpretation of a law is the right one in the circumstances of a case.

There are other reasons why statutes need to be interpreted.

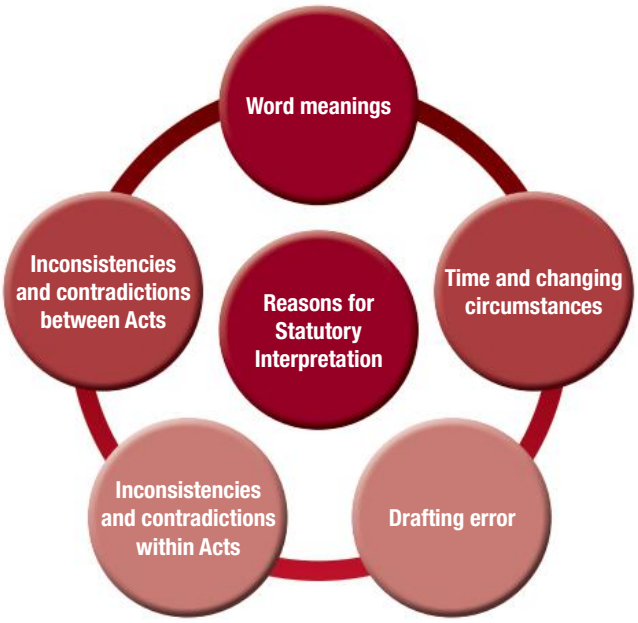


Figure 6.10 — Reasons for statutory interpretation.

Word meanings

Words are the smallest units of meaning in any text. Homonyms are the same word with different meanings. Consider the word 'right'. It can mean the opposite of both 'left' and 'wrong'. It can have political meanings like 'right wing', but that could also mean one of the wings of an aeroplane. How are we to know?

Time and changing circumstances

Today, society is passing through an age of change, and the rate of change is accelerating. The rate of change is so great our age has been described as the Third Industrial Revolution. New technologies such as artificial intelligence are disrupting old ways of doing things. In many fields, the law has difficulty keeping up.

Statutes need to be as future proof as possible, otherwise parliament will be forever changing them to keep up. Parliament does not have a crystal ball to foretell the future, yet it must draft its bills and laws in ways that will take future situations into account. It could not predict the internet, social media, ridesharing services like Uber, artificial intelligence, or many other innovations. Yet, somehow, its laws must be able to cope with them.

Parliament often leaves it to the courts to interpret statutes to fit new and evolving circumstances. Well written statutes should be capable of interpretation by courts without changing the fundamental purpose of the statute. Good interpretation by courts aims to give life to a law's purpose in evolving real world situations.

To make laws work in future situations, parliament may choose to draft them in

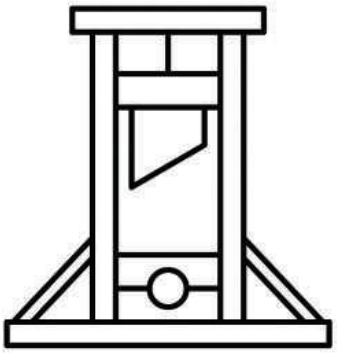


Figure 6.11 — The government often uses the **guillotine** to put a time limit on debate of legislation.

deliberately broad and general terms. Broad and general terms allow courts the flexibility to adapt an Act to changing technologies or social values. But terms that are too broad and too general risk creating a law that fails to communicate parliament's purpose.

Drafting error

Mistakes are occasionally made despite the precision of statutory construction and the detailed processes of law-making. Legislating is a human activity and, like all things human, it is fallible.

Recall that the Commonwealth Parliament can pass enormous quantities of legislation through its lower house, the House of Representatives, or via the fast-track pathway through the Senate. A bill's progress through parliament can be sped up enormously if needed. The second reading and committee stages are the phases most likely to be cut if the parliament wants to pass a bill urgently. Unfortunately, these are the two most important stages for checking and refining a bill.

Inconsistencies and contradictions

Inconsistencies and contradictions can exist within an Act. There may be thousands of words in one statute. It is always possible, because of the drafting errors outlined above, that parts of a statute are inconsistent with other parts of the same statute. They may even be contradictory. Courts must resolve these inconsistencies and contradictions through interpretation, or the statute will be incoherent. A coherent body of law is one of the principles of the rule of law, so courts need to ensure inconsistencies are resolved.

There are an overwhelming number of statutes on Australian statute books. They range from very old statutes to those just passed. It is very easy to see how inconsistencies and contradictions can arise between statutes. Courts must resolve these inconsistencies and contradictions too. They do so through interpretation. Again, inconsistent and contradictory law is incoherent.

For example, the GST Act, properly called *A New Tax System (Goods and Services Tax) Act 1999 Cth)* is more than 600 pages long and contains nearly 180,000 words. Further, it is only one of many taxation laws. The scale and complexity of legislation such as this almost guarantee that inconsistencies and contradictions will arise from time to time as laws are tested in the real world.

Example: Uber and A New Tax System (Goods and Services Tax) Act 1999 (Cth)

Uber is an example of an unforeseeable disruptive change with which the law must cope. The relevant law was written years before technology made peer to peer ridesharing possible.

Taxi travel

The taxi industry provides individual transport services to clients who pay a fee – it is called a 'taxi travel' service. The GST Act requires that businesses providing taxi travel services collect and pay 10 per cent GST on the service they provide. A customer pays the taxi business directly for the taxi travel service and the taxi business then is obliged to pay GST to the tax office.

Uber revolutionised the sector when it introduced a ridesharing service in which Uber drivers use private cars to provide rides to Uber customers. Drivers are self-employed contractors to Uber – they are neither employees nor owners of Uber. Uber customers pay Uber for the rideshare service, and then Uber pays the driver a percentage. This is quite different from a traditional taxi business. Uber argued that it does not provide a 'taxi travel' service and therefore is not liable to pay GST. Uber claims it is simply providing a platform (the Uber App) that allows private **citizens** to share rides. Its fee is for the 'platform' service, not for taxi travel services.

Figure 6.12 — Taxis, Uber and the GST.

The dispute

The Australian Taxation Office (ATO) is a large Commonwealth Government department that administers taxation laws, including the GST Act. The ATO made a decision to include Uber as a taxi travel service in its definition of 'taxi travel' under the Act. It would mean that Uber drivers would then have to pay GST on every dollar earned, just as traditional taxi businesses do.

Uber disputed the ATO's definition of 'taxi travel'. The GST Act is Commonwealth law, so the court with jurisdiction to hear the case was the Federal Court of Australia.

Uber B.V. v The Commissioner of Taxation of the Commonwealth of Australia [2017] *FCA 110* was heard by the Federal Court in late 2016 and early 2017. The Federal Court had to decide the meaning of the term 'taxi travel' and if Uber was a taxi travel service under the Act.

Uber relied on a 'trade definition' of taxi travel meaning a licenced service with special conditions such as kerbside and taxi rank pick up of passengers. Uber argued its drivers could not be hailed by customers from the kerbside like a taxi and could not pick up rides from taxi ranks at airports or similar places. Thus, Uber drivers should not fall under the trade definition as providers of taxi travel. The ATO argued for an 'ordinary definition' of taxi travel as "a vehicle available for hire by the public and which transports a passenger at his or her direction for the payment of a fare that will often, but not always, be calculated by reference to a taximeter".[5]

In short, the dispute was about whether 'taxi travel' in the GST Act should be defined by its trade definition or by its ordinary definition.

Judge Griffiths of the Federal Court interpreted taxi travel to mean the ordinary definition favoured by the ATO. The interpretation broadens the meaning of taxi travel and allows taxation law written in the GST Act to change so that it includes Uber and Uber-like ridesharing services as taxi travel services. Rideshare drivers must now pay GST just as taxi drivers must.

The Federal Court used an ordinary definition of a term in the Act. Such a definition is what might be found in a standard dictionary. Uber argued for a narrower legal definition based on what other statutes and common law have used in similar cases.

Not a single word in the GST Act was changed by the Federal Court ruling. Nevertheless, the law changed when the Federal Court declared the meaning of 'taxi travel'.

Methods of statutory interpretation

How do courts interpret statutes? More precisely, how do courts interpret statutes, so they achieve parliament's intentions in real world situations where the application of a statute is not always clear? Courts have developed an entire body of legal principles which they use to assist them in the task of interpreting statutes.

There are many tools courts use when interpreting statutes. Three of the most important of these tools are:

1. rules of interpretation;
2. interpretive legal **maxims** developed over centuries by courts; and
3. Acts Interpretation Acts which are special statutes which provide courts with guidance and additional rules when interpreting legislation.

Rules of interpretation

Courts follow rules to encourage consistency in the interpretation of laws. These rules themselves are part of the common law and continue to be developed by the courts. It's important for the court to follow predictable rules when interpreting statutes as this helps to provide parliament, and the people, with an idea of how the courts will apply legislation when disputes arise.

Figure 6.13 — The Federal Court classified Uber as a "taxi travel" service.

5 *Uber B.V. v Commissioner of Taxation* (2017) FCA 110, 17 February 2017, 55. In support of the ordinary definition, the Commissioner of Taxation referred to six dictionaries.

The literal rule

Historically, when interpreting a statute, judges assumed that parliament had clearly stated its intention in the wording of the law. They assumed the statute says what it means and means what it says. In other words, judges read a statute 'literally'. The rule states that a judge should not deviate from the literal meaning of the statute, even if that led to an absurd or unjust result. The justification for the rule was that if parliament intended anything different, it would have used different language. The problem with this rule was that it unreasonably expected that parliament would be capable of carefully drafting its legislation to accurately apply in a whole range of unexpected circumstances. The application of the rule often led to unjust outcomes and over time the rule was abandoned.

The Golden Rule

Occasionally a literal reading can result in an unjust or nonsense interpretation. This is more likely to occur with older statutes as the words used may have changed their literal meaning over time. Over time, the courts developed a new rule of interpretation called 'the **Golden Rule**'. This rule stated that a word in a statute would be given its literal meaning unless that would lead to an absurd outcome. The development of this rule was an acknowledgment of the injustice that can arise with a strict application of the **literal rule**. One consequence of this rule is that it began to give courts more discretion over the interpretation of statutes.

'Taxicab' once meant 'a one-horse vehicle for hire'. If courts used a literal interpretation of this word, there would be no taxis or Ubers on our roads despite there being thousands of motorised vehicles for hire. This definition is no longer relevant.

Courts interpret a word or phrase using the golden rule in order to prevent an unjust outcome or an absurd interpretation. This rule is used to help statutes to keep pace with rapid technological or social change.

The Mischief Rule

The courts' approach to statutory interpretation continued to evolve. In the 1960s, the courts developed a new rule of interpretation called the '**mischief rule**'. This rule stated that the courts must begin the task of interpreting a statute by trying to identify the 'mischief' – the gap in the law that the statute was trying to fill – before giving it an interpretation. This formed the basis for the court's current approach to statutory interpretation.

The Purposive Approach

The modern rule of interpretation universally followed by all Australian courts today is referred to as the 'purposive approach'. This method of interpretation incorporates parts of all three of the historical rules – literal, golden and mischief.

The purposive approach to statute interpretation simultaneously considers the **text, context and purpose** of a law before arriving at a sensible interpretation or 'construction' of the word in doubt.

One of the leading decisions which has set the precedent for how modern courts are supposed to approach the task of statutory interpretation is the case of ***SZTAL v Minister for Immigration and Border Protection*** **[2017]**.[6] *In that decision, the High Court said:*

*'The starting point for the ascertainment of the meaning of a statutory provision is the **text** of the statute whilst, at the same time, regard is had to its **context** and **purpose**. Context should be regarded at **this first stage** and not at some later stage and it should be regarded in its **widest sense**'.*

The approach works in the following way:

1. Firstly, the judge considers the **text** of the word – this is the ordinary or natural meaning of the word as used in everyday speech or defined in the dictionary;
2. Secondly, the judge considers the **context** of the word and whether anything in the context points towards expanding or narrowing the word's ordinary meaning. Context can refer narrowly to the surrounding words and sections of the word and or broadly to include speeches made in parliament, or law reform reports that informed parliament's decision to introduce the law; and
3. Thirdly, the judge considers the **purpose** of the law to ensure that the interpretation that is ultimately given will carry out that purpose rather than undermine it.

This is a broad inquiry which gives the judge discretion to consider a range of material when determining the appropriate interpretation of word.

Let's reconsider the example above about the law which makes it an offence to 'drive any vehicle through residential parks'. A person charged with committing an offence under the statute for riding an electric scooter may choose to argue that an electric scooter does not meet

6 SZTAL v Minister for Immigration and Border Protection [2017] 262 CLR 362, 368 at paragraph [14].

the definition of 'vehicle'. A judge hearing this dispute must apply the purposive approach to give meaning to the word vehicle. How would they do that?

Firstly, the judge would consider the ordinary meaning of vehicle. A dictionary definition would appear to give that word a broad scope indeed – it is defined as 'a thing used for transporting people or goods'.[7] If the judge were to stop here without considering the context and purpose, the individual would have committed an offence as an electric scooter would certainly fall within this definition.

Secondly, the judge must consider the context of the word. This would include narrow context such as the surrounding word 'drive' and consider how that word may affect the types of vehicles that are contemplated by the Act. Given the awkwardness in the expression of a person 'driving' an electric scooter, the judge may feel justified in limiting the meaning of vehicle to exclude electric scooters. Additionally, the judge may consider broader contextual material such as speeches made in parliament when debating the bill (to see what references to vehicles might have been made by parliamentarians) or reports written on the types of vehicles that parliament might have had in mind. Importantly, when judges interpret legislation, they are no longer bound as they once were to solely the words in the Act. Today, judges are permitted to consider a range of additional material when determining the meaning of words in doubt. These additional materials are referred to as 'extraneous' sources and include materials such as dictionaries, **Hansard**, and law reform reports. The judge, for example, may discover from a review of Hansard during the second reading debate concerns raised by parliamentarians about the number of electric scooters that are causing a nuisance in parks, and this would certainly influence their interpretation of the word in doubt.

Thirdly, and significantly, the judge must consider the purpose of the law. To find the law's purpose, the judge will often have regard to the title of the law, the aims and objectives of the law (which are usually included at the beginning of the statute), second reading speech made in parliament, the explanatory memorandum (a document prepared by parliamentary counsel explaining how each of the sections in the law is intended to operate) and the other parts of the Act. When the purpose of the law is considered, an alternative interpretation of the words in doubt may become available. For example, if the judge ascertains that the purpose of the law is to ensure the safety of pedestrians, or to create a calm and tranquil atmosphere in our residential parks, the judge may decide an interpretation of vehicle which excludes electric scooters is consistent with achieving that purpose. In this way, the judge has used the purpose of the law to give the word 'vehicle' an interpretation which is **narrower** than its ordinary or natural meaning. Judges may also use the purpose of a law to give a word an interpretation which is **broader** than its ordinary meaning, but they are careful not to stretch or strain the meaning beyond what parliament intended.

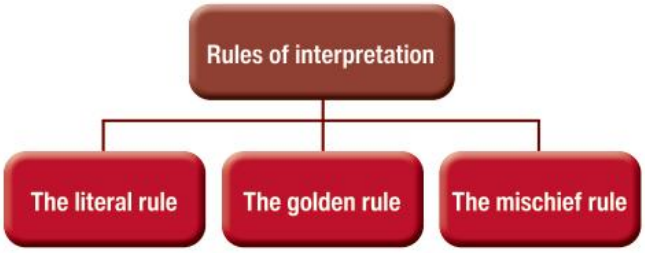


Figure 6.14 — The three rules of statutory interpretation.

Maxims of interpretation

Judges also apply a range of more minor rules called interpretative legal maxims when they interpret statutes. A 'maxim' is a rule of conduct. Legal maxims are similar to 'conventions' (as in Westminster conventions). They are unwritten rules that guide legal professionals such as judges in their work. Legal maxims are considered by judges to be additional tools in their toolbox which occasionally assist the judge to arrive at an appropriate interpretation. Maxims provide a sort of 'lens' through which to read written law so it can be made coherent, predictable, and clear.

Maxims of interpretation have Latin names because using Latin was common practice in earlier times. In centuries past, Latin was the language of education, and judges were amongst the most educated people in Britain.

Noscitur a sociis

Noscitur a sociis means 'by the company it keeps'. This is a very simple maxim that every skilled reader uses when confronted with an unknown word—they look at the other words around the problem word for clues to its meaning. School teachers encourage young readers to figure out the meaning of a new word by looking at its context. Judges do the same every time they consider the context of a word in doubt. *Noscitur a sociis* simply means reading words in context.

The word 'passenger' can mean a person riding in a taxi, bus, train, friend's car, aeroplane,

7 Oxford English Dictionary, s.v. "vehicle (n.)," December 2023, https://doi.org/10.1093/OED/9399221538.

or cruise ship. In the *Taxi Act 1994 (WA)* the word 'passenger' has a specific meaning that can be deduced from its context in an Act about taxis, even if the Act does not define the word. Its meaning is made clear by its context. That is, phrases such as "for a person who requests a taxi"; "taxi means a vehicle which is used for the purpose of standing or plying for hire, or otherwise for the carrying of passengers for reward"; and "on the return journey by a direct route to the place from which passengers were brought" provide the context for our interpretation of the word 'passenger'. Additionally, the example discussed above of a law which prohibited the driving of cars in parks would involve an application of the maxim. This is because courts would interpret the word 'vehicle' in reference to 'driving' – that is, the courts would almost certainly limit the meaning of 'vehicle' to only include those which are capable of being driven.

Students should note that the *noscitur a sociis* maxim is a fundamental step within the purposive approach to interpretation. That is, judges are required to consider the context of a word in doubt before arriving at an interpretation.

Ejusdem generis

The most well-known interpretative legal maxim is ***ejusdem generis*** which means 'of the same kind'. Many laws utilise lists or create a class or category of things using specific terms. For example, the relevant law in ***Prior v Sherwood* [1906]** made it an offence to gamble in any 'house, office, room or place'. This is an *ejusdem generis* pattern because it involves a list of specific terms followed by a more generalised term. The maxim requires that the meaning of the generalised term be limited by reference to the common features of the specific terms. In this example, the High Court determined that houses, offices, rooms and places all generally have four walls and a roof, such that the individual charged for gambling in an open alleyway had not gambled in a 'place'.

The issue of pets in taxis provides a good example of how this maxim is used by courts. Pets may not be permitted in taxis if the taxi owner or company insists pets are not allowed. But what about guide dogs? In the past guide dogs were the only recognised 'assistance animal'—they helped vision impaired people go about their daily lives. They were not pets so taxi drivers had to allow them in a taxi with a blind passenger or be in breach of anti-discrimination laws allowing 'assistance animals' to accompany blind people.

Today the idea of 'assistance animal' is much broader. For example, 'emotional support animals' are trained to provide comfort to people with psychological disorders, Post-Traumatic Stress Disorder and Alzheimer's Disease. **section 9** of the *Disability Discrimination Act 1992* defines the meaning of 'assistance animal' using the following words: "For the purposes of this Act, an assistance animal is a dog or other animal" trained "to assist a person with a disability to alleviate the effect of the disability".

Parliament uses the specific term 'a dog' to create a class or category of things called 'assistance animals'. It then uses the general term 'other animal' to allow for future change in the use of animals to help people with a range of disabilities. The use of the general term allows courts to decide in specific cases if a particular animal belongs to the same category or class of 'assistance animals'.

Each time a court determines a case related to another animal in the class of assistance animal under **Section 9** of the *Disability Discrimination Act 1992,* it creates new meanings of the Act. The courts declare the anti-discrimination law case by case and develop its meaning over time by expanding the range of animals in the class 'assistance animals'. Note that courts never add words to an Act, they add meaning to existing words.

By declaring the law through interpretation, courts are changing the meaning of a statute and keeping it up to date. Parliament does not have to amend the Act every time a new animal is found to be useful for helping a person alleviate the effect of their disability. Courts can do that in response to actual real-world developments.

Expressio unius est exclusio alterius

Expressio unius est exclusio alterius means 'an express reference to one matter indicates that other matters are excluded'.

This maxim provides that if a statute refers to a specific subject, matter or idea, it is presumed to exclude all other subjects, matters or ideas. For example, if part of a statute expressly provides taxi drivers with permission to use bus lanes, the express mention of taxis will be taken to exclude limousines.

Interpretation legislation

Parliamentary supremacy means that parliament is able to pass legislation which regulates and controls many of the work undertaken by courts. One important way in which this is done is through the use of Acts Interpretation Acts.

These are special statutes that create additional rules that judges must follow when interpreting statutes according to a law made by parliament. They are a firm attempt by parliament to limit **judicial discretion** in statutory interpretation. The Commonwealth and the states have passed these statutes. The *Acts Interpretation Act 1901* (Cth) applies to all Commonwealth Acts and other legislative instruments whereas the *Interpretation Act 1984* (WA) applies to the interpretation of state legislation in Western Australia. The rule of law and parliamentary supremacy mean judges are legally bound to follow these rules when interpreting other statutes.

Interpretation legislation contains a list of definitions, terms, and rules to apply when interpreting legislation. Where an interpretation Act defines a term, judges must interpret that term in every other statute in which it appears, using the definition parliament has given.

As you can see from the examples in Table 6.1, the *Acts Interpretation Act 1901* not only contains specific definitions and rules on how words are to be interpreted but also includes sections which emphasise the purposive approach to interpretation the courts must follow.

Acts Interpretation Acts limit judicial discretion, override rules and maxims of interpretation and ensure the intent of parliament is expressed when Acts are interpreted by judges. Acts Interpretation Acts help uphold the rule of law by making statute clear, coherent and predictable.

Judicial discretion

Notwithstanding the rules of interpretation, legal maxims and interpretation legislation discussed above, judges retain a significant amount of discretion when they go about the task of attributing meaning to statutes. In Australia, this discretion is often exercised conservatively in just the same way that the courts are careful to gradually develop the content of the common law. Many judges are reluctant to radically change the meaning of statutes through interpretation because they believe that is the role of the legislature. They respect the separation of powers and believe that the parliament is the legislature, and it is up to parliament to amend laws that are not working well. Conservative judgments are described as **literalist** or **legalist interpretations** of the law. These interpretations are predictable and consistent, which upholds the rule of law, but may create unfairness in specific circumstances.

Other judges might be more adventurous. They might be more likely to use their discretion creatively in order to update statutes and keep them in line with social, economic, technological and cultural change. These judges are less reluctant to change the meaning of statutes through interpretation. They may give an interpretation to a word which was arguably beyond the contemplation of parliament but nevertheless justify it on the basis that such an interpretation would better fulfill the statute's purpose. They still respect the separation of powers, but in a different way. These judges know that parliament is superior to courts. They

Relevant sections of the Acts Interpretation Act 1901 (Cth)

15AA *Interpretation best achieving Act's purpose or object - which provides for interpreting an Act in a way that best achieves the purpose or object of the Act*

In interpreting a provision of an Act, the interpretation that would best achieve the purpose or object of the Act (whether or not that purpose or object is expressly stated in the Act) is to be preferred to each other interpretation.

15AB *Use of extrinsic material in the interpretation of an Act - about using material that is not part of an Act (like explanatory memorandums and second reading speeches) in interpreting an Act*

(1) ... in the interpretation of a provision of an Act, if any material not forming part of the Act is capable of assisting in the ascertainment of the meaning of the provision, consideration may be given to that material

23 Rules as to gender and number

In any Act:

(a) words importing a gender include every other gender; and

(b) words in the singular number include the plural and words in the plural number include the singular.

35 Measurement of distance

In the measurement of any distance for the purposes of any Act, that distance shall, unless the contrary intention appears, be measured in a straight line on a horizontal plane.

37 Expressions of time

Where in an Act any reference to time occurs, such time shall, unless it is otherwise specifically stated, be deemed in each State or part of the Commonwealth to mean the standard or legal time in that State or part of the Commonwealth.

Table 6.2 — *The Acts Interpretation Act 1901(Cth)* contains definitions that must be applied by judges when they interpret other Acts.

know that at any time parliament can amend a statute and override their interpretations. This knowledge gives them confidence that their interpretations are not breaching the doctrine of the separation of powers because if they go too far parliament will override them. More adventurous judgments are described as **activist interpretations** of the law. Activist interpretations are less predictable and consistent, which is not good for the rule of law, but they are more likely to be fair, which is good.

Figure 6.15 — Styles of judicial interpretation.

Statutory interpretation and the doctrine of precedent

It is important to understand that a court is creating a precedent when it provides an interpretation of a statute. An interpretation is itself a precedent, binding, or persuasive, on other courts in their interpretations of the same statute. For example, the Federal Court's interpretation of the meaning of 'taxi travel' within the GST Act is a binding precedent on the inferior Federal Circuit and Family Court when it interprets the GST Act, and a persuasive precedent for equivalent Federal Court judges and superior High Court judges in their interpretations of the Act. However, it is important to note that a court's interpretation of a word in a statute is not binding on another court interpreting the same word appearing in a *different* statute. If the second court considers the word to be used in a similar context, then it may find the first court's interpretation to be persuasive.

The relationship between statute and common law

Statute and common law are complementary—they go well together. For example, parliament cannot foresee the future and so its laws will inevitably be general and contain gaps. Courts can interpret and expand statutes to fill gaps as they are discovered in real cases. Courts can also discover gaps in the law through original cases and then create new law—such as the tort of negligence and new native title—that fill these gaps.

Parliament can respond to courts' discovery of gaps in the law by legislating new statutes to cover newly discovered areas of law. The *Native Title Act 1993 (Cth)* is an example of an Act that clarified a common law created by the High Court. Parliament may also **abrogate** (extinguish) common law precedent by passing an Act to override it if it believes courts have been too activist and 'legislative'.

Parliament may also leave an area of law to the courts to develop on a case by case basis. Some areas of law, like negligence, are highly specific to the facts of a particular case. No statute could be written that could adequately cover all the ways in which people could owe duties of care to others in all possible circumstances. Parliament does not even try – it is left to the courts to develop this area of law. Common law is designed for case by case law-making, and some areas of law are best developed case by case.

In some cases, parliament may opt to leave it to courts to develop law but restrain judges in some circumstances. The *Defamation Act 2005* (Vic) is an example. It leaves Victorian courts to develop defamation law in individual cases but imposes a legislative cap on the amount of damages judges can award. In this way, statute law can be used to direct or influence the development of the common law, without completely overriding it.

There is a constant dialogue between the courts and the parliament. Court decisions are monitored by parliament, and parliament may respond by changing statutes, which, in turn, can be interpreted by courts, and so on. The process is a positive feedback loop that strengthens the law, keeping it up to date, in line with the majority will, and constantly improving and adapting to changing times. The feedback loop is also the solution to the problem, noted previously, of courts 'legislating'. The important point here is that the separation of powers is preserved by the doctrine of **parliamentary supremacy**. Parliament's supremacy makes it the primary legislator.

Today, the role of courts has increasingly been to interpret legislation. In the past, parliaments were not anywhere near as active as they are today, and most areas of law existed entirely within the common law. Parliament now legislates to cover almost every conceivable aspect of our lives which leaves less and less to be settled exclusively by the courts. This means that the role of courts has becoming increasingly one of interpreting and applying those statutes while at the same time developing existing bodies of common law.

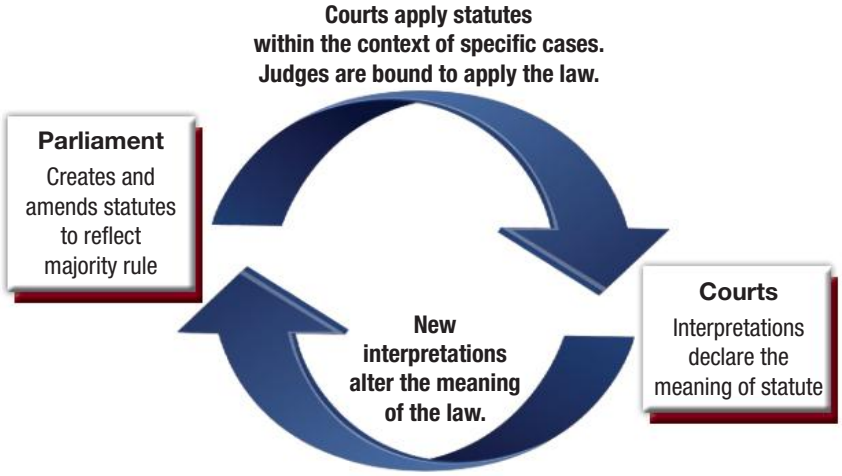


Figure 6.16 — The interaction of the parliament and the courts produces a positive feedback loop that keeps law up to date and responsive to majority will. Parliament is superior to the courts, so it is always in control of this process, preserving the separation of powers.

Common law and statute law compared

The judicial power to declare the meaning of law gives courts great power. They have the power to develop the common law in ways that has a significant impact on the rights and obligations of everyone. Citizens can exercise their political rights and freedoms and participate in the political debate about court powers and decisions. The media can report cases and outcomes. But the people cannot elect new judges at a future election. Judges are immune from political pressure.

The problem for a democratic system is that power and authority over law should be accountable to the people. Students will recall that judges are appointed by the executive and their independence (essential for the rule of law) makes it difficult for the executive or the parliament to hold them to account for decisions they make and laws they create.

In Australia's legal system, statute and common law both equally carry the full force of law, however parliament does have the power to introduce laws which have the effect of overriding (or abrogating) common law. In this way, Australia's legal system resolves the issue of an unelected branch of government respecting the supremacy and **sovereignty** of the parliament. In all cases, except High Court constitutional cases, the courts are inferior to parliament.

Common law and statute law also differ in their application. Recall that common law can only be developed if a dispute is brought to court. Judges and courts can never be proactive and make common law on their own initiative. They can only create new precedents, or apply old precedents in different ways, if a dispute is brought to a court. In this way, common law is always retrospective. New precedents are reactive because the disputes (or wrongs) they settle have already occurred. In Latin this is expressed as ex post facto or after the fact. While common law is ***ex post facto,*** the precedents that are set do of course create new law that regulates society in the future. On the other hand, statute law operates ***in futuro*** – Latin for 'in the future'. Parliament typically only seeks to regulate society in the present and the future, not the past.

Table 6.2 summarises some of the attributes of statute and common law.

	Statute	Common Law
Made by	Parliament	Courts
Method by which law is made	Legislative process	Doctrine of precedent
Source of legitimacy	Democratic will	Judicial authority
Application	*In futuro* – statute laws ordinarily only apply prospectively to regulate future conduct	*Ex post facto* – judicial power makes determinations about past conduct - retrospective. However, in such a determination may set a precedent which also has the effect of guiding future conduct.
Focus	Broad and general to fit future circumstances	Specific and particular to apply to specific cases
Rate of change	Capable of rapid change	Incremental and evolutionary
Superiority	Superior to common law	Inferior to statute
Best suited to	Broad regulation of society	Highly case specific situations
Result of two forms of law	One complete body of dynamically interacting and complementary law	

Table 6.3 — Attributes of statute and common law.

Summary

- The judiciary is the third arm of government. Appointed rather than elected, it nevertheless has great authority. Courts are the main institution of the judiciary. Judges and magistrates are its main personnel.
- Courts exercise judicial power, which is the power to make legally binding decisions that are themselves law. Judicial power is allocated to courts through jurisdictions.
- Courts are arranged in a court hierarchy from the most powerful to the least powerful according to their judicial power. The hierarchy is essential for the doctrine of precedent to operate (through binding and persuasive precedent and appeals).
- Courts use judicial power to resolve disputes. Disputes are always between legal persons. Legal persons may be natural persons (real people) or artificial persons (such as corporations or governments). Courts treat all legal persons equally, which is a principle of the rule of law.
- Courts resolve disputes by applying the law to the facts of a case. Applying the law to unique and specific cases requires interpretation of the law. Laws are thus adapted by courts to real-life cases. Interpreting law can alter its meaning—but not its wording.
- The common law system is one of two great legal systems in the world. It derives from English common law and is a global system spread by the British throughout their empire and interconnected by the doctrine of precedent. The other great system is the civil law system based on Roman law and dominant in Europe and former colonies of European colonial powers. The two systems arrive at the truth by different routes—common law through the adversarial trial (by contest) and civil law through the inquisitorial trial (by inquiry).
- Courts create common law when they create precedents and apply them in new circumstances. Common law is based on the principle of *stare decisis* and is made through the doctrine of precedent. Precedents are recorded and applied in future similar cases. Precedent operates within court hierarchies in which appellate court precedents bind courts lower in the hierarchy. Precedents set in one court may also be persuasive to courts above it and at the same level in the hierarchy, and to courts in other common law hierarchies, including internationally.
- The doctrine of precedent produces common law through an incremental evolutionary process. It is adaptive, flexible, consistent, and predictable.
- Appellate courts can avoid precedent by distinguishing cases, overruling earlier precedent, disapproving precedent, and reversing precedent on appeal. These methods allow common law to adapt and avoid becoming stagnant.
- Courts also interpret and apply general statutes written by parliament to specific cases. They utilise rules of interpretation, legal maxims and interpretation legislation. *Ejusdem generis, noscitur a sociis* and *expressio unius est exclusio alterius* are examples of maxims which guide interpretation. The purposive approach is the dominant form of interpretation in contemporary Australia.
- Statutes require interpretation because they are written in general terms for future situations and they may be poorly drafted, contain inconsistencies, be inconsistent with other statutes or go out of date. Court interpretations keep statues fit for purpose in a changing world.
- Statutory interpretation demonstrates to parliament the performance of its statutes in the real world. Parliament may respond to court interpretations by legislating to create, amend or repeal statute. Courts and parliament are in a positive feedback loop with each other, generally leading to development of statute over time.
- Statute and common law are complementary. They work together and respond to each other to create one complete body of dynamically interacting law.

Exam practice questions

Short answer

1a. Outline what is meant by the term 'judiciary'.

1b. Explain **one** difference between the elements of a criminal case and a civil case.

1c. Discuss **two** reasons why the courts play a key role in hearing civil and/or criminal disputes.

2a. Outline what is meant by the term 'statute law'.

2b. Explain **one** reason why the principle of stare decisis is essential in common law systems.

2c. Discuss **two** reasons why the court hierarchy is important in Australia's legal system.

3a. Outline what is meant by 'precedent' in common law systems.

3b. Explain the difference between 'stare decisis' and 'obiter dictum'.

3c. Discuss **two** ways that the rule of law is upheld in the judicial system of Australia.

4a. Outline what is meant by the term 'persuasive precedent.'

4b. Explain **one** reason for the relationship between statute and common law.

4c. Discuss **two** factors that enable common law to evolve.

Source Analysis

Read the Example: Uber and *A New Tax System (Goods and Services Tax) Act 1999* (GST Act) page 124, and respond to the following:

5a. Outline what is meant by the term 'statutory interpretation'.

5b. With reference to the source discuss, in your own words, the dispute between Uber and the Australian Tax Office.

5c. With reference to examples, discuss **two** methods of statutory interpretation.

5d. Evaluate the extent to which judges have judicial discretion in Australia.

Essay response

6. Analyse how, and to what the extent, Australia's federal and state court hierarchies provide for the effective creation of common law.

7. Evaluate the extent to which legislatures have more influence than courts on law-making in Australia.

continued overleaf

Investigation and discussion

Explore the adoption of the common law of negligence into Australian law by investigating the High Court case, Grant v Australian Knitting Mills [1933].

Provide a brief description of the case, the background, the decision, the reasons for the decision, and the case's significance to precedent.

Mabo [1992] is possibly the most significant example of the High Court's ability to create common law.

Create a timeline of the development of native title. Your timeline should include the following cases: *R v Murrell and Bummaree* [1836], *Milirrpum v Nabalco Pty Ltd* (commonly referred to as the Gove Case) [1971], *Koowarta v Bjelke-Petersen* [1983], *Mabo v Queensland (No. 2)* [1992], *Western Australia v Commonwealth* [1995], *Wik Peoples v Queensland* [1996] and *Commonwealth v Griffiths* [2019]

a. Provide a brief description of each case, the background, the decision, the reasons for the decision, and each case's significance to precedent.

b. Analyse how and to what extent, the Mabo [1992] High Court case was a significant common law case.

Sources

Figure 6.1 Source: Kelly Underwood, 2014, <https://www.flickr.com/photos/kju/86660334/> and CC BY 2.0, https://commons.wikimedia.org/w/index.php?curid=1511782
Figure 6.2 Source: Jonathunder, *Old gavel and court minutes displayed at the Minnesota Judicial Center*, 2008, Own work, CC BY-SA 4.0, <https://commons.wikimedia.org/w/index.php?curid=3899115>
Figure 6.3 Source: Jean Poussin, *Balance à tabac*, 2007, CC BY-SA 3.0, <https://commons.wikimedia.org/w/index.php?curid=1681347>
Figure 6.4 Source: Cesare Maccari, *Cicero, author of the classic book* The Laws, *attacks Catiline for attempting a coup in the Roman Senate*, 1889, Public Domain, <https://en.wikipedia.org/wiki/Roman_law#/media/File:Maccari-Cicero.jpg
Figure 6.5 Source: *Common law world*, 2011, CC BY-SA 3.0, <https://commons.wikimedia.org/w/index.php?curid=1793013> and <https://commons.wikimedia.org/wiki/File:Common_law_world.png#/media/File:Common_law_world.png>
Figure 6.6 Source: Stephen King, Warren Hennessy 2023
Figure 6.7 Source: Elena Khvorostova 2024
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Figure 6.9 Source: Eva Rinaldi, Rebel Wilson at the A Few Best Men movie premiere in Sydney, 2012, CC BY-SA 2.0, <https://commons.wikimedia.org/w/index.php?curid=37233165> and <https://en.wikipedia.org/wiki/Rebel_Wilson#/media/File:Rebel_Wilson_(6707611099)_(cropped).jpg>
Figure 6.10 Source: Nicol Davis, 2018
Figure 6.11 Source: Juan Pablo Bravo, Guillotine, Noun Project, <https://thenounproject.com/search/?q=guillotine&i=374018>
Figure 6.12 Source: Peter Nicholson, 2015, <http://nicholsoncartoons.com.au/uber-v-taxis-margin-call-cartoon-2015-03-24.html>
Figure 6.13 Source: *Taxis waiting for customers in Cologne*, Germany, © CEphoto, Uwe Aranas, 2014, CC BY-SA 3.0, <https://commons.wikimedia.org/w/index.php?curid=39504950> and <https://en.wikipedia.org/wiki/Taxicab#/media/File:Cologne_Germany_Taxi-waiting-at-Central_Station-01.jpg>
Figure 6.14 Source: Nicol Davis, 2018
Figure 6.15 Source: Nicol Davis, 2018
Figure 6.16 Source: Stephen King, 2018
Table 6.1 Source:-W Hennessy 2024
Table 6.2 Source: SECTION 35 and SECTION 37, *Acts Interpretation Act 1901*
Table 6.3 Source: Stephen King, Warren Hennessy 2023

All sources last accessed 31/7/24

Finding the truth

Syllabus points

- **Key processes (pre-trial, trial, and post-trial) of civil and criminal trials in Western Australia**
- **A recently implemented or proposed reform (the last ten years) to the civil or criminal law process in Western Australia**
- **Essential to the understanding of democracy and the rule of law is knowledge of:**
  - **judicial independence**
- **Essential to the understanding of representation and justice is knowledge of:**
  - **natural justice**

Justice

Justice is an essential quality of all parts of liberal democratic systems. For example, **laws** made by parliament must be just laws. Laws must be justly carried out by the **government**. Nevertheless, it is the **judiciary** and court system that specifically focuses on justice.

The **trial** is the primary procedure of the judiciary. Trial procedures can be evaluated according to how well they achieve the ideals of:

- protection of rights;
- enforcement of obligations; and
- impartiality, and fairness.

For a familiar example of arbitrary 'justice' recall the Chinese example from Unit 1. China has a non-democratic system of government with a judicial branch that is beholden to the Communist Party of China (CPC). Thus, China's justice system is not fully independent. Students should recognise the following about China's judiciary:

China's legal system is not based on the protection of individual rights. Its core purpose is the perpetuation of CPC rule;

China's legal system is not about the enforcement of obligations. It is about the enforcement of CPC power;

Figure 7.1 — Chinese-Australian writer Yang Hengjun was sentenced to death for spying in China after a show trial.

China's most senior judges are CPC members. The CPC can exert **power** over them to influence trial outcomes; and

China's trial system would have difficulty delivering just outcomes according to the definition above because it cannot adequately render to each his due.

Natural justice

Principle of **natural justice** refers to the rules and procedures to be followed by any person or agency that has to **adjudicate** in disputes between others about the rights of others. A dispute is resolved by an unbiased adjudicator in an open forum and each party to a dispute has an equal opportunity to present its case.

Justice requires impartiality, evenhandedness, fairness, objectivity and open-mindedness. All of these attributes can be summed up in the four principles of **natural justice** that define a fair trial:

1. impartial adjudication (**judge** and/or **jury**);
2. Hearing both parties (equal opportunities for each party to know the case against them and to present their case);
3. evidence based decisions; and
4. transparent and open **court** processes (to ensure public confidence in justice).

This requires that all persons accused of a wrong, require notice of what is accused against them, that the person adjudicating the dispute must have no actual or suspected interest in the dispute (rule against actual or perceived bias), that each party to a dispute must have the opportunity to openly and fairly present their case in the presence of the other party/parties to a dispute, and that all evidence used in a dispute, that is relevant, must be known and presented to the parties in a dispute.

Any system of trial should incorporate all of these principles or be at risk of producing arbitrary and unjust outcomes.

Adversarial Trials

Assumption about finding truth

The fundamental purpose of any trial is to find the truth. The procedures of the **adversarial** trial are based on the belief that a contest between the parties reveals the truth.

Competition between parties is intended to bring forth the:

- highest quality evidence the parties can locate;
- rigorous testing of evidence by the parties themselves; and

- quality legal argument and counterargument concerning the **interpretation** of laws.

Why is it assumed that a contest achieves these desirable outcomes? The motivation to win provides a great incentive to prepare and present the best case. In the same way that competition between athletes produces world class performances, competition also produces the best possible case before a court.

In adversarial trials the truth emerges through battles over evidence and through argument. It is the best efforts of parties before an impartial and passive adjudicator that reveals the truth to the court.

Onus of proof

The **onus of proof** always rests with the accuser regardless of the type of trial. Often called the **burden of proof**, the onus to prove the accusation against an accused is the responsibility of the party who brings the dispute to trial—the accuser.

The accused party has no obligation to prove anything. The accused is not 'proven innocent'. If an accused party wins a case, it is always because the accuser failed to prove them liable or guilty.

In **civil trials**, the accuser is the **plaintiff** and is always a private party. The accused is the **defendant**. The plaintiff bears responsibility for initiating the trial and presenting evidence and argument sufficient to prove the defendant's civil liability for the wrong or breach of contract.

In **criminal trials**, the accuser is the **prosecution** and is always the State. The accused is the defendant. The prosecution bears responsibility for initiating the trial and presenting evidence and argument sufficient to prove the defendant's criminal guilt.

Standards of proof

A **standard of proof** is the measure of the level of proof that is required to establish the liability or guilt of the accused.

The plaintiff or prosecution must achieve the standard of proof required to win their case. There is no standard of proof for the defendant because they have nothing to prove.

Plaintiffs in civil trials must prove the liability of the defendant on the **balance of probabilities**.

Prosecutors in criminal trials must prove the guilt of the defendant **beyond reasonable doubt**—which is a much higher standard.

Balance of probabilities

Proof on the balance of probabilities in a civil trial means the plaintiff must prove that their version of the case was more likely than not. There may be doubt about the liability of the defendant, but doubt is insufficient to overcome a greater weight of evidence indicating a probability of liability.

Beyond reasonable doubt

To prove beyond reasonable doubt means that any evidence that gives rise to doubt in the mind of a reasonable person requires the defendant to be found not guilty. To defeat the prosecution case, a defendant merely has to create reasonable doubt. Creating doubt about guilt is not the same as proving innocence.

In law, a reasonable person is defined as a person of sound mind who is capable of ordinary, rational thinking.

Why does the adversarial trial set the bar of proof so much higher in criminal trials compared to civil trials? The answer lies in the consequences for the accused of losing their case. A civil defendant will, at worst, be required to 'remedy' a wrong or fulfil a contract. There is no negative consequence for their rights, whereas a criminal defendant may be lawfully stripped of some of their rights. Most convicted persons will carry a criminal record that may limit their chances of enjoying equality of social and economic rights for the rest of their lives. At worst they may lose their rights to liberty and freedom via a custodial sentence. In some **common law** jurisdictions, like several of the American states, they may even lose their right to life.

Roles within adversarial trials

Judicial Independence

Judicial independence is an essential aspect of the **rule of law** and underpins a trial held fairly, according to the principles of natural justice. Judges are independent of the legislative and **executive** branches of government and make decisions according to the law without pressure from Parliament or the government. *See CS10.*

Judge

In the adversarial trial the judge:

- ensures a fair trial by enforcing trial procedures designed to uphold natural justice; and
- decides the:
  - remedy in the post-trial phase of civil trials; or
  - sentence in the post-trial phase of criminal trials.

Figure 7.2 — Current Chief Justice of the High Court - The Honourable Stephen Gageler.

In the absence of a jury (as in all Western Australian civil and summary criminal cases, and some indictable criminal cases), the judge also:

- finds the facts—meaning they decide liability or guilt based on the evidence (facts) presented.

Students must note that none of the above roles requires the active participation of the judge in the trial. Judges in adversarial trials are passive. They do not present evidence, ask questions or argue matters of law. They are more like umpires, rather than 'players' in a trial.

Jury

A **jury** is an impartial adjudicator of the facts in a criminal trial. Juries are composed of 12 of a defendant's peers—that is, fellow citizens—who judge if the prosecution has proven guilt beyond reasonable doubt. In most cases, all jurors must agree unanimously on the verdict, but a judge may accept a 'majority decision' of ten jurors or more.

In WA, juries are only used in District and Supreme Court criminal trials. A jury is used to find the facts in indictable (serious) criminal cases unless the defendant requests a judge only trial because circumstances may make it impossible to empanel 12 impartial jurors. A highly publicised case that draws a great deal of media attention may make it impossible to find 12 citizens who have not already been exposed to news about the case. They may have already judged or pre-judged the case. Being prejudiced, and therefore not impartial, because of such prior awareness undermines the capacity of the parties to receive a fair trial.

Juries complement the judge. They take over the role of deciding criminal guilt, leaving the judge to ensure a fair trial and the responsibility of sentencing a convicted offender in the post-trial phase. Like the judge, juries must be passive and impartial. Jurors do not ask questions or present evidence or make an argument.

Parties

All cases have an accusing party (plaintiff or prosecution) and a defending party (defendant).

- The accuser bears the onus or burden of proof and must reach the standard of proof required to win the case; and
- The defendant is presumed innocent and has a right to silence.

Parties are responsible for:

- gathering evidence;
- presenting evidence in court;
- testing the other party's evidence; and
- arguing about how the law should be interpreted, for example, about:
  - common law **precedents** that should or shouldn't apply to their case; and
  - how **statute law** should be interpreted in their case.

Legal representatives

The law is complex and it is beyond the understanding of most citizens who, at best, only know its basics. Parties responsible for running their case in a high stakes contest against a determined and skilled adversary need expert assistance. The rule of law demands everyone be equal before the law. The problem is that not everyone is equally capable or knowledgeable about the law. This unfortunate fact makes it necessary for an 'equaliser' to make disputes between unequal parties fairer.

Legal representatives are the 'equalisers'. They bear the burden of running the case on behalf of a party; they are expert hired help whose expertise is a key to success.

The nature of the adversarial trial makes expert, often expensive, legal assistance an unfortunate necessity. Students might like to consider the implications of this reality on the rule of law's demand that parties be equal before the law—here you might consider a party's access to justice if they cannot afford **legal representation** or if there is some other factor that does not afford them equality before the law. Sometimes it is Important to treat people differently to ensure that there is equality. As such measures may need to be put into place to ensure that people are treated equally and without

discrimination. For example, a person who is self-represented and does not have a lawyer, may need more assistance by the Judge or Magistrate in understanding processes or understanding their rights. First Nations people may also need to have changes made to their court processes and procedures, to ensure that when giving evidence that they are not disadvantaged in any way.

Phases of a trial

Trials are conducted in phases. There are three phases to a trial and each has a different purpose.

Pre-trial phase

The purpose of pre-trial is to:

- clarify the dispute;
- discover and prepare evidence; and
- decide how the law may apply to the case.

Many cases are resolved at this stage because the processes of dispute clarification and discovery of evidence often convince one or both parties to change their position and agree with each other. Agreement between the parties ends the dispute, making a trial unnecessary.

Trial phase

If the dispute is not resolved during pre-trial, it may proceed to the trial phase. The purpose of the trial is the discovery of truth. The trial interprets law and applies it to the specific facts to resolve the dispute.

Strict procedures guide a trial. Trial procedure is designed to ensure natural justice. It is the judge's task to ensure correct procedure is followed so that the trial is fair.

In the trial phase, parties present their best evidence and argument before an impartial adjudicator. The adjudicator is the judge or, in an indictable criminal case, the jury.

Trials have a four-part sequence. The parties have equal opportunities to:

1. open their case with an address to the court;
2. examine witnesses and present evidence; and
3. close their case with an address to the court.

If the judge or jury is convinced to the standard of proof required that the defendant is liable or guilty, they deliver the:

4. verdict.

A detailed description of this sequence is provided in Figure 7.1. Note how the parties actively run the case and have precisely the same opportunities to address the court, call witnesses, present evidence and test their adversary's evidence. Also, note the passive role of the judge, who does not ask questions or present or test evidence.

Opening address

The plaintiff/prosecution, as the accuser, bears the burden of proof and so begins the trial with an **opening address** followed immediately by the defence opening address.

Presenting and testing evidence—examination-in-chief, cross-examination and re-examination

The parties present all the evidence. The judge plays no active role in the discovery or presentation of evidence. Judges are passive in the adversarial trial—their job is to ensure a fair trial.

The presentation of evidence by the plaintiff/prosecution commences and is tested by the defence.

> *"Only evidence that has survived scrutiny by the parties is admissible and may be used to reach a decision."*

After all the evidence from the plaintiff/prosecution is presented and tested the defence may present its evidence. The defence, those representing the accused, are not required to do so because the accuser has the burden of proof. If the defence is confident the plaintiff/prosecution has failed to reach the required standard of proof, it may decide not to present any evidence at all. The accused is presumed innocent and has nothing to prove.

All evidence must conform to the **rules of evidence**. In the adversarial trial, the parties are responsible for running the case. Thus, each party must object to evidence it thinks does not meet the rules of evidence. This is why expert legal representation is essential—the rules must be known. The judge, who is responsible for fairness, applies the rules of evidence and either allows or disallows the objections. Only evidence that has survived scrutiny by the

parties is admissible and may be used to reach a decision. Further information on specific rules of evidence is found below.

Evidence may be in the form of:

- Witness testimony. Witness evidence is given as spoken answers to questions asked by the parties. It is given under oath. Each witness is called in turn, takes an oath to tell the truth, and is:
  - questioned by the party calling them (examination-in-chief);
  - questioned by the opposing party (cross-examination); and, sometimes,
  - questioned again by the party calling them (re-examination); and
- Other evidence may be presented and tested by both parties. Non-oral evidence can be in many forms, including:
  - written statements, called affidavits, made by witnesses;
  - documents including receipts, photographs, video and audio recordings, and so on;
  - physical objects; for example, a weapon; and
  - miscellaneous, including DNA, biological samples, data recorded by digital devices (like a GPS tracker) and other forms of evidence.

Closing address

First, the plaintiff/prosecution and then the defence conclude the trial with closing addresses. A closing address is the final opportunity for both parties to summarise their argument or 'put their case' to the adjudicator before a verdict is reached.

Verdict

The adjudicator (judge or jury) decides the result of the trial by weighing up the evidence and assessing if the plaintiff/prosecution has proven their case to the standard of proof required.

Civil trial verdicts are **liable** or **not liable**. Criminal trial verdicts are **guilty** or **not guilty**.

Post-trial

There is not usually a post-trial phase if the plaintiff/prosecution fails to achieve the standard of proof.

If the accusation is not proven the civil plaintiff may have to pay the court costs of the defendant. A not guilty criminal defendant is free to leave the court without any sanction.

If the plaintiff wins a civil trial, it means the court believes, on the balance of probabilities, they have been wronged or there has been a breach of a contract, and the plaintiff has suffered because of it. The solution is a **remedy** to 'right the wrong' or enforce the contract.

If the prosecution wins a criminal trial, it means the court believes, beyond reasonable doubt, that the defendant has committed a criminal offence. The resolution to a crime is a **sanction** that punishes, rehabilitates, and deters the offender. Sanctions may also protect the community by removing the convicted criminal from society.

Figure 7.3 — Criminal and civil procedure

Rules of Evidence

The principles of natural justice demands that decisions are based on evidence. This is ensured through the use of strict evidence rules. Evidence is what is used to resolve disputed facts and predominantly consists of oral testimonies from witnesses. These testimonies are procured through the oral testimony of witnesses who undergo examination-in-chief, cross-examination, and re-examination by each parties' counsel. Physical evidence, such as weapons or documents, can also be presented through witnesses familiar with them. For example, a police officer who found a weapon at an accused's residence during a search can tender it as evidence.

Only evidence adhering to the 'rules of evidence' can be accepted in a trial and considered by the decision-maker, be it a magistrate, jury, or judge. If any evidence violates these rules, it becomes inadmissible and can't be used in decision-making. By ensuring only high-quality evidence is included, the rules uphold a core principle of natural justice.

Originating from Common Law, the Rules of Evidence have been predominantly codified across Australian jurisdictions. The Australian Law Reform Commission, in 1987, proposed a revamp and unification of these laws. Consequently, the *Evidence Act 1995* (Cth) was enacted, paving the way for the Uniform Evidence Law. This act now dictates evidence rules in all Federal matters. States like Tasmania, Victoria, New South Wales, ACT, and the Northern Territory adopted legislation mirroring the Uniform Evidence Law. Conversely, Western Australia, South Australia, and Queensland have continued to rely on common law principles, with specific legislation influencing these principles, like the *Evidence Act 1906* (WA) for Western Australia.

Some rules of evidence are outlined below.

Relevance

Any evidence submitted must be pertinent to the case and must help establish a disputed fact. Irrelevant evidence is inadmissible. If evidence is relevant, it must also comply with the other rules of evidence to be considered. Accordingly, relevance can be seen as the 'first hurdle' in order for evidence to be admitted.

Hearsay

Evidence should be based on direct experiences, not second-hand information. That is, witnesses must give evidence based on what they have personally observed or experienced. Evidence cannot be 'heard' from another person and then 'said' in court. There are exceptions to the hearsay rule, such as representations made by someone who will be called to give evidence. The justification for this exception is that the person who made the representation can be questioned about what they said, by the parties. Another exception to the hearsay rule is evidence of an admission that is voluntarily given and legally obtained (see Investigation in Pre-trial Criminal Procedure).

Opinion

Witnesses can only report observed facts as evidence. They cannot express their opinions. One exception to this rule is the opinion of expert witnesses. Experts may be called to give evidence in their area of expertise and may be permitted to present their professional opinion. For example, a forensic pathologist would be permitted to give evidence on their opinion on the time of death in a murder trial. Another exception is so called 'lay opinions', that is, opinions that come from everyday experience and assist the court in understanding the witnesses' perception of events. For example, a witness would be able to give an opinion on their perception of another person's age or the speed of vehicle.

Character

The plaintiff or prosecution cannot introduce evidence highlighting the defendant's bad character, including prior criminal records. This rule seeks to uphold the principle the accused is innocent until proven guilty. If the defendant calls evidence of their own good character or disputes the credibility of a witness, the prosecution may counteract with bad character evidence. Character evidence is another exception to the opinion rule.

Propensity

Propensity evidence operates as an exception to the character rule. In certain circumstances, the prosecution may seek to use an accused's past convictions to establish that they had the 'propensity' to commit the kind of crime they are currently charged with. For example, the prosecution might lead evidence of an accused's many past convictions for possessing drugs with intent to sell them, in a case where they are again accused of possessing the same drugs in similar circumstances. In Western Australia, propensity evidence is admissible

Principles of Natural Justice	Achieving through
Judicial Independence	Decisions being made by juries, judges or magistrates
Hearing both sides	Pre-trial stages Adversarial trial procedures.
Evidence based decisions	Rules of evidence
Transparent and open court processes	Open courts Judges provide written reasons for decisions

Table 7.1 — Achieving natural justice

under s 31A of the *Evidence Act 1906* (WA) if it has "significant probative value". Additionally, the court must weigh the value of the evidence against the risk of an unfair trial. The evidence will only be admitted if the court determines that the 'fair-minded' person would consider it in the 'public interest' to admit the evidence. A similar type of evidence, called 'tendency evidence', exists in the Uniform Evidence law jurisdictions. Whether or not the prosecution is permitted to lead propensity evidence may be determined by a judge in a pre-trial hearing known as a '*voir dire*'.

Civil Law

Civil law regulates disputes between individuals, groups, and organisations. This type of law enables people to seek compensation when their rights have been infringed. This is because they have been harmed or wronged because of a breach that has occurred.

Civil trials:

- resolve disputes between private parties;
- do not involve the government as a party (except sometimes as a private party being sued);
- may not involve statute; and
- have fewer implications for the community at large.

Some examples of civil law include:

Torts

Tort is a French word meaning 'wrong'. Examples of torts are:

- negligence;
- nuisance; and
- defamation.

Tort disputes arise where one party accuses the other of causing them loss or damage.

Contracts

Contracts are legal agreements between parties. A contract has four components:

1. an 'offer' by one party;
2. 'acceptance' by the other party;
3. an 'intention' to enter the contract; and
4. 'consideration' (usually money).

Disagreements can arise about any of these four parts of a contract.

Other private law matters

Other forms of private law that may be influenced more heavily by statutes include:

- inheritance law;
- workplace law;
- health and safety law; and
- Family law.

Figure 7.4 — Family law is a civil matter. In Western Australia such cases are heard in the Family Court of Western Australia.

Civil Procedure

Most civil disputes are resolved prior to trial. A court trial is the absolute last option for most parties to a dispute because of the costs, lack of control of the outcome and the legally binding nature of the decision. Many will abandon their pursuit of resolution before they reach this stage because of these factors, and this helps explain why, out of the thousands of civil cases that are commenced, only a few ever reach the courts. In 2017, while the Supreme Court of WA finalised 3,011 matters, only 51 of these involved trials in court.[1]

CIVIL PROCEDURE			
PRE-TRIAL			Purpose and Explanation
Compulsory Case Management (Required by Court throughout Pre-Trial Phase)	PLEADINGS	**Writ of summons** issued by the plaintiff against the defendant and lodged with the court	Initiates proceedings and notifies the court. Writs notify the defendant of legal action against them.
		Memorandum of appearance lodged by the defendant with the court	Notifies the plaintiff and the court that the defendant intends to contest the case in court. If the defendant does not lodge a memorandum of appearance, the plaintiff may ask the court to make a judgment against the defendant.
		Statement of claim lodged by the plaintiff	An itemised list (numbered paragraphs) of claims and facts provided by the plaintiff. The list outlines the allegations against the defendant. Helps ascertain what is in dispute.
		Statement of defence by the defendant	An itemised list of responses to each claim and fact made by the plaintiff. The defendant may agree with or dispute each claim. Helps clarify what is in dispute.
		Counterclaim by the defendant — optional	The defendant may also make claims against the plaintiff. In such cases, the counterclaim accompanies the statement of defence.
	DISCOVERY	**Discovery** by the plaintiff and defendant	Each party must prepare a list of documents that are relevant to the case. Documents may include any written, digital or other types of record. Both parties may inspect each other's documents.
		Interrogatories by the plaintiff and defendant	Formal written questions sent by each party to the other party. Parties must respond in writing under oath (affidavit). Helps clarify the facts and decide what evidence may be presented in the trial phase. Answers to questions may be used as evidence in the trial.

■ Table 7.2 — Civil pre-trial procedure used in the Western Australian District Court.

Pre Trial

In Western Australia, mediation is a compulsory step prior to trial for some matters, including in the Family Court for custody/parenting matters and in the Federal Court of Australia and the Federal Circuit Court.

Civil pre-trial procedures in the Supreme Court

Civil procedure in Western Australia follows the same basic procedures. Both the Supreme and District Court implement case management. Case management stipulates that certain procedures must be completed within a particular period of time. Below are some sample documents required before proceeding to trial.

Writ of summons

The writ is where it all begins. The wronged party, the plaintiff, drafts a **writ of summons** outlining the alleged wrong and files it with the court. The writ will include an 'indorsement of claim' that generally outlines the wrong alleged to have occurred or the 'cause of action'. Once filed, the court will issue the writ. It then needs to be served on the defendant.

The current price for an individual to file a writ in the Supreme Court of Western Australia is $1,730, and in the Magistrates Court of WA the cost is somewhere between $172 and $687.

1 https://www.supremecourt.wa.gov.au/_files/Annual_Review_2017.pdf

IN THE SUPREME COURT OF WESTERN AUSTRALIA
HELD AT PERTH

CIV 215 of 2025

B E T W E E N :

Mac Construction — Plaintiff

and

ABC Cranes — Defendant

GENERAL FORM OF WRIT OF SUMMONS

Date of Document: 14 January 2025

Filed on behalf of: The Plaintiff

Date of Filing: 15 January 2025

Prepared by:
AAA Lawyers

TELEPHONE: 9444 4444
REF: 123

To: ABC Cranes of 55 Winding Road, Perth in the State of Western Australia

You are commanded that, within 30 days after the service of this writ on you, exclusive of the day of such service, you cause an appearance to be entered for you in our Supreme Court in an action at the suit of the above named plaintiff; and take note that in default of your so doing the plaintiff may proceed therein and judgment may be given in your absence.

WITNESS: THE HONOURABLE Chief Justice of Western Australia,
the 20 day of January 2025 .

NOTE: This writ may not be served later than 12 calendar months beginning with the above date unless renewed by order of the Court.

A defendant may appear to this writ by entering an appearance either personally or by solicitor at the Central Office of the Supreme Court, Barrack Street Perh

■ Figure 7.5 — Sample writ of summons.

In 2021, 5,146 new civil actions were commenced by writ in the District Court of Western Australia, of those, 169 civil trials were listed but only 41 matters proceeded to trial.[2]

Discovery and inspection

Each party must provide the other party to the action with a list of documents that are relevant to the pleadings and which they will rely on in a trial. This is called **discovery**. Usually this is done in two lists, with items in both listed in chronological order. One list contains all relevant documents. The other lists all relevant documents over which the party is claiming **privilege**.

Legal privilege protects parties from disclosure of certain communications between a lawyer and a client. This usually applies to documents and electronic and oral communication. Privilege is an important common law protection and seeks to promote full and frank advice and disclosure between a lawyer and a client without fear of this information being used against them in trial.

If additional documents are discovered during the pre-trial process, these must also be disclosed to the other party. Parties are able to inspect these documents and they may also request a copy. The list of documents must also include dates,

FORM 18
IN THE SUPREME COURT OF WESTERN AUSTRALIA

No CIV 215 of 2025

B E T W E E N:

Mac Constructions — Plaintiff

and -

ABC Cranes — Defendant

AFFIDAVIT VERIFYING LIST OF DOCUMENTS

Date of Document: 14 March 2025

Filed on behalf of: The Plaintiff

Date of Filing: 15 March 2025

Prepared by:
AAA Lawyers

TELEPHONE: 9444 444
REF: 123

Page No

1. Affidavit of — 1 - 2
2. Annexure "A" — 3 - 4

I the abovenamed plaintiff Mac Constructions, make oath and say as follows:-

1. The list of documents produced to me and marked "Attachment A" is the list of the documents relating to the matters in question in this action that are or have been in the possession, custody or power of the Mac Constructions.
2. The documents listed in Part 1A of Attachment A are the documents relating to the matters in question in this action that are in the possession, custody or power of the Mac Constructions.
3. The Plaintiff objects to producing those of the documents in Part 1A of Attachment A identified in Part 1B on the grounds stated in Part 1B.
4. The documents listed in Part 2A of Attachment A are the documents relating to the matters in question in this action that were, but no longer are, in the possession, custody or power of the Mac Constructions.
5. The statements in Part 2B of Attachment A about the documents listed in Part 2A are true.
6. The Plaintiff has made all reasonable enquiries, including of its employees and agents, to identify all documents of any description whatever relating to any matter in question in this action that are or were in its possession, custody or power.
7. To the best of my knowledge, information and belief, neither the Plaintiff, nor its practitioner, nor any other person on its behalf, has now, or ever had possession, custody or power over any document of any description whatever relating to any matter in question in this action, other than the documents listed in Parts 1A and 2A of Attachment A.

SWORN by the deponent)
At Perth in the State of Western)
Australia this 14 day)
Of March 2025) *J Doe*
Filed on behalf of the plaintiff

BEFORE ME: *J. Peace*
JUSTICE OF THE PEACE

TO: ABC Cranes

List of Documents – Part 1A3

The documents relating to the matters in question in this action that are in the possession, custody or power of Mac Constructions are as follows:

No	Description of Document	Date
1	Advertisement from *The West Australian*	10 March 2024
2	Email from Mac Constructions to ABC Cranes	22 March 2024 @ 9.25am
3	Email from ABC Cranes to Mac Constructions	22 March 2024 @ 10.00am
4	Email from Mac Constructions to ABC Cranes	22 March 2024 @ 10.05am
5	Email from ABC Cranes to Mac Constructions	22 March 2024 @ 10.00am
6	Crane Specification Documents	22 March 2024
7	Contract for Sale	7 April 2024

■ Figure 7.6 — Sample list of documents.

2 https://www.districtcourt.wa.gov.au/_files/District%20Court%20Annual%20Review%202021.pdf

times and a place where the documents may be inspected.[3]

Discovery—A civil trial issue

The discovery process is one which can be lengthy and incur significant legal costs. In extreme cases, 'mega-litigation' can result in the discovery of millions of documents. In *Seven Network Limited v News Limited* [2007] FCA 1062[4], Justice Sackville noted that:

> *"The trial lasted for 120 hearing days... The outcome of the processes of discovery and production of documents in this case was an electronic database containing 85,653 documents, comprising 589,392 pages. Ultimately, 12,849 'documents', comprising 115,586 pages, were admitted into evidence." [at 4]*

Justice Sackville estimated that the parties would have spent approximately $200 million in legal costs for these proceedings, which he stated that, for 'a single piece of litigation is not only extraordinarily wasteful, but borders on the scandalous.' [at 10]

Interrogatories

Parties may seek to question each other on facts relevant to the pleadings. A party will draft a list of numbered questions and will seek leave of the court to serve them on the other party. These are called **interrogatories**. The other party must then provide responses to the questions. The responses are attached to a **sworn affidavit** and may then be admitted to court as evidence.

Order 27 of Supreme Court Rule 5 provides several grounds for objecting to answer a question. One of them is "that it is scandalous or irrelevant, not bona fide for the purpose of the proceeding, unreasonable, prolix, oppressive or unnecessary".

Entry for trial

When all the previous stages have been completed, both parties complete and file the relevant documents, including a checklist and memorandum of conferral, to indicate that they are ready to go to trial.

The District Court requires all parties to attend a pre-trial mediation conference as a last effort to resolve the dispute before trial. This is a significant contributing factor to the fact that only approximately 1% of all cases go to trial.[5]

Trial

Civil trial procedure ensures each party has equal opportunities to present their case before an impartial judge, which is a critical feature of a fair trial and reflects the principles of natural justice.

In Western Australia, juries are very rarely used for civil trials. There has been no civil jury trial in Western Australia since 1994.[6]

The average length of civil trials decreased from six days in 2020 to four days in 2021. The median time to trial increased by 26.7% from 30 weeks in 2020 to 38 weeks in 2021. This increase in delay can be attributed to the COVID-19 pandemic restrictions and the increased pressures on the Court's resources.[7]

Although the "evils of cost"[8] delay and complexity have remained consistent barriers for the ordinary Australian to access justice, new research has indicated that the new and inventive arrangements of no-win-no-charge may improve how often civil matters are pursued.[9]

Post Trial

If a defendant wins on the balance of probabilities the judge may award them **costs** to be paid by the plaintiff. The effect is to compensate the defendant for the expense caused by the plaintiff's action.

Remedies

Civil wrongs are corrected by remedies. Remedies aim to restore the injured party to the position they enjoyed before suffering the loss. They are not custodial sentences, sanctions or punishments.

In WA, the *Civil Liability Act 2002* (WA) governs the remedies for torts. It defines and limits the amount of damages that judges can award to plaintiffs.

Other Acts regulate private relationships that might be subject to civil trials.

3 District Court of Western Australia, 2021 Annual Review, District Court of WA website, n.d. https://www.districtcourt.wa.gov.au/_files/District%20Court%20Annual%20Review%202021.pdf accessed 9

4 Australian Government Law Reform Commission, *Background: Costs, terabytes and efficiency,* https://www.alrc.gov.au/publication/managing-discovery-discovery-of-documents-in-federal-courts-alrc-115-summary/report-summary/background-18/ accessed 9 May 2024.

5 District Court of Western Australia, 2021 Annual Review, District Court of WA website, n.d. https://www.districtcourt.wa.gov.au/_files/District%20Court%20Annual%20Review%202021.pdf accessed 9 May 2024.

6 https://www.lawsocietywa.asn.au/wp-content/uploads/2015/10/2016APR-Recently-Implemented-Reform-The-Jury-System-Teacher-and-Student-Post-Visit-Resource.pdf

7 District Court of Western Australia, 2021 Annual Review, District Court of WA website, n.d. https://www.districtcourt.wa.gov.au/_files/District%20Court%20Annual%20Review%202021.pdf, accessed 9 may 2024.

8 Barristers fees can vary from $5000 to $25,000 per day.

9 Naomi Neilson, 'No-win-no-charge arrangements improving access to civil justice', 22 November 2021, https://www.lawyersweekly.com.au/biglaw/33082-no-win-no-charge-arrangements-improving-access-to-civil-justice accessed 9 May 2024

Types of remedies

Remedies for torts are often **damages** that compensate for losses caused by wrongs. They are **restitution** (return of loss) or **compensation** for loss suffered by the plaintiff.

Damages are monetary and include:

- compensatory damages such as:
  - general damages awarded for non-quantifiable loss such as pain and suffering;
  - specific damages awarded for a measurable economic or financial loss;
- nominal damages awarded where a plaintiff wants acknowledgement of a wrong and does not seek monetary compensation. Nominal damages may be a single dollar;
- aggravated damages are compensation for a defendant deliberately humiliated or harmed by the plaintiff; and
- punitive damages are designed to punish and deter a defendant or others.

There are many other types of damages.

Remedies for the tort of defamation include:

- damages to compensate for a loss of reputation;
- injunctions preventing a party from doing something, for example, publishing a defamatory article; and
- orders of specific performance, for example, forcing the publication of an apology.

Remedies for contracts include:

- orders of specific performance, requiring a party to carry out actions that fulfil the terms of a contract; and
- orders of rescission[10], freeing a party from a contract where they may have been misled or pressured into entering a contract. Recall the four parts to a legal contract (offer, acceptance, intention and compensation). If a party is tricked into a signing a contract, there can be no intention to enter the agreement. The court will rescind the contract.

Example: Remedies in Defamation Case: Palmer v McGowan (No 5) [2022] FCA 893

Clive Palmer commenced proceedings by writ in the Federal Court of Australia in August 2020. He sued then Premier Mark McGowan for defamation, alleging six defamatory publications. Mr McGowan responded in September 2020 with a cross-claim, alleging nine defamatory publications by Palmer.

In a decision delivered by Justice Lee on 2 August 2022, it was ordered that Mr McGowan pay damages of $5,000 to Mr Palmer for the original claim. Mr McGowan was awarded damages of $20,000 to be paid to him by Mr Palmer.[11]

Under section 34 of the *Defamation Act 2005 (WA)*, 'the court is to ensure that there is an appropriate and rational relationship between the harm sustained by the plaintiff and the amount of damages awarded.'[12] Further, there exists a $250,000 cap on damages awarded for non-economic loss in defamation proceedings in Western Australia, unless a court is satisfied that the circumstances of the defamation warrant an award of aggravated damages.

In his opening remarks, Justice Lee noted that Enoch Powell once remarked: "for a politician to complain about the press, is like a ship's captain complaining about the sea". As these proceedings demonstrate, a politician litigating about the barbs of a political adversary might be considered a similarly futile exercise." [at 1]

In awarding Mr Palmer damages of $5,000, Justice Lee stated : "In the end, I am required to ensure that there is an appropriate and rational relationship between the harm I have found sustained (which is very minor) and the amount of damages awarded (which should, as a consequence, be very minor)." [at 515]

For Mr McGowan, "Although his damage to reputation was non-existent. Mr McGowan's evidence as to an aspect of the subjective hurt he suffered was compelling. But he is the Premier of Western Australia. Robust criticism is, and should be, part and parcel of the job." and consequently he was awarded $20,000 in general damages for non-economic loss. [at 516]

Justice Lee was particularly critical of the fact that this case was even brought to trial. In his concluding remarks he stated "The game has

10 A remedy available from a court of law which restores the condition prevailing before a contract was entered into (cf. ultra vires).- Oxford Reference, https://www.oxfordreference.com/display/10.1093/oi/authority.20110810105725373 accessed 9 May 2024

11 https://www.judgments.fedcourt.gov.au/judgments/Judgments/fca/single/2022/2022fca0893

12 https://www.legislation.wa.gov.au/legislation/prod/filestore.nsf/FileURL/mrdoc_602.pdf/$FILE/Defamation%20Act%202005%20-%20%5B00-a0-10%5D.pdf?OpenElement

Figure 7.7 — WA Premier Mark McGowan (second left) speaks to the media as he arrives at the Federal Court of Australia in preparation for the defamation trial in 2022.

> not been worth the candle. These proceedings have not only involved considerable expenditure by Mr Palmer and the taxpayers of Western Australia, but have also consumed considerable resources of the commonwealth and, importantly, diverted Court time from resolving controversies of real importance to persons who have a pressing need to litigate." [at 522-523].

Appeals

When resolving disputes, a fundamental right in the legal system is the right to **appeal**. If one party wishes to appeal a decision made in a court, they may avail themselves of the right to appeal to a higher court in the court hierarchy. If they have already been heard in the highest court of their state, they may seek leave to appear before the **High Court of Australia**. This is the point at which the right to appeal is no longer a right; there is no higher court in Australia.

The High Court, under its **appellate jurisdiction**, has the power to determine whether it chooses to hear the case. If the Justices deny 'special leave' the case is over and the most recent decision stands. On occasion, the High Court may choose to hear a matter of civil law on appeal. The decision made will resolve the dispute before them and also create a binding precedent upon all courts in the Australian legal system.

In the case of *Ammon v Colonial Leisure Group Pty Ltd* [2018] WASC 280, the plaintiff, Mr Ammon made a claim under the tort of private nuisance due to the noise generated by the Raffles Hotel (owned by the defendant) in Applecross, seeking $2.7 million in compensation. The case was dismissed, and Mr Ammon subsequently appealed the case to the Court of Appeal. In 2019, the Court of Appeal dismissed the appeal in the decision *Ammon v Colonial Leisure Group Pty Ltd* [2019] WASCA 158. Mr Ammon exercised his final right to appeal, seeking leave to appeal to the High Court in 2020. This application was dismissed with costs by the High Court in *Ammon v Colonial Leisure Group Pty Ltd* [2020] HCASL 54, with Justices Gordon and Edelman stating "The applicant has not identified a question of law sufficient to warrant the grant of **special leave to appeal** and otherwise advances no arguable ground of appeal against the decision of the Court of Appeal of the Supreme Court of Western Australia".[13] The risk in appealing your case is that you may need to pay the costs of the other parties to the matter as well as your own, which was the outcome for Mr Ammon in this example.

Alternative Dispute Resolution

There are many forms of alternative dispute resolution (ADR) that promote resolution of disagreements and also reduce the number of disputes that end up in courts.

Negotiation

Negotiation involves the disputing parties talking to each other until a resolution is agreed. They may agree to differ, to compromise or to reach consensus. Either way, only the parties to the dispute are involved in direct negotiations (that is, there is no third party).

Negotiation is the cheapest form of ADR and one which is most likely to preserve the relationship between the disputing parties.

Negotiation may continue even though other forms of ADR have been initiated.

Mediation

Since 2010 mediation has been a compulsory precursor to Western Australian civil law trials.

Mediators are trained in dispute resolution techniques. Mediation involves a mediator as a neutral and impartial third party acting between the parties. Mediators assist the parties in finding common ground by helping them clarify their disagreement and reach a settlement. Mediators engage in dialogue with the parties, hear both parties' sides of the dispute and gather information from each party to assist resolution. Students should be able to identify the **principles of natural justice** in the way mediation works.

13 http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/HCASL/2020/54.html

Mediation is useful when the relationship between parties has deteriorated to the extent that they may be unable to settle through negotiation. Family disputes are an example.

Mediation is flexible and non-binding. The power to resolve the dispute remains with the parties.

> *With mediation and conciliation, parties retain the power to resolve their dispute. Arbitration reduces this power by transferring decision making to the arbitrator.*

Conciliation

Conciliation is like mediation. A neutral and impartial third party assists the disputing parties to find an agreement. However, a conciliator is more active than a mediator. Conciliators seek the optimal solution, not just any agreeable solution. Consequently, conciliators make proposals for settlement and attempt to drive the parties towards the best resolution for both. Ultimately, the power to resolve the dispute still rests with the parties.

Conciliation is used in Australia for the settlement of industrial disputes between employers and employees. The Administrative Appeals Tribunal uses conciliation.

Arbitration

Arbitration is more rule based and procedural than mediation or conciliation. It involves strict rules and procedures that both parties must adhere to during the process. An arbitrator is, therefore, a more formal neutral and impartial third party than either a mediator or conciliator. Arbitration may involve a panel of arbitrators rather than an individual mediator/conciliator working informally with the parties.

Arbitration is also more adversarial than either mediation or conciliation. Arbitrators—who often have technical expertise in the area of the dispute—usually sit on a panel in a formal setting resembling a courtroom. The setting, rules and procedures are part of the increased formality.

With mediation and conciliation, parties retain the power to resolve their dispute. Arbitration reduces this power by transferring decision making to the arbitrator. Resolutions will also be more formal. The parties will lose the capacity to devise innovative or creative solutions to their dispute because the arbitrator decides for them.

At any time during arbitration parties may resolve their dispute by negotiation or other means if possible.

Arbitration was commonly used in Australia to resolve industrial and building disputes where conciliation had failed. It is still common today in construction and building disputes where parties argue over technical details.

Criminal Law

Criminal law addresses wrongs deemed so severe that they warrant punishment as determined traditionally by courts through common law and now mainly by parliaments via statutes. This distinction sets criminal wrongs apart from civil wrongs, where harmed individuals seek redress in courts. Crimes such as theft, drug use, assault, murder, fraud, and vandalism threaten societal harmony and public safety. Hence, they are prosecuted by a representative from the government's executive branch, emphasizing their significance to public welfare.

Criminal law evolved out of the common law but has largely been codified into statutory law in each Australian jurisdiction. In Western Australia, many criminal offences are established by the *Criminal Code Act Compilation Act 1913*, aka the *Criminal Code*. Other Western Australian statutes that create criminal offences include the *Misuse of Drugs Act 1981, Road Traffic Act 1974,* the *Graffiti Vandalism Act 2016* and more.

The Commonwealth Parliament has also created the *Criminal Code Act 1995* (Cth). The Commonwealth *Criminal Code Act 1995* (Cth). creates offences related to federal legislative power as defined by the Constitution. For example, crimes related to importing and exporting drugs across our national borders dealt with by federal laws, whereas possession of drugs is generally dealt with by state laws.

Crimes vary in seriousness. Some are minor while others are serious. Generally, the law recognises two broad categories of crime:

1. Summary offences; and
2. Indictable offences.

Summary offences

Summary offences, commonly termed "simple offences", are considered minor and determined in the Magistrates Court. Unlike more severe crimes, these offences do not involve a jury trial; rather, a Magistrate directly determines the

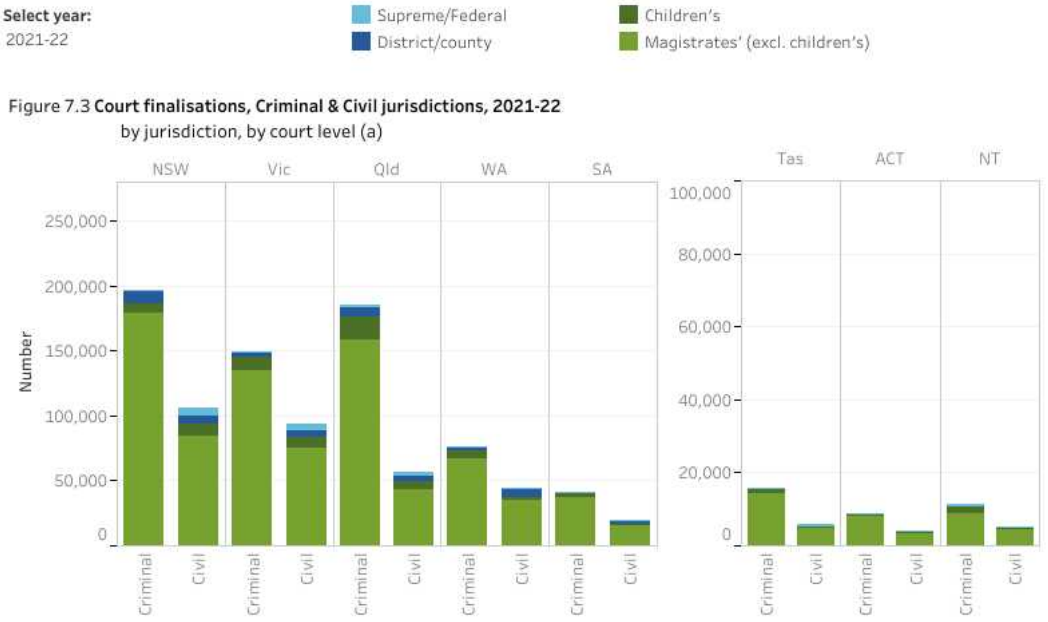


Figure 7.3 **Court finalisations, Criminal & Civil jurisdictions, 2021-22** by jurisdiction, by court level (a)

Figure 7.8 — Court finalisations, Criminal & Civil Jurisdictions, 2021-22. (Figure 7.3 in the diagram taken from the original source page 57.)

accused's innocence or guilt. Police Prosecutors are typically responsible for prosecuting these offences.

Due to their straightforward nature, summary trials tend to be shorter. Magistrates often make a ruling '*ex tempore*', which means they decide on the matter immediately without retiring for deliberation.

Statutes clearly designate which crimes qualify as summary offences. Examples include:

- Assault
- Theft (when the stolen goods' total value is under $50,000)
- Disorderly conduct
- Traffic infractions

Some offences are 'either way' offences meaning that they can be prosecuted summarily or on indictment. For example, the offence 'assault occasioning bodily harm' under s 317 of the *Criminal Code* is an either way offence. The maximum penalty if the offence proceeds in the Magistrates court is 2 years imprisonment but is 5 years imprisonment if determined on indictment. Either way offences are dealt with summarily unless the prosecution applies to have it dealt with in a higher court and the court determines that the alleged offending is too serious to be dealt with in the Magistrates Court.

The vast majority of criminal offending in Western Australia is dealt with summarily (see Figure 7.8)

Indictable offences

Indictable offences are more serious and are dealt with by the District and Supreme Courts. The document that formally charges the accused is called an **indictment.** Indictable matters are prosecuted by the Director of Public Prosecutions. A **jury** is usually involved to decide if the accused is guilty. The judge ensures a fair trial by enforcing proper procedure and the rules of evidence. If the accused is found guilty of any offending by the jury, the judge will determine the sentence.

Rights of the accused

The prosecution bears the burden of proof of the elements of the offence beyond reasonable doubt. The defendant has no obligation to prove anything. Beyond this fundamental principle, several other protections are accorded to the accused.

Right to silence

The right to silence is a fundamental principle of the Common Law. This principle upholds an individual's right to abstain from self-incrimination.

Given that admissions stand as exceptions to the hearsay rule, it's crucial for a suspect to be "cautioned" against making incriminating statements. In Western Australia, the police must give a caution, typically phrased as: "You are not obliged to say anything unless you wish to do so, but whatever you do say will be recorded and may later be given in evidence." A failure to give this caution can render the suspect's subsequent statements to the police inadmissible in court.

This right also protects the accused from being forced to testify in their criminal trial. In the adversarial system, each side presents their case independently. Asking the accused to present

Figure 7.9 — Sir William Garrow coined the phrase "presumed innocent until proven guilty".

evidence against themselves would be akin to asking the defence to aid the prosecution.

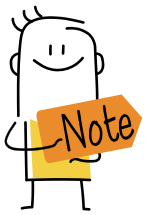
Students may come across terms like "Miranda rights" or "pleading the fifth" from TV shows or movies. These are rooted in the U.S. legal system. The 5th Amendment to U.S. Constitution is part of the Bill of Rights. It protects individuals against self-incrimination. The landmark U.S. Supreme Court case, *Miranda v. Arizona* (1966), held that the 5th Amendment necessitates police to caution suspects before interrogation, hence the term "Miranda rights".

Presumption of innocence

Defendants are entitled to a **presumption of innocence**. The accuser must prove the accusation. If the accuser fails to achieve the standard of proof required—on the balance of probabilities or beyond reasonable doubt—then the defendant has not been proven liable or guilty and is, thus, presumed innocent. In an important distinction—if the defendant is found 'not guilty' or 'not liable' they are not proven innocent.

The presumption of innocence is instrumental in shielding a defendant from becoming ensnared in 'guilt by mere accusation'. Together with the right to silence, this presumption is pivotal in safeguarding individuals against baseless allegations. Both rights form the bedrock of the adversarial legal system, distinguishing it from the **inquisitorial** system, where such protections are not as robustly present. The inquisitorial system is covered in chapter 11 of this book.

Figure 7.10 — HM Prison Pentridge, where Dietrich was taken following arrest.



Some argue that the right to silence and the presumption of innocence make it too hard to prosecute 'criminals'. However, students should remember the consequences of a criminal conviction, which is the denial of rights for a convicted person, sometimes for their entire life. Sir William Blackstone's 1765 observation, "It is better that ten guilty persons escape, than that one innocent suffer",[14] sums up the view that before society strips a citizen of his or her rights, they must be proven guilty to the very highest standard.

Right to Legal Representation and the Right to a Fair Trial Dietrich v the Queen (1992)

Olaf Dietrich flew from Bangkok to Melbourne on 17 December 1986. The next morning police raided his house and found a condom filled with heroin. Whilst he was in police custody, he 'passed' several other condoms filled with heroin. Police charged him with importing a total of 70g of heroin into Australia from Thailand. Dietrich firmly denied the charges, asserting the police had planted the drugs on him.

Dietrich was not represented at trial. He applied for a Legal Aid lawyer, but they would not represent him unless he pleaded guilty. Legal Aid considered that it was not a good use of their limited funding to fight such a strong prosecution case. Upon conviction, Dietrich contested his verdict, arguing for his right to legal representation, eventually taking his appeal to the High Court.

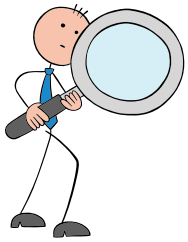
The High Court allowed his appeal, overturned the conviction and ordered a re-trial. Although the court held that the common law of Australia does not contain a right to free legal representation at the state's expense, it does guarantee the right to a fair trial. Where an accused is charged with a serious offence and they, through no fault of their own, are unrepresented, the courts should grant a stay (a pause) on the trial until legal representation is available.

Although there is no common law right to free legal representation, the practical effect of the High Court's decision has forced government to provide Legal Aid funding to people accused of indictable offences when they cannot afford representation. Funding needs to be provided if the state wishes to prosecute such matters.

14 Harvard Law School Library, 'Sir William Blackstone', Words of justice, <http://library.law.harvard.edu/justicequotes/explore-the-room/south-4/>.

Criminal Procedure

The *Criminal Procedure Act 2004* (WA) provides the legal framework for all criminal proceedings. This is supplemented by **regulations** and practice directions made by the courts.



Looking Ahead: Accountability of the courts is covered in Unit 4.

Parliament can act as an external accountability mechanism by passing legislation that limits judicial discretion. Mandatory sentencing acts as an accountability mechanism in that these laws hold the courts to account by Parliament for not sentencing criminals according to community expectations. However, the courts may engage in statutory interpretation where appropriate, identifying gaps in legislation and applying common law principles. Over time, they may develop common law on a case-by-case basis. However, the Commonwealth Parliament can codify or abrogate these decisions due to parliamentary sovereignty. In this way, the Legislature and the Judiciary act as a check and balance to each other, holding each branch to account by legislation to shape judicial procedures and the interpretation of legislation by the courts.

Pre-Trial Criminal Procedure

Police Investigation

An investigation begins once an alleged offence is brought to the police's attention. Each matter will be assigned to an "Investigating Officer" to oversee the investigation. The *Criminal Investigation Act 2006* (WA) and other pieces of legislation grant and limit the powers police have to investigate offences. These powers include:

- arresting and detaining people
- obtaining information such as fingerprints and photographs
- carrying out searches
- seizing items
- obtaining breath samples, blood test, urine tests et cetera for traffic matters

A warrant is a written order from a Justice of the Peace, Magistrate or Judge. Some investigative powers require the police to seek a warrant. The decision maker must be satisfied of the justification for the police's encroachments on people's rights. For example, police wanting to obtain a search warrant must justify the invasion of a person's privacy. Warrants are also required for other investigative powers such as the tapping of phone conversations, planting surveillance devices or seizing items.

Figure 7.11 — An investigation begins once an alleged offence is brought to the police's attention.

If the police belief is that there is sufficient evidence for a '*prima facie*' (on the face of it) case, they can apply for a warrant for the arrest of a suspect. Police also have powers to arrest someone without a warrant in various situations. These include:

if the officer reasonably suspects that the person has committed or are committing an offence where imprisonment is a possible penalty.

- if the person is doing, or the officer reasonably suspects they are about to do, something violent or cause fear of violence;
- to prevent a 'breach of the peace';
- if the officer reasonably suspects the person has breached a Family Violence Restraining Order or similar order; and
- if the officer reasonably suspect the person has committed, are committing, or are about to commit any offence and that person is likely to:
  - continue committing the offence;
  - commit another offence;
  - endanger someone's safety;
  - interfere with witnesses, evidence, or the investigation; and
  - there is no other lawful way to identify that person.

Police have various obligations under the *Criminal Investigation Act 2006* when they arrest a person. This includes informing the arrested person of their right to medical treatment, opportunity to tell a friend or relative where they are, or an interpreter. If they are arrested as a suspect the police must also inform

the accused of their right to know what they are arrested for, their right to speak to a lawyer and be cautioned about their right to silence.

Police may interview a suspect. Under the *Criminal Investigation Act 2006*, these interviews must be recorded in an audio and visual format if they are to be admitted into evidence in a future trial. Because of this, interviews are generally conducted in purpose built interview rooms at police stations. The interview should begin with the suspect being cautioned about their right to remain silent and informed of their right to legal representation and an interpreter if needed. Once an interview is completed, the suspect must be provided with a copy of the recording.

Charges are filed by the Investigating Officer once they believe the police have sufficient evidence to prove the alleged offending. Whether the matter proceeds summarily or on indictment will depend on what the police charge the accused with.

Bail and Remand

If a suspect has been arrested and interviewed but the police decide not the charged them, then they must be released.

If the accused is charged with a summary offence the police may release them and provide them with a Court Hearing Notice or Summons (see *Summary Offences*).

If the accused is charged with a more serious offence they may be released on bail. Bail is a written promise (a bail undertaking) to attend court on a fixed date. Failure to attend will result in a warrant being issued for the accused's arrest.

Some senior police officers have the power to release an accused on a bail undertaking. If the police refuse to grant bail, then the accused must be taken to the relevant judicial officer as soon as practicable so that a court can determine whether or not to release the accused on bail. If bail is refused, then the accused will be remanded in custody until the next court date.

Under the *Bail Act 1982* (WA), a court must consider a range of factors when deciding whether or not to grant bail, including:

- The risk that the accused might, if not remanded in custody:
  - fail to appear at the next court date;
  - leave the jurisdiction;
  - commit an offence;
  - endanger the safety of any person; or
  - interfere with witnesses.
- Whether the imposition of any bail restrictions would reduce these risks;
- Whether there have been any breaches of bail in the past;
- The nature and seriousness of the alleged offending; and
- The strength of the prosecution case against the accused.

There is a general presumption in favour of granting bail in most circumstance. This reflects the principle that the accused should be treated as innocent until proven guilty and not have their freedom restricted. However, the risks listed above might necessitate the imposition of bail conditions such as requiring the accused to reside at a fixed address, to abide by a curfew, report regularly to a police station, to refrain from associating with certain people or surrender passports.

One condition of bail might be the requirement to pay a cash **bond**. This is an amount of money that the accused must pay to the court which will be returned if they abide by their bail conditions. Alternatively, another person may act as **surety** and undertake to pay the court a certain amount if the accused fails to appear. Sometimes a person's car or even house may be offered as surety.

Unfortunately, there are occasions when bail is granted but an accused remains in remand because they are unable to pay the bail or find someone willing to act as surety. Other times a judge may be willing to grant bail, but the accused has no fixed address to be bailed to. This may be because the accused cannot afford rent or lacks a support network of friends and family willing to take them in. Such scenarios highlight how socioeconomic disparities can potentially compromise the principle of equality before the law.

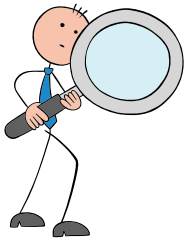
Certain situations create a presumption against the provision of bail. Schedule II of the *Bail Act 1982* (WA) list offences that are deemed 'serious offences' for the purposes of a bail application. Schedule II offences cover a wide range of offending from murder (*Criminal Code* s 279), assault occasioning bodily harm (*Criminal Code* s 317) and selling or supplying a prohibited drug (*Misuse of Drugs Act* s 6(1)). If an accused is alleged to have committed a serious offence while on bail for another serious offence, then the court must refuse bail unless satisfied of "exceptional circumstances" in favour of being released on bail. This **reverses the burden of proof** and arguably undermines the principle

that the accused should be treated as innocent until proven guilty. This is an example in which the parliament has listened to the concerns of the public and used its legislative powers to erode long-standing common law protections, all in the pursuit of ensuring broader community safety.

Background information: Habeas corpus

A writ is a formally written order issued by a court. Warrants, subpoenas and witness summons are all types of writ. Habeas corpus ('you have the body' or 'show me the body') is a common law writ with medieval roots. The order requires a person who is being held in custody to be brought before a court, allowing the judicial system to determine the legality of the detainment. The writ acts as a protection against arbitrary or illegal imprisonment such as being held without charge.

This medieval writ continues as part of the common law and is reflected in modern statutes on bail. It has also been imbedded into international **human rights** law. Article 9 of the International Covenant on Civil and Political Rights states that "anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise **judicial power** and shall be entitled to trial within a reasonable time or to release".[15]



Looking ahead: Human Rights Law

Students will learn more about Human Rights law in Unit 4.

Pre-Trial Hearings Summary Offences

A summary matter is started by the filing of a Prosecution Notice under the *Criminal Procedure Act 2004* at a Magistrates' Court. The Prosecution Notice sets out the alleged charges and must be provided to the accused.

Court Hearing Notices are for minor matters where attendance is optional. An accused may choose to endorse the notice with a plea of guilty. If this is done, the matter will be dealt with in their absence and the offender will be informed of the outcome, such as requiring a fine to be paid. If the accused chooses to endorse the notice with a plea of not guilty, the court will list the matter for trial. If the accused fails to attend, the matter may be dealt with in their absence.

Some summary matters may begin with a **summons** being sent to the accused. The summons is a written order requiring attendance. If the accused fails to attend, a warrant may be issued for their arrest to ensure they are brought to the Court.

CRIMINAL PROCEDURE (SUMMARY OFFENCES)		
PRE-TRIAL		**Purpose and Explanation**
A **minor** offence is committed		Minor offences are called 'simple' offences and are dealt with **summarily**.
No arrest	**Arrest**	Police may not arrest the alleged offender OR police may arrest the offender if needed (for example, intoxication, threatening behaviour, disorderly conduct, or other such minor offences)..
	Magistrates Court	An arrested alleged offender is brought before a magistrate. They are either released or held in custody on remand.
Criminal summons issued by police	**Criminal summons** issued by a magistrate	A summons (issued by police if no arrest or by a magistrate if there is an arrest) requires the alleged offender to come to the Magistrates Court on a date set for a hearing.
Not guilty	**Guilty**	Guilty plea means there is no dispute — police allege the defendant committed the offence and the defendant agrees. Not guilty plea means the police allege the defendant committed the offence, but the defendant does not admit guilt — there is a dispute.

Table 7.3 — Criminal pre-trial for simple offences.

15 United Nations Human Rights Office of the Commissioner, 'International Covenant on Civil and Political Rights', *Article 9*, United Nations website, 1996-2024, https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-civil-and-political-rights, accessed 10 May 2024

Pre-trial Hearings for Indictable Offences

The pre-trial stages for indictable offences are more complicated than those in summary matters. All indictable matters, regardless of whether they will end up in the District or Supreme Court, start in the Magistrates Court. The pre-trial hearings seek to ensure that the police's investigation has been reviewed by the Director of Public Prosecutions (DPP) and that the accused understands the charges and the prosecution's evidence.

CRIMINAL PROCEDURE (INDICTABLE OFFENCES)		
PRE-TRIAL		**Purpose and Explanation**
A serious offence is committed		
Arrest	**Police investigation** (may include warrants)	Police may arrest the alleged offender (suspect) if the crime is observed or discovered immediately, OR a police investigation may be conducted before the arrest of a suspect(s) if the offence is not discovered until later. Warrants may be sought from the judiciary to investigate a suspect (phone taps, seizing property, or other forms of evidence gathering).
	Arrest (police investigation may continue after arrest)	The alleged offender is **charged**. An arrested person, the alleged offender, is detained in custody awaiting a hearing in the Magistrates Court.
First Hearing in Magistrates Court		The suspect is brought before a magistrate who sets out a timeline for the case. The case is filed for hearing at a later date. Alleged offender (now 'the defendant') may plead guilty at this stage. If so, the accused will be committed to either the District or Supreme Court for sentencing. The suspect may be released on **bail** or held on **remand**.
Police Committal Hearing		The Magistrate will confirm that WA Police Force have provided all of the evidence they have in relation to a charge; this is called disclosure. The matter will then be transferred to the Perth Magistrates Court for a Disclosure/Committal Hearing.The police investigation may continue.
Defendant receives the **hand-up brief** from DPP		The hand-up brief contains prosecution evidence against the defendant to inform the defendant about the evidence that is against them.
Disclosure/Committal Hearing		A hearing in a Magistrates Court. The purpose of this hearing is to ensure the Prosecution has disclosed all of the evidence to the defence and have settled on the charges that will proceed on indictment. If necessary, **amendments** to the original police charges can be made. Defendant enters a plea to the charges and is committed either for sentence or...
Plea		If the defendant did not enter a plea at the first hearing they will do so at the committal mention.
Not guilty	**Guilty**	A guilty plea means there is no dispute—DPP alleges the defendant committed the offence and the defendant agrees. All that remains is sentencing. Not guilty plea means the DPP alleges the defendant committed the offence, but the defendant does not admit guilt—there is a dispute to resolve by trial.
Bail or **Remand**	Proceed to post-trial sentencing	Bail is granted to defendants if they are not a danger to the community or not at risk of flight. Bail requires an assurance, usually money, that the defendant will appear for trial. Remand means defendants are held in custody until trial. Defendants who are dangerous or at risk of flight are remanded in custody.

Table 7.4 — Criminal pre-trial for indictable offences

First Hearing and Police Committal Hearing

The prosecution of an indictable offence starts with the police filing a Prosecution Notice in the Magistrates Court. This generally occurs in the Magistrates Court closest to where the offending occurred or where the accused lives. The police prosecutors are in control of the legal proceedings at this stage. At the first hearing, the accused will be provided with:

- A copy of the prosecution notice;
- A statement of material facts;
- Any confessional statements (such as admissions made during an interview); and
- The accused's criminal record if they have one.

This is the earliest opportunity for the accused to plead guilty to the offending. If the accused pleads guilty, the matter will proceed through the fast-track system and be committed to the District or Supreme Court where the matter is taken over by the DPP. Otherwise, the matter will be adjourned for a Police Committal Hearing.

The adjournment provides the police with time to gather all the evidence into what is called the 'hand up brief' which will be served on the accused and the DPP. The brief is a summary of the evidence the police have gathered, such as witness statements, photographs, CCTV footage et cetera. At the Police Committal Hearing, if a magistrate is satisfied that all materials have been served, the matter will be adjourned to the Perth Magistrates' Court for a disclosure/committal hearing. The matter can then proceed to the District Court. If the matter involves an offence that must be heard in the Supreme Court, such as murder or manslaughter, it will be adjourned to the Stirling Garden's Magistrates Court for the disclosure/committal hearing. The Stirling Gardens Magistrates Court deals exclusively with pre-trial proceedings for Supreme Court indictable matters.

■ Figure 7.12 — The Stirling Gardens Magistrates Court deals exclusively with pre-trial proceedings for Supreme Court indictable matters.

Background Information: The Office of the Director of Public Prosecutions

The Office of the Director of Public Prosecutions (DPP) is an independent **statutory authority** created by the *Director of Public Prosecutions Act 1991* (WA). The DPP is headed by the Director of Public Prosecutions and staffed by lawyers known as State Prosecutors. The DPP conducts criminal prosecutions in the District and Supreme Courts. The DPP does not investigate crime, this is done by the WA Police Force. The DPP reviews the evidence obtained by the police and determines whether charges should be proceeded with on indictment. Its acts independently of the WA Government in its decision making on criminal matters.

According to the DPP Statement of Prosecution Policy and Guidelines, State Prosecutors are not entitled to act as if they represent private interests. They are not the lawyers of the police or of the victims. They don't have 'clients' in the traditional sense but should act independently in the interest of the public. The duty of prosecuting counsel is to administer justice fairly, not obtain a conviction at all costs. They are, however, expected to firmly present the prosecution case and where necessary, challenge the case put on behalf of the accused.[16]

Disclosure/Committal Hearing

The DPP takes over the prosecution of the matter at the Disclosure/Committal Hearing. The purpose of the hearing is to ensure that the DPP is satisfied with the charges and to confirm that all material has been disclosed to the defence.

Once the Office of the Director of Public Prosecutions has received the Hand Up Brief from the police, the matter is assigned to a State Prosecutor. The State Prosecutor assesses the brief and determines the adequacies of the charges and if any additional evidence if required. The Investigating Officer works with the State Prosecutor to collect additional evidence as needed. The prosecution has a **continuing obligation of disclosure**, that is, any new information the police obtain must be provided to the defence.

The State Prosecutor should only allow the matter to proceed if they are satisfied that there

16 https://www.wa.gov.au/system/files/2022-07/DPP_Statement_of_Prosecution_Policy_and_Guidelines_2022.pdf

is a ***prima facie* case.** That is, if the available material appears on its face or initial assessment to prove the offence which has been charged. If there the State Prosecutor is not satisfied of this, they will work with the Investigating Officer to gather the evidence needed or discontinue the prosecution of the charge.

The State Prosecutor must also be satisfied that **prosecution is in the public interest**. One consideration of this factor is whether there is a **reasonable prospect of conviction**. In evaluating the prospects of conviction, the State Prosecutor should have regard to factors such as the admissibility of evidence, the reliability of witnesses, reasonable inference that are consistent with innocence and the onus and standard of proof required for conviction. If there is not a reasonable prospect of conviction and this cannot be resolved with further investigation, then the matter should be discontinued.

Other factors that might be considered when deciding if prosecution is in the public interest include:

- The need to maintain the rule of law;
- The age, health or vulnerability of the victim or a witness;
- The availability of any alternatives to prosecution; and
- The attitude of the victim of an alleged offence.

At the Disclosure/Committal Hearing the Prosecution may seek to amend the charges having reviewed the evidence. It is not uncommon for the Disclosure/Committal Hearing to be adjourned to allow the prosecution to obtain the results of forensic testing or to allow the defence to engaged in negotiations to resolve the matter to a plea of guilty.

Once the Magistrate is satisfied that the Prosecution have fulfilled their disclosure obligations the accused will be asked to plead to the charges. Depending on the plea, the matter will be committed to the relevant court for sentence or a trial listing hearing. Generally, slightly over half of the matters committed to the District Court have resolved to a plea of guilty. In 2020, the District Court had 1,357 matters committed to it for trial and 1,443 for sentence.[17]

Trial Listing Hearing

The Trial Listing Hearing is an administrative hearing that allows for case management by the court. The prosecution will file the Indictment, - the formal document setting out the charges at this hearing. The court will be told about information necessary to list the matter for trial, such as the number and availability of witnesses, the need for a *voir dire*[18] to determine the admissibility of certain pieces of evidence and estimated trial length. The Trial Listing Hearing may be also adjourned for further plea negotiations. If the matter does not resolve, the court will list the matter for Trial.

Comparing civil and criminal trials

The criminal trial procedure is similar to the civil trial procedure and is constructed around the principles of a fair trial and natural justice. Each party has equal opportunities to present their case. The defendant knows the evidence against them.

A significant difference between a civil and criminal trial is the standard of proof borne by the prosecution. 'Beyond reasonable doubt' is a significantly higher standard than 'on the balance of probabilities', making it harder to prove guilt in criminal proceedings. As already outlined, the reason for this is that a criminal conviction may mean the suspension or loss of rights for a convicted defendant.

Another difference is the use of juries in indictable matters. Jury trials provide a safeguard against the arbitrary or oppressive enforcement of criminal justice by those in authority. Juries ensure community representation informs the balancing of evidence and allows community perspective to be incorporated into the judging of those accused. There are, however, some circumstances in which an accused may be tried by judge alone (see *DPP v Edwards – A Judge Alone Trial*).

In jury trial, the decision-making power is divided between the judge and jury. The judge holds the legal decision-making power. The judge determines questions such as the admissibility of evidence and ensure that proper procedure is followed. At the end of the closing addresses, the judge must 'charge' the jury by outlining the key pieces of evidence presented, explaining the elements of the offences and legal questions they must answer. The jury is the decider of facts. The jury must determine whether the accused is guilty or not guilty.

17 https://www.districtcourt.wa.gov.au/_files/District_Court_Annual_Review_2020.pdf

18 'voir dire' – a pre-trial hearing

CRIMINAL TRIAL PROCEDURE (INDICTABLE OFFENCES)		
TRIAL		**Purpose and Explanation**
Arraignment and Jury Empanelment		The accused is formally read the charge(s) on the indictment and pleads guilty or not guilty. The jury is selected from the jury pool.
Opening Addresses	**Prosecution opening address**	Prosecution outlines the case, explaining the alleged crime, the evidence to be presented and the law they argue supports their case.
	Defence opening address	Defence outlines the case explaining the alleged crime, the evidence to be presented and the law they argue supports their case.
Examination of Prosecution Witnesses	**Examination-in-chief**	Prosecution calls each of their witnesses to the stand. Witnesses take an oath. Prosecution asks questions. Witnesses answer orally. Evidence should conform to the rules of evidence.
	Cross-examination	Defence tests prosecution witnesses' evidence by asking questions attempting to highlight weaknesses, contradictions, reliability or other aspects that draw witness evidence into doubt. The aim is to create 'reasonable doubt', which is required to defeat the prosecution case.
	Re-examination (optional)	The prosecution may ask further questions if cross-examination has undermined witness evidence.
Close of Prosecution Case		After the prosecution has called its last witness, it will close its case. If defence considers that the prosecution has failed to provide evidence of guilt it may submit to the court that there is 'no case to answer' and ask for the charges to be dismissed. Alternatively, defence may seek to call their own witnesses.
Examination of Defence Witnesses	**Examination-in-chief**	The defence *may* call witnesses to the stand. Witnesses take an oath. Defence asks questions. Witnesses answer orally. Evidence should conform to the rules of evidence. The aim is to create 'reasonable doubt'.
	Cross-examination	Prosecution tests defence witnesses' evidence by asking questions attempting to highlight weaknesses, contradictions, reliability or other aspects that draw witness evidence into doubt.
	Re-examination (optional)	The defence may ask further questions if cross-examination has undermined witness evidence.
Closing Addresses	**Prosecution closing address**	Prosecution sums up their case and the evidence presented. They will argue they have proven their case beyond reasonable doubt and that the defendant should be found guilty.
	Defendant closing address	Defence sums up their case and the evidence presented. They will argue there is reasonable doubt and that the defendant should be found not guilty.
Judge	**Charging the jury and verdict**	The judge addresses the jury, summarising the evidence and instructing them on what they must consider in reaching their verdict. The judge reminds the jury of the standard of proof—beyond reasonable doubt—and of the evidence that may have been ruled inadmissible and which must not be considered. The jury will return with its verdict. If 'guilty' the jury must be unanimous or, if the judge allows, a majority verdict of 10–2 or greater.

Table 7.4 — Criminal Trial Procedure (Indictable Offences)

Juries

Arraignment and Jury Empanelment

Potential jurors are selected from the electoral roll. A person selected for jury duty will receive a Summons to Juror requiring their attendance at a court. In Perth, around 200-350 people attend the Perth District each week for jury duty. Each juror is given a card with a number that is used to identify them during the empanelment process.

If a trial needs a jury, a group of around 30-50 will be selected to form a 'jury pool' and taken to a public gallery in the courtroom. The accused will then be **arraigned** before the jury pool. Arraignment is the formal reading of the criminal charge(s) on the indictment. The accused will stand in the 'dock' in the courtroom where they will remain throughout the trial. The charges on the indictment will be read out by the judge's associate and the accused will respond either guilty or not guilty to each charge.

Following this, the judge provides an overview of the allegations, introducing every person playing a role in the trial, from witnesses to the defence and prosecution legal teams. Potential jurors with prior knowledge of the case, or personal connections to those involved, are expected to excuse themselves from the trial. A juror may also seek to excuse themselves if the nature of the trial would cause them significant discomfort. This is done to ensure that the

Figure 7.13 — Either the prosecution or defence can object or "challenge" a juror before they take their seat in the jury box.

empanelled jurors can make an impartial decision at the end of the trial based solely on the evidence presented to them.

All the jurors' cards are placed in a container and randomly drawn one by one. As each number is called, the juror steps forward and moves to the jury box. However, either the prosecution or defence can object or "challenge" a juror before they take their seat in the jury box. This continues until the required number of jurors (typically 12-18) is filled. Even though only 12 jurors will finalise the verdict, extra jurors can be added for prolonged trials to account for unforeseen circumstances that might reduce their number.

Once all the jurors are selected, they are required to take an oath or non-religious affirmation to give a true verdict according to the evidence and issues to be tried before them. The jurors will be asked to retire to a jury deliberation room to pick who among them will act as the 'foreperson'. The foreperson's role is to speak on behalf of the jury when necessary.

After the jury has been empanelled the trial can begin with the opening addresses.

Background information: Jury Eligibility

The British Judge, Lord Atkins once described trial by jury as "the bulwark of liberty, the shield of the poor from the oppression of the rich and powerful".[19] However, who has been allowed to sit on a jury has changed significantly over the course of Australian history.

In Western Australia, the 1898 Juries Act stated that only men between the ages of 21-60 who satisfied various property requirement could serve on juries.[20] Sexist ideas about women excluded them from juries well into the 20th century. In 1924, during a Legislative Assembly debate on jury laws, the Member for Roeburne stated "To my mind women are far too illogical to sit on a jury. They are apt to judge rather by intuition than by reasoning out the evidence placed before them. I doubt whether they are quite competent to carefully reason out the pros and cons put before them. Numbers of women judge a man by his face".[21]

It was not until the passing of the *Juries Act 1957* that women were finally allowed on juries. However, under these laws, women were given an absolute right to be excused. Societal norms meant that very few women ended up serving on a jury because of pressure to remain at home and perform the role of housekeeper.

Aboriginal people were originally excluded serving on juries because they were denied the right to vote and were therefore not on the electoral roll from which jurors are chosen. Even after they obtained the right to vote in 1962, low enrolment rates impacted the chances of Aboriginal people sitting on juries. In 2017, WA's Aboriginal enrolment rate was just 62.8%. This has lifted to 86.9% as of August 2023.[22]

In 2010, the Law Reform Commission of Western Australia (the Commission) issued a report entitled *Selection, eligibility and exemption of jurors.* In this report the Commission proposed 68 recommendations to improve the jury system and led to passing of the *Juries Legislation and Amendment Act 2011* (WA).

One aim of the amendments was to increase participation by restricting the ability of potential jurors to avoid jury duty. At the time of the review, the Commission reported that, in Perth alone, the incident rate of pre-attendance excuse was at approximately 50 per cent, and failure to attend was at 14 per cent.

Before the 2011 amendment, the following people could be excused by right:

- Emergency services;
- Health Practitioners;
- Priests;
- Pregnant women; and
- Full-time carer of children/elderly/infirm.

The 2011 amendment removed the right to be excused from the above listed people. Now,

19 https://www.fedcourt.gov.au/__data/assets/rtf_file/0019/21466/Rares-J-20100325.rtf

20 http://classic.austlii.edu.au/au/journals/MurUEJL/2004/32.html

21 Ibid.

22 https://www.aec.gov.au/media/2023/08-03.htm#:~:text=In%20WA%2C%20the%20estimated%20Indigenous%20enrolment%20rate%20is%2086.9%25.

only the following people are ineligible from serving on juries:

- Vice-Regal and parliamentary officers;
- Judicial and court officers;
- Australian legal practitioners;
- Certain public officers, including those appointed under the Corruption, Crime and Misconduct Act 2003 (WA); and
- Police officers in criminal trials.

In additional to removing the right to be excused, the 2011 Amendment introduced the ability of jurors to defer their jury service for up to six months. A judge or summoning officer can allow a person to defer jury duty due to work commitments, a special engagement, mental impairment, physical disability, personal circumstances, or health issues. This increased the representative nature of the juries by enabling the participation of a broader range of people who, in the past, would simply have been excused.

The 2011 amendments also increased the fines for non-attendance of a jury summons from $200 to $800. Employers who prohibit an employee from attending jury can face a penalty of up $10,000 for an individual or $50,000 for a company.

In Western Australia, employees are entitled to continue to be paid by their employer when absent from work for jury duty. Employers and self-employed people can apply for reimbursement of lost income from the WA government.

Jury Challenges

The right to challenge potential juror before they are selected is an important protection for the right to be tried impartially. Peremptory challenges, or challenges without cause, do not require any explanation as to why the defence is challenging that juror.

During the empanelment process the defence and prosecution are provided with a table of the jury pool's card numbers. The table also lists each juror's name and occupation. This information, along with any observations in court, is used in deciding whether to challenge a juror. For example, an accused facing a charge of assaulting a nurse may seek to challenge the empanelment of other nurses out of a concern that they will be biased against them. Alternatively, the accused may be concerned by an unfriendly look or overheard comment made by the juror during the empanelment process.

Given that peremptory challenges need not be explained, there is a risk that they will be abused to unfairly stack a jury in one party's favour. For example, a man accused of assaulting a woman may seek to challenge any women from being on the jury. Traditionally, the common law gave an accused 35 peremptory challenges, and the Crown had an unlimited right to 'stand aside' potential jurors. The *Juries Legislation and Amendment Act 2011* (WA) reduced the number of challenges without cause from 5 to 3 for each party and thereby limiting the risk of jury stacking. The parties still have a right to an unlimited number of challenges with cause if they have serious concerns about a potential juror.

Defences

The accused may present a **defence** to a crime they have been charged with in court. A defence is an excuse or reason for why the act occurred. Typically, the accused is arguing that their act was lawful, or they could not be held legally responsible for their act at the time they committed it. Once a defence is raised by the defendant the parties must address this as part of their arguments.

Generally, if the accused wishes to raise a defence, they must satisfy the evidential onus of proof for any defence on the balance of probabilities. If defence have satisfied the evidential onus, the prosecution then bears the onus of negating the defence beyond reasonable doubt.

Defences, if proven, can be an absolute defence—an excuse—or a partial defence—a reason—for the commission of a crime. That is, a successful defence could result in the accused receiving no sanction or a less severe sanction.

There are different defences available, including:

- self-defence;
- unsoundness of mind;
- provocation; and
- accident.

Legislation, such as the *Criminal Code Compilation Act 1913* (WA) sets out defences that may be used in their jurisdiction. These Acts also set out what cannot be used by an accused to try and expunge an unlawful act. One such example is 'ignorance of the law'.

Section 248. Self-defence

1) In this section —

harmful act means an act that is an element of an offence under this Part other than Chapter XXXV.

(2) A harmful act done by a person is lawful if the act is done in self-defence under subsection (4).

(3) If —

(a) a person unlawfully kills another person in circumstances which, but for this section, would constitute murder; and

(b) the person's act that causes the other person's death would be an act done in self-defence under subsection (4) but for the fact that the act is not a reasonable response by the person in the circumstances as the person believes them to be, the person is guilty of manslaughter and not murder.

(4) A person's harmful act is done in self-defence if —

(a) the person believes the act is necessary to defend the person or another person from a harmful act, including a harmful act that is not imminent; and

(b) the person's harmful act is a reasonable response by the person in the circumstances as the person believes them to be; and

(c) there are reasonable grounds for those beliefs.

(5) A person's harmful act is not done in self-defence if it is done to defend the person or another person from a harmful act that is lawful.

(6) For the purposes of subsection (5), a harmful act is not lawful merely because the person doing it is not criminally responsible for it.

■ Figure 7.14 — Section 248 of the *Criminal Code Compilation Act 1913* (WA) outlines what constitutes self-defence.

As can be seen in Figure 7.14, depending on the circumstances upon which an act has occurred, it is possible for self-defence to be lawful—and an absolute defence to an act that would otherwise be a crime. In other circumstances the act remains unlawful. However, a defendant may be convicted of a lesser offence and subsequently receive a lesser sanction—a partial defence to the unlawful act.

Jury Charge

After the prosecution and defence have delivered their closing addresses, the judge provides directions to the jury. This usually involves a summary of the evidence presented in the case. The judge must be careful not prove their own conclusions about the significance or weight of the evidence as this is a matter for the jury. The judge will also summarise the legal tests that the jury must consider when deciding the outcome of each charge. As part of this, the judge will remind the jury about the standard of proof needed to convict the accused, that is, they must be satisfied beyond reasonable doubt.

The jury charge is an integral part of the trial. It ensures that the jury applies the law to the facts as they find them based on the evidence presented. As juries do not provide reasons for their decisions, the judge's instructions are closely monitored by both parties, and any errors might lead to an appeal in the future.

Jury Verdict

After judge's directions, the jurors will retire to the jury room for deliberations. If there more than 12 jurors were empanelled at the beginning of the trial, a random ballot will be used to reduce their number down to 12.

The common law has traditionally required a unanimous decision of the jury to return a verdict of either guilty or not guilty. A jury that cannot come to a unanimous agreement is called a 'hung jury'. After a hung jury, the prosecution will need to re-assess whether it should seek a re-trial or discontinue the prosecution of the matter.

Section 114 of the *Criminal Procedure Act 2004* (WA) allows for **majority verdicts**. If the jury has been deliberating for more than 3 hours, the judge may direct them to return a verdict if at least 10 out of 12 jurors are in agreeance. Majority verdicts were created by parliament to ensure that justice can prevail if one or two

jurors are being unreasonable and thus save the public the expense of running a re-trial after a hung jury. Of course, majority verdicts can also be seen as an erosion of the protection provided to the accused by jury trials. Indeed, in recognition of this, majority verdicts are not available for murder charges. Commonwealth indictable offences also require a unanimous verdict.

Jury Misconduct

Juries are supposed to act as a protection against arbitrary or oppressive enforcement of criminal justice by those in authority. However, sometimes juror misconduct can result in a miscarriage of justice.

During the empanelment process the judge will warn the jury that they are not to conduct any of their own research into the case or related matters. They are also restricted from discussing the case with others. All conversations about the case should be done in the presence of all members of the jury.

In Australia, there are legal restrictions that prevent jurors being asked about what is discussed during deliberations. Accordingly, we do not know the extent to which jurors are following the directions provided by the judge or applying the law correctly. Overseas research has raised some concerns. For example, in a 2010 study UK Ministry of Justice interviewed jurors from trials where self-defence was an issue. They were asked to identify the two legal questions needed to determine the defence. Only 31% of those interviewed could accurately identify both questions. 48% could only identify one of the two and around 20% couldn't identify either.[23]

Common forms of jury misconduct include:

- Researching information outside of what was provided in the trial;
- Unauthorised visits to the scene;
- Communicating with non-jurors;
- Not paying attention during the trial; and
- Intimidation or coercion by other jurors.

Jury misconduct undermines the principles of natural justice. Jurors must only rely on the evidence presented to them in court. By researching their own information, a juror undermines the court's ability to ensure that decisions are made on reliable evidence. Juries also risk undermining their own impartiality if they are influenced by opinions in the media or by discussing the matter with other people.

If jury misconduct is revealed, this will generally require the judge to discharge the jury and order a re-trial. This can cause significant psychological and emotional distress for the victims, witnesses and accused as well as increased costs borne by the public.

Example: Jury Misconduct – DPP v Lehrmann (2022) ACTSC

In 2021, Liberal Party staffer Brittany Higgins alleged that she had been raped in 2019 by her colleague Bruce Lehrmann. She stated that the offence occurred in the parliamentary office of the then Minister of Defence, Senator Reynolds. The allegations and the case that followed created a significant amount of media attention.

Lehrmann pleaded not guilty in the Magistrates court on 5 November 2021 and was committed to the ACT Supreme Court for trial (the ACT does not have a 'middle tier' District Court equivalent). The trial ran from 4-19 October 2022 with the jury retiring to consider its verdict.

On 27 October 2022, the trial aborted after it was discovered that a juror had brought in two research papers on sexual assault into the jury room. The papers were discovered when court staff accidently knocked over a juror's document holder during a routine tidying of the jury room. Her Honour **Chief Justice** McCallum, who had been presiding over the trial, noted that she had warned the jurors "at least 17 times" during the trial not to find out more about the case. [24]

In December 2022, the prosecution announced that it would discontinue the matter and dropped the charges against Mr Lehrmann. The reason given was that continuing with the matter would pose an unacceptable risk to the health of the victim.

In August 2023, Mr Lehrmann stated in a media interview that he would be seeking a multimillion-dollar compensation claim because of what occurred. He maintained that if the trial had been allowed to continue, he would have received a verdict of not guilty.

Students should consider who has borne the cost from this example of jury misconduct. *See CS9.*

23 http://classic.austlii.edu.au/au/journals/NSWBarAssocNews/2012/52.pdf page 52

24 Lizabeth Byrne and Markus Mannheim *'Jury discharged in trial of Bruce Lehrmann, who was accused of raping Brittany Higgins,* published by ABC News (27 October 2023) https://www.abc.net.au/news/2022-10-27/jury-discharged-in-trial-of-bruce-lehrmann-brittany-higgins/101583486

Example: Trial by Judge alone – DPP v Edwards (2020)

The Claremont serial killings were a series of murders that occurred in the 1990s. The victims were Sarah Spiers (18), Jane Rimmer (23) and Ciara Glennon (27). The three women went missing on separate occasions between 1996-1997 after a night out in Claremont. While Ms Spiers' body remains undiscovered, Ms Rimmer's and Ms Glennon's bodies were found in bushland weeks after their disappearances. These crimes remained unsolved for years, becoming one of Australia's longest running and most notorious cold cases.

In December 2016 Bradley Robert Edwards (48) was arrested and charged with the murder of the three women. The matter drew immense media coverage and public interest due to the duration and mystery surrounding the Claremont serial killings.

On 1 November 2018, the Supreme Court heard an application under section 118 of the Criminal Procedure Act 2004. The prosecution submitted that it was in the interest of justice that the matter be determined by judge alone given:

- the extensive publicity;
- the likely length of the trial;
- the disturbing nature of the evidence to be presented; and
- the technical nature of the evidence.

Defence consented to the application and the Supreme Court ordered the trial to be determined by judge alone. [25]

The Supreme Court trial before Justice Hall started on 25 November 2019. The prosecution case took over five and half months and involved over 200 witnesses. The prosecution's case focused on four pieces of evidence: [26]

- DNA Evidence;
- Fibre Evidence;
- Testimony of "Telstra Living Witnesses"; and
- Propensity evidence.

DNA that matched Mr Edwards was located under Ms Glennon's fingernails. The defence accepted that this was his DNA but sought to raise doubt about how the DNA got there, suggesting there may have been cross-contamination at the testing facility.

Fibres were identified on the two women that matched the Telstra work pants Mr Edwards would have worn in the mid-1990s when he worked for the company. Other fibres matched those found in his Telstra issued Holden Commodore. Fibre experts gave evidence that these strongly suggested the women had been in Mr Edwards' car before their deaths.

A group of women came to be referred to by the police as the "Telstra Living Witnesses". These women gave evidence of trying to get home from Claremont or Cottesloe at night and being offered a lift by a man. The witnesses described him has having a white vehicle with Telstra logos, a description that matched the car Mr Edwards would have been issued.

The prosecution also sought to rely on what they said was a propensity of Mr Edwards to commit unprovoked violence towards women. The basis for this propensity evidence was three assaults he had pleaded guilty to.

After the close of the prosecution case, the defence chose not to call any witnesses and Mr Edwards did not testify. The only evidence defence counsel relied on was the weather record from the City of Gosnells for 1996. This supported the evidence of a witness who testified that Mr Edwards had come to her house on the morning that Ms Spiers went missing and had offered to fix the air-conditioning because it was a hot day.[27] Remember that the accused is under no obligation to prove their innocence. No negative inference is allowed to be drawn from Mr Edwards exercising his right to silence. As the burden of proof rests with the prosecution, defence need only to create sufficient doubt in the prosecution's case.

On 24 September 2020, Justice Hall delivered his verdict and found Mr Edwards guilty of murdering Ms Rimmer and Ms Glennon. However, His Honour acquitted him of the

Figure 7.15 — A court sketch of Supreme Court of WA Justice Stephen Hall at a final directions hearing ahead of Bradley Robert Edwards lengthy trial at the Supreme Court of WA on Monday, October 21, 2019.

25 State of Western Australia v Edwards [2018] WASC 419.

26 https://www.abc.net.au/news/2020-05-08/case-against-bradley-edwards-for-the-claremont-serial-killings/12224754

27 https://www.abc.net.au/news/2020-05-06/claremont-serial-killings-trial-bradley-edwards-not-testifying/12219872

murder of Ms Spiers. The evidence from the two bodies made His Honour satisfied that the same person killed both Ms Rimmer and Ms Glennon. Mr Edward's involvement in the murder of Ms Glennon was connected by the DNA found under her fingers. Regarding Ms Spier's death, His Honour concluded that the "prosecution has failed to establish beyond reasonable doubt that the accused killed Ms Spiers. The evidence of his propensity to kill may make him a likely suspect, or even the probable killer, but it does not exclude the real possibility that some other person killed her. If an inference consistent with innocence is open, then the accused cannot be found guilty".[28]

Post Trial

If the prosecution fails to prove its case beyond reasonable doubt the defendant is free to go and there is no post-trial phase.

If the defendant is found guilty, the prosecution has proven its case beyond reasonable doubt in the minds of the jury or judge. Once found guilty by the adjudicator, the accused is now convicted. At this point they are found, in law, to have committed the crime.

In the financial year 2022-2023, there were 419 Supreme and District Court cases that proceeded to trial. Of these, 235 trials resulted in a conviction for at least one of the charges on the indictment. 192 trials resulted in no convictions being recorded. 14 resulted in a hung jury, 48 resulted in a mistrial, and 2 judge only trials were awaiting a verdict. The remaining 10 per cent of cases (50 trials) did not result in a definitive outcome due to a hung jury, mistrial or other outcome.[29]

A post-trial sentence follows a guilty verdict. **Sentencing** may occur:

- immediately after the verdict in a summary case; or
- at a separate sentencing hearing after an indictable case.

Sentencing

Sentencing Hearing

Once there has been a finding of guilty, for an indictable offence, either by plea or trial, the matter will be listed for a Sentencing Hearing. At the hearing the prosecution and defence will make submissions to the Judge on what the sentence should be. The judge may sentence the offender after hearing these submissions or choose to adjourn the matter if more time is needed to consider the sentence.

Sentencing is a matter of **judicial discretion**. That is, the judge has a degree of freedom to decide the appropriate sentence, in the circumstances of the case. This discretion is guided by statute.

Parliament creates the offences in Acts such as the *Criminal Code Compilation Act 1913* (WA) and *Road Traffic Act 1974* (WA). These Acts provide explicit statements on the maximum penalties available when sentencing a convicted person for each offence. However, the nature of each offence and the circumstance of each offender are unique. Accordingly, judges must ensure that sentences are **proportionate** to the offending behaviour. There also needs to be some **parity** between sentences for similar offences, committed by offenders in similar circumstances.

Judges are also bound to apply other laws passed by parliament regarding sentencing, such as the ***Sentencing Act 1995* (WA)**. The Sentencing Act sets out the factors that

Section 313. Common assault

Any person who unlawfully assaults another is guilty of a simple offence and is liable —

- if the offence is committed in circumstances of aggravation or in circumstances of racial aggravation, to imprisonment for 3 years and a fine of $36 000; or
- in any other case, to imprisonment for 18 months and a fine of $18 000.

■ Figure 7.16 — Section 313(1) of the *Criminal Code Compilation Act 1913* (WA) identifies the maximum possible sentence for 'common assault'.

29 https://www.wa.gov.au/system/files/2023-09/odpp-annual-report-2022-23.pdf#page=37&zoom=100,0,0 page 74.

28 The State of Western Australia v Edwards [No 7] [2020] WACA 339. para [2372]

judges must consider when sentencing, and must be commensurate to the seriousness of the offending. The Sentencing Act requires judges to consider the following when sentencing an offender:

- The maximum penalty for the offence;
- The circumstances of the offence;
- The aggravating factors;
- The mitigating factors; and
- The purposes of sentencing.

At the Sentencing Hearing, the prosecution will generally highlight the **aggravating** factors of the offending. Aggravating factors could include the vulnerability of the victims, the seriousness of the harm caused or if the offender has been convicted of similar offences in the past.

The defence will seek to emphasise the **mitigating** factors during the Sentencing Hearing. Factors that could be seen as mitigating include the degree of cooperation the offender provided the police, acceptance of wrongdoing or expressions of remorse.

A **plea of guilty** is one of the most significant of mitigating factors. An offender who pleads guilty is not only accepting their wrongdoing but has also saved the victims the stress of going through trial and saved the public the expense of running a trial. In recognition of this, section 9AA of the Sentencing Act requires judges to reduce any term of imprisonment imposed on an offender who has pleaded guilty. The maximum reduction that can be received is 25% compared to if the offender had been convicted after trial. To receive the full 25% reduction, the offender needs to have pleaded guilty at the **first reasonable opportunity**. The first reasonable opportunity may be when the charges are first filed in the Magistrate Court, or it could be during the Disclosure/Committal hearing stage if the DPP have made amendments to the charges after reviewing the brief of evidence.

Purposes of Sentencing

The **purposes of sentencing** are multifaceted. The weight given to each factor will depend on the nature of the offending and the circumstances of the offender. Factors that the judge must consider when sentencing include:

- Retribution;
- Specific deterrence;
- General deterrence;
- Denunciation;
- Community protection; and
- Rehabilitation.

Retribution is based on the ancient principle of 'an eye for an eye'. An offender has caused suffering and so must be made to suffer in their turn. Retribution is punishment for committing a crime.

Specific deterrence is aimed at discouraging the offender who is being sentenced from future offending. Specific deterrence may be particularly significant when dealing with a repeat offender.

General deterrence aims to discourage the others in the community from committing similar crimes in the future. Media reporting of criminal cases informs the public of criminal sentencing. Potential offenders become aware of what awaits them if they are caught, and so do not offend. General deterrence can be a significant factor when sentencing offences related to drugs or domestic violence because of the prevalence and harm these types of offences have on society.

Denunciation requires that the sentence imposed be seen as formal public expression that the behaviour of the offender is unacceptable.

Community protection is aimed at dangerous offenders. Repeat dangerous offenders have obviously not been deterred by past sentences aimed at preventing reoffending. They have not been rehabilitated or reformed. Very serious offenders who cause significant harm to victims or create fear in society require removal from the community. Their removal promotes social cohesion, which is one of the purposes of law.

Rehabilitation is designed to reform an offender. Compulsory completion of training or educational courses is a common sanction. A reformed offender will hopefully make better decisions and cease to be a threat to social cohesion. They may eventually make a positive contribution to their community. Young offenders are uniquely capable of rehabilitation. In modern liberal democracies, rehabilitation is often regarded as the most important aim of sentencing.

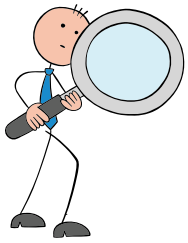
Sentencing options

WA courts have a range of sentencing options. These are listed below in order of severity, from most to least severe.

- Imprisonment. Custodial sentences are the most severe sentence. Prison sentences can be served immediately or may be suspended subject to good behaviour to provide a powerful deterrent against future offending.

- Community based orders. An offender may be sentenced to work without pay, to attend educational courses, be treated for addiction or similar, or be placed under intensive supervision by an officer of the Department of Corrective Services to whom they must report regularly.
- Home detention. An offender may be sentenced to remain in their home with only short breaks for essential outings such as medical visits.
- Fines. Fines can be imposed alone or in combination with any of the above.
- Conditional release orders - Also known as Good Behaviour Bonds. This requires the offender to avoid reoffending for a period of time and comply with other conditions.

The above sentences can be used in combination. For example, a sentence could include a short term of imprisonment coupled with a community based order requiring the attendance of various rehabilitative programs.



Looking ahead: Mandatory sentencing

Mandatory sentencing is a controversial component of WA's sentencing laws. For certain types of offences, parliament has set a **minimum** sentence of imprisonment that must be imposed by courts. This is an example of the **legislature** limiting the discretion of the judiciary. Students will learn more about the judiciary and **accountability** in Unit 4.

Assaulting a public officer

The *Criminal Code Amendment Act 2009* altered ss 297 and ss 318 of the *Criminal Code* to introduce mandatory sentences for the offences relating to assaulting a public officer. A public officer for the purposes of these offences includes a police officer, youth custodial officer or public transport security officer.

- Under s 297 of the Criminal Code, if an adult assaults a public officer and causes grievous bodily harm, the courts must impose a minimum sentence of 12 months' imprisonment.
- Pursuant to s 318, a serious assault on a public officer in aggravated circumstances carries a mandatory term of nine months imprisonment. Aggravated circumstances occurs where the offender is armed with a weapon, or the assault occurred in company.
- A serious assault on a public officer, without aggravating circumstances, carries a mandatory sentence of six months imprisonment.

If any of these offences are committed by a person between the ages of 16 and 18, the court must impose a mandatory term of three months youth detention.

Three Strike Home Burglaries

A burglary is committed when a person enters the place of another without consent. Mandatory sentences for home burglaries were first introduced in Western Australia in 1996. The *Criminal Law Amendment (Home Burglary and Other Offences) Act 2015* increased the mandatory sentences. Under s 401 of the *Criminal Code,* an adult who is being sentenced for a home burglary and has convictions for at least two other relevant offences must be sentenced to a term of imprisonment for at least two years. If the offender is under the age of 18, they must be sentenced to at least 12 months' youth detention.

Serious offences in the course of home burglaries

If an adult commits a 'serious offence' during a home burglary, then the court must sentence the offender to at least 75% of the maximum sentence for that serious offence. The offences that have this mandatory sentence requirement include unlawful assault causing death (s 281), grievous bodily harm (s 297) and a range of sexual offending. This means that an offender who causes someone grievous bodily harm (maximum penalty of imprisonment for 20 years) during a home burglary, they must be sentenced to at least 15 years' imprisonment.

Arguments for Mandatory Sentences

Mandatory sentences have been created by parliament, which represents the democratic will of the people. They are a response to the public's perception that courts are too lenient when sentencing and governments who have been elected by campaigning on a 'tough on crime' platform.

Supporters of mandatory sentencing argue that it sends a strong message that denounces particular criminal behaviour. It is also argued that mandatory sentences provide a powerful deterrent against offending. Additionally, keeping offenders in jail protects the community from the possibility of re-offending.

Criticism of Mandatory Sentencing

Mandatory sentencing can also be seen as an unacceptable constraint on judicial discretion. It removes the power of judges to flexibly tailor sentences to the specific circumstances of the crime and offender.

Critics argue mandatory sentencing lacks proportionality and targets lower socioeconomic and disadvantaged sections of society disproportionately. In particular, the three strike home burglary laws and assault on public officer laws have been seen as targeting a 'crime of poverty'. These offences tend to be committed by people, from disadvantaged backgrounds, who may have developed negative perceptions of authorities. One group especially affected has been young indigenous boys and adolescents in remote areas of WA. Lack of education, social dysfunction and lack of opportunities may cause petty crimes that can result in high rates of incarceration (prison) due to mandatory sentencing. One of the most damning criticisms of mandatory sentencing is its unintentional racial bias. Another criticism is that it prioritises retribution and deterrence over rehabilitation. Fifty-three per cent of all young people in detention are Aboriginal or Torres Strait Islander, while just 2.8 per cent of Australia's total population is indigenous.[30]

WA is the only jurisdiction in Australia to impose mandatory sentences on offenders under 18. Arguably, young offenders deserve, and are capable of, rehabilitation and should never be jailed for minor offences. Incarceration socialises juveniles with 'hardened' criminals and normalises the prison experience, undermining the chance of rehabilitation.

The Australian Human Rights Commission Social Justice Report 2001 referred to one example case to highlight the potential injustice of imposing mandatory sentences. That case involved a 12-year-old Aboriginal boy who received a mandatory sentence under the three strike home burglary laws. The child was from a regional area and had a history of welfare interventions and substance abuse. His relevant prior convictions involved entering a laundry room at a hotel where nothing was removed and entering a school canteen and taking a can of soft drink. He received a mandatory term of 12 months youth detention for his 'third strike' which involved entering a house in company with others and taking a wallet containing $4.00.[31] This example highlights the fact that not all burglaries are the same and that there is a need for sentences to be proportional to the offending and tailored to the circumstances of the offender.

Appeals

The right to appeal is also important in criminal law. Many convicted persons continue to claim innocence and there have been numerous 'miscarriages of justice' in the Western Australian legal system. An offender may seek to appeal the conviction and/or the sentence they received.

Appeals from a summary conviction made in the Magistrate's Court are reviewed by a single judge of the Supreme Court of WA. Appeals from convictions from the District or Supreme Court are determined by the Court of Appeal. Generally, a panel of three judges will sit in the Court of Appeal, but sometimes, in significant cases, five judges will sit.

In 2017–2018 there were 34 appeals by the accused from the District Court to the Supreme Court. Fifty-nine per cent (or 20) of these were regarding the sentence—presumably thought to be too severe—whereas 29.4 per cent (or 10 appeals) were regarding the conviction.[32] None of these appeals were resolved in the same year. This reflects the delays that can occur in the legal system.

There were 216 appeals from the Supreme Court of Western Australia to the Court of Appeal commenced in 2017–2018. Only 4.6 per cent (or 10) of these were initiated by the prosecution or DPP, while the accused initiated 206 appeals. Two hundred accused-initiated appeals were concluded in 2017–2018, but only 26 (or 13 per cent) were successful. Twenty-seven per cent of appeals initiated were subsequently abandoned by the accused before the appeal hearing.[33] None of the five appeals heard and determined by the High Court of Australia in 2017–2018 involving the Western Australian DPP were successful. These statistics can help quantify the extent to which individuals and the state access appellate jurisdiction of higher courts to seek a review.

30 [2] Australian Institute of Health and Welfare, *Youth detention population in Australia* 2017, Bulletin 143, 2017, pp 11–12, < https://www.aihw.gov.au/getmedia/0a735742-42c0-49af-a910-4a56a8211007/aihw-aus-220.pdf.aspx?inline=true>; and Australian Bureau of Statistics, 2016 Census QuickStats, <http://quickstats.censusdata.abs.gov.au/census_services/getproduct/census/2016/quickstat/036>.

31 https://humanrights.gov.au/our-work/social-justice-report-2001-chapter-4-laws-mandating-minimum-terms-imprisonment-mandatory paragraph [21]

32 Office of the Director of Public Prosecutions for the State of Western Australia, *Annual Report 2017–2018*, Perth, p 25, <https://www.dpp.wa.gov.au/_files/annual-reports/ODPP-Annual-Report-2017-2018%20.pdf>.

33 Office of the Director of Public Prosecutions for the State of Western Australia, *Annual Report 2017–2018*, Perth, p 26.

They demonstrate the exercise of legal rights through the right to appeal and a necessary element of both natural justice and rule of law.

Equally, the prosecution may also choose to appeal the verdict and or sentence. Prosecution appeals from the District and Supreme courts in WA are very rare, numbering only one or two annually.

Criminal Appeals Amendment Act 2022

This Act amended the *Criminal Appeals Act 2004* (WA) and introduced new rights for a person convicted of an indictable offence, to bring a second or subsequent appeal against conviction to the Court of Appeal. This right to appeal requires there to be fresh or new compelling evidence related to the offence.

Before the 2022 amendments, if a convicted person had already attempted an appeal in the Court of Appeal and lost, they would have no further right to appeal. The only way they could have their case reheard was by seeking a Royal Prerogative of Mercy and having the Attorney General to refer the case to the Court of Appeal. The 2022 amendments were prompted by the publicity surrounding overturning of the wrongful convictions, including that of Scott Austic.

Example: Wrongful Conviction – Austic v The State of Western Australia [2020] WASCA 75

On 9 December 2007, 34 years old Stacey Thorne died after being stabbed 21 times. At the time, she was 22 weeks pregnant with the child of Scott Austic. Mr Austic was accused of murdering his partner to prevent the birth of the baby.

The prosecution case was that he had gone to her house at night and stabbed her. He then threw the knife away during his walk home. Police located a knife they allege was the murder weapon in a field in between Ms Thorne house and Ms Austic's house. They also found a bloody cigarette packet that tested positive for the victim's DNA. When Mr Austic was interviewed by police, he maintained that he had been at his home and had nothing to do with the murder.

Mr Austic was convicted of murdering Ms Thorne by a jury in the Supreme Court on 6 April 2009. He was sentenced to life imprisonment with a minimum non-parole period of 25 years. In 2010, the Court of Appeal rejected Mr Austic's appeal against conviction.

In 2018 a petition for the exercise of the Royal Prerogative of Mercy was presented to the Attorney General of WA who referred the matter to the Court of Appeal.

On the 14 May 2020, the Court of Appeal allowed an application to hear new evidence. The defence called a range of expert witnesses that, amongst other things, opined that the knife the police found in the paddock was too short to have caused some of the stab wounds on the victim. The defence raised concerns that the bloodstained cigarette packet was not seen in the original police photographs of the scene but was located after the photographs had been taken. Their case centred on a theory that the police had planted the knife and other evidence to frame Mr Austic. The Court of Appeal found that there had been a miscarriage of justice, overturned the conviction and ordered a re-trial.

On 6 June 2020, the Supreme Court granted Mr Austic bail pending the re-trial. On 20 November 2020, after a three-week trial and two hours of the jury deliberations, the jury acquitted Mr Austic of Ms Thorne's murder. [34]

In May 2023, Mr Austic was given a $1.6 million payment plus legal costs by the WA State Government as compensation for the injustice that occurred. [35]

Figure 7.17 — Scott Austic

34 https://www.abc.net.au/news/2020-11-20/scott-austic-acquitted-of-murdering-pregnant-lover-stacey-thorne/12899760

35 https://www.abc.net.au/news/2023-05-17/scott-austic-compensation-after-stacey-thorne-murder-acquittal/102357922

Depth Study: Raise the Age of Criminal Responsibility

Until recent 2023, the age of criminal responsibility across all Australian jurisdictions was 10 years old. That is, children under 10 cannot be found guilty of a criminal offence.

The common law principle of *doli incapax* ('incapable of deceit') holds that children under 14 are presumed to lack the capacity to be criminally responsible for their acts. If a child between 10-14 is accused of a crime, the prosecution must rebut this presumption and prove they knew their conduct was wrong. It needs to be shown that the child understood that their conduct was morally or seriously wrong rather than just naughty.

In Western Australia, the common law principle of *doli incapax* has been codified into section 29 of the *Criminal Code*.

The international community has been critical of Australia's low age of criminal responsibility. Australia is a signatory to the International Convention on the Rights of the Child (CRC). Article 37 of the CRC states that the "arrest, detention or imprisonment of a child ... shall be used only as a measure of last resort". In 2017, the Special Rapporteur on the Rights of Indigenous Peoples reported that seeing the detention of young indigenous children was "the most distressing aspect of her visit".

[36] In 2019, the UN Committee on the Rights of the Child reported that it was "seriously concerned" about Australia's "very low age of criminal responsibility" and regretted that its previous recommendations to raise the age to 14 years-old had not been implemented.[37]

Within Australia, Legal Aid institutions, the Law Society of Western Australia, and coalitions of social, health and legal groups such as Smart Justice for Young People have advocated for raising the age of criminal responsibility. These groups have criticised the use of *doli incapax* and similar legislative schemes. They argue that the principles lead to children being arrested and remanded in custody before their mental capacity can be tested in court. Even if they are later acquitted, exposure to the criminal justice system does lasting harm that could have been avoided.

Advocates for raising the age argue that exposing children to the criminal justice system creates cycles of disadvantage and entrenches criminal behaviour. The Victorian Sentencing Advisory Council found that the six year recidivism rate for children who were first sentenced at age 10-12 was 86% compared to a rate of 33% for those first sentenced at the age of 19-20.[38]

In 2021, the Meeting of Attorney-Generals (MAG) announced general support for increasing the age of criminal responsibility to 12. MAG was made up of the Attorneys-General from the Australian Government, all states and territories, and the New Zealand Minister for Justice. MAG has since been changed to Standing Council of Attorneys-General (SCAG).

In December 2022, the Northern Territory passed legislation that increased the age of criminal responsibility to 12 years from August 2023. In April 2023, the Victorian government announced plans to introduce amendments that would increase the age to 12 by the end of 2024 and 14 by 2027. In May 2023, the ACT passed legislation increasing the age of criminal responsibility to 12 and later increasing to 14 by 1 July 2025.

In 2021, the WA Labor State Party Conference voted and passed a motion supporting increasing the age of criminal responsibility to 14. However, in November 2022, Premier Mark McGowan told media that they did not support raising the age to 14 "under any circumstances" but noted that there was national debate around raising the age to 12.[39]

36 Boffa, C., & Mackay, A. (2024). Hyperincarceration and human rights abuses of First Nations children in juvenile detention in Queensland and the Northern Territory. Current Issues in Criminal Justice, 1–17. https://doi.org/10.1080/10345329.2023.2293317

37 https://documents-dds-ny.un.org/doc/UNDOC/GEN/G19/316/49/PDF/G1931649.pdf?OpenElement page 14.

38 https://www.sentencingcouncil.vic.gov.au/sites/default/files/2019-08/Reoffending_by_Children_and_Young_People_in_Victoria.pdf page 25.

39 https://www.abc.net.au/news/2022-11-15/buried-report-on-youth-detention-raising-the-age/101635706

29. Immature age [40]

A person under the age of 10 years is not criminally responsible for any act or omission.

A person under the age of 14 years is not criminally responsible for an act or omission, unless it is proved that at the time of doing the act or making the omission he had capacity to know that he ought not to do the act or make the omission.

Figure 7.18 — Section 29 of the *Criminal Code Compilation Act 1913 (WA)* determines the age of criminal responsibility.

Example: Ezra's Story

This is extracted from a case described by Victorian Legal Aid as part of its 2021 submission to the Victorian Parliament to increase the age of Criminal Responsibility.[41]

Ezra (not his real name) is an 11-year-old boy from a refugee background living with his family in Metropolitan Melbourne. On a Friday night in June 2021, Ezra was at home with his family when the police came to his home and arrested him for stealing from a supermarket two weeks earlier.

Ezra was already on bail for stealing four cans of coke from a shop. Ezra had been placed on very strict bail conditions after he stole the soft drinks, which included exclusion from the local shopping centre, a curfew and a condition that he did not associate with certain other children. Because he was on bail at the time of the second theft, Ezra was in a reverse onus position for bail.

Ezra was also accused of lighting a small fire in a pile of leaves in a playground. No damage was caused or intended, he was charged with a summary offence of lighting a fire in a public place.

Ezra was taken to the police station where he was held until midnight and a hearing was conducted in front of a bail justice. His family did not understand what was happening and his teenage sister was required to translate for his mother. He did not have legal advice or representation before the bail justice.

Bail was refused as the bail justice considered that there was a risk that Ezra would reoffend. Ezra was transported to Parkville where he was placed in the custody of Youth Justice. Due to the COVID-related quarantine arrangements, Ezra was placed in isolation.

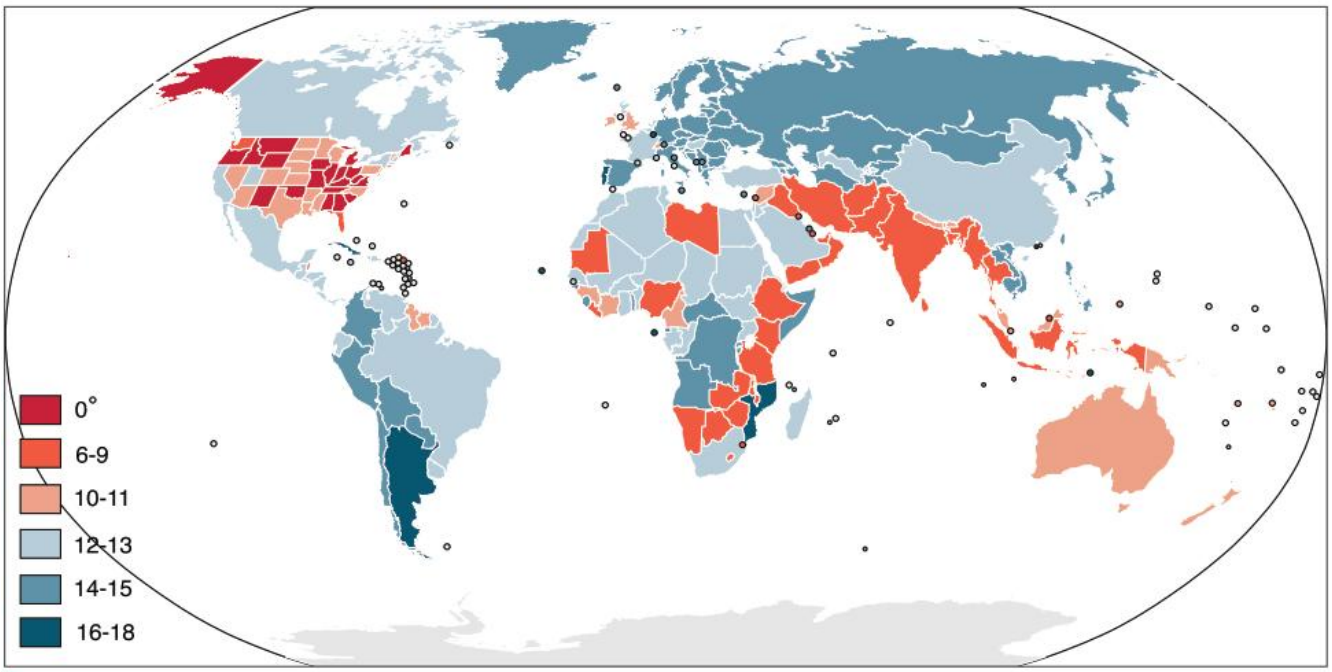


Figure 7.19 — Minimum age of reduced criminal responsibility by country

40 https://www5.austlii.edu.au/au/legis/qld/consol_act/cc189994/s29.html

41 https://new.parliament.vic.gov.au/4a4ca6/contentassets/6bf7797f0a8d43698f8b9d2a8c25be7d/submission-documents/159.-victoria-legal-aid_redacted_.pdf, Appendix 3 – page 21.

Ezra spent a night in isolation at Parkville and the staff became increasingly concerned about his welfare and levels of distress. Ezra was scared and couldn't stop crying in custody.

Ultimately the prosecution withdrew all charges, accepting that the presumption of '*doli incapax*' applied to Ezra (meaning that due to his age he did not possess the necessary knowledge required to have criminal intent).

Example: DPP v PM (2023) Victorian Supreme Court

On 13 March 2022, 16-year-old Declan Cutler was walking home from a party at night when he was attacked by a group of boys. He did not know the boys, but they were part of a group that had issues with one of his friends. Declan was beaten up and stabbed multiple times and died.

"PM" (court allocated pseudonym) was one of the group that attacked Declan. PM was the youngest in the group just 13-years-old. The group included PM's older brother and the oldest boy was 17 years old. The prosecution case was that PM kicked Declan but did not stab him. PM was charged with murder by complicity.

On 20 September 2023, the Victorian Supreme Court found the prosecution had not rebutted the presumption of doli incapax[42] beyond reasonable doubt. PM was therefore found not guilty. [43]

Background information: Amendments to Unpaid Fines Legislation

As far back as 1991, in the Royal Commission into Aboriginal Deaths in Custody, the report stated that:

"Fines operate in a manner which is obviously unjust towards poor people, since the impact of any monetary penalty is directly proportionate to the defendant's income. Taking no account of the level of income of the offender means that poor people are punished more harshly than the affluent for the same offences, because the fine has a much greater effect on their modest means. The fact that the court may not, and usually does not, insist upon immediate payment, and grants time for the fine to be paid, does not affect the offender's obligation to pay the fine. The practice of imprisoning those who do not or cannot pay fines imposed on them, without proper regard to their ability to do so, emphasises the injustice of existing sentencing policies to poor people, among whom Aborigines figure so prominently." [Volume 1 Regional Report 4.2.5.2]

Between 2015 – 2016, a coronial inquest was held into the death of Ms Dhu, a 22-year-old Yamatji woman who died in 2014 in police custody in Port Hedland while being detained for $3,662.34 in unpaid fines. In her final report, State Coroner Fogliani recommended that imprisonment should be removed as an option for enforcing the payment of fines, to address the over-representation of Aboriginal people in custody, particularly Aboriginal females, for fine default.[44]

In a 2016 report by the State Government's Office of the Inspector of Custodial Services entitled 'Fine Defaulters in the Western Australian prison system'[45], the Inspector found:

- Between July 2006 and June 2014, 7,025 people served just over 54,800 days in prison to clear $55 million worth of unpaid fines.
- The approximate cost to house these prisoners for fine default was $42 million.
- Women were disproportionately represented in the fine default population, particularly Aboriginal women.
- Aboriginal people comprised 64% of female fine defaulters and 38% male fine defaulters.
- There was a high correlation between people who are unemployed or in lower paying occupations and fine defaulters in prison. Over 73% female fine defaulters and only 10% male fine defaulters were unemployed at the time of their reception into prison.

Figure 7.20 — A protest held on the first anniversary of Dhu's death.

42 In all Australian jurisdictions, a child under 10 years cannot be found guilty of a criminal offence. https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/rp2122/Quick_Guides/MinimumAgeCriminalResponsibility

43 Criminal law – Trial by Judge alone DPP V PM, https://childrenscourt.nsw.gov.au/documents/other/Director_of_Public_Prosecutions_Vic_v_PM_2023_VSC_560.pdf

44 https://www.coronerscourt.wa.gov.au/_files/dhu%20finding.pdf

45 https://www.parliament.wa.gov.au/publications/tabledpapers.nsf/displaypaper/3914182a267c7268541194a448257fd20032c2e4/%24file/4182.pdf

Example: The Amendments

On 16 June 2020, the *Fines, Penalties and Infringement Notices Enforcement Amendment Act 2020 (WA)* was granted Royal Assent by the Governor of Western Australia. This bill amended the *Fines, Penalties and Infringement Notices Enforcement Act 1994* (WA) in response to growing calls for changes to reduce the disproportionate impact this legislation had on Aboriginal and Torres Strait Islander peoples in Western Australia. The key changes in the Act include:

- Imprisonment for non-payment of fines is a sanction of last resort and can only be ordered by a Magistrate or Judge (previously this could be ordered by the Fines Enforcement Registrar, which is a government agency).
- A person can apply to complete certain activities in lieu of paying their fines through a Work and Development Permit Scheme. Activities include unpaid work, medical treatment or an educational course and those experiencing financial hardship, family violence, mental illness, disability, homelessness or alcohol or drug abuse problems are eligible.
- Cancelling a driver's licence for unpaid fines will no longer be an option for people living in remote areas.

Example: High Risk Serious Offenders Act

In 2020, the Western Australian Parliament passed the *High Risk Serious Offenders Act 2020 (WA)*. In a media statement, Attorney General John Quigley stated this new law would "give the Supreme Court the power, upon receipt of an application from the Director of Public Prosecutions or State Solicitor's Office, to order the continuing detention or supervision of an offender who has committed serious violent crimes but at the completion of their sentence continues to pose an unacceptable risk of violent reoffending."[46]

In Chapter Case Study: The Garlett Case

In September 2022, the High Court heard an appeal from the Court of Appeal of the Supreme Court of Western Australia challenging the constitutional validity of the *High Risk Serious Offenders Act 2020 (WA)*. In the case of *Western Australia v Garlett* [2021], Noongar man Peter Garlett was charged with and plead guilty to the offences of robbery and assault with intent to rob, contrary to sections 397 and 393 of the Criminal Code (WA). The offences had been committed in 2017, wherein Mr Garlett "in company with others, entered a dwelling without consent and, with threats of violence, stole a pendant necklace and $20 in cash. He pretended to be armed with a handgun."[47] He was sentenced to three years and six months imprisonment for these offences. While in prison, Mr Garlett was sentenced to a further 5 months imprisonment for the offence of criminal damage, with his final release date due for 19 October 2021.

On 29 July 2021, the State of Western Australia applied for a restriction order under the *High Risk Serious Offenders Act,* which under section 7 of the Act is designed to "ensure adequate protection of the community against an unacceptable risk that the offender will commit a serious offence". These restriction orders can be a "continuing detention order" under section 26 of the Act or a "supervision order" under section 27 of the Act.

A 5:2 majority of the High Court upheld the constitutional validity of the Act in *Garlett v The State of Western Australia & Anor* [2022] HCA 30. In the majority decision of Kiefel CJ, Kean and Steward JJ, the Court held that the Act did not allow the legislature or executive to dictate the making of a particular decision by the judiciary (which would compromise the **independence** of the judiciary and therefore undermine the separation of powers principle). The justices held that: "Rather, the Court, in making a restriction order, is required to act upon its own evaluative judgment, by reference to prescribed criteria, in order to determine whether such an order is necessary for the purpose of protecting the community from harm." [at 107]

While upholding the constitutionality of the Act, majority judge, Edelman J remarked that "Whether or not a continuing detention order for an offence that has not been committed can ever be morally justified, the Constitution does not prohibit the Parliament of Western Australia from empowering a court to impose that injustice in the extreme circumstances of an anticipated robbery as permitted by the proper interpretation of the HRSO Act."

In her dissenting judgement, Justice Gordon noted that "It raises a question, fundamental to the rule of law in a democratic society, about whether, consistently with Ch III of the Constitution, the judiciary, as the protector of the liberty of the individual, may deprive an

46 https://www.wa.gov.au/government/media-statements/McGowan-Labor-Government/Parliament-passes-laws-to-keep-high-risk-offenders-behind-bars-20200626

47 https://eresources.hcourt.gov.au/downloadPdf/2022/HCA/30 [at 1]

individual of their liberty, not to punish them for a crime committed but to prevent the prospect of a further offence based on an individual's propensity to commit robbery." [at 161].

Considerable commentary has been made regarding the decision in *Garlett*, particularly in relation to its potential impact on Aboriginal and Torres Strait Islander people. In an academic opinion for *ABC News*, Noongar woman, Dr Hannah McGlade, along with Dr Harry Hobbs argue that the decision for "Indefinite detention such as that sought in relation to Peter Garlett is a form of arbitrary detention. It is inconsistent with the International Covenant on Civil and Political Rights (ICCPR), which Australia signed in 1972. It is also inconsistent with the federal government's commitment to Closing the Gap and reducing Indigenous incarceration. In Western Australia this law will contribute, according to the government's own advice, to the further incarceration of possibly 700 more Aboriginal adult prisoners."[48] *See CS15.*

Example: Abortion Law Reform

In September 2023, the WA State Parliament passed the *Abortion Legislation Reform Act 2023 (WA)*. This Act:

- Fully decriminalised abortion as an offence under the Criminal Code;
- Increased the gestational time limit for a procedure from 20 weeks to 23 weeks;
- Abolished the requirement for mandatory counselling for women seeking an abortion; and
- Removed the requirement of a GP referral for abortion.

Acting Deputy Medical Director of Sexual Health Quarters Dr Nicole Filar stated that these changes will enhance the safety and dignity of women seeking an abortion; "It particularly impacts those communities that you know are more vulnerable, for instance, First Nations people, people with a disability, young people and ... those living with intimate partner violence and reproductive coercion." [49]

48 https://www.abc.net.au/religion/high-court-indigenous-incarceration-and-indefinite-detention/14055108

49 https://www.abc.net.au/news/2023-06-10/wa-abortion-law-changes-time-limit-access-laws/102465580

Summary

Justice

- Justice is an important element of a liberal democratic system. The principles of fairness, equality and access are used to evaluate how well the trial procedures in a criminal and civil law case are achieved.
- The independence of the judiciary throughout the trial process is important in upholding the rule of law and the principles of natural justice. As such, the presumption of innocence, independent and impartial adjudicators and the law being applied equally and fairly must be seen to be upheld.
- The adversarial system is often known as a discovery of the truth through battles over evidence and argument.
- The presumption of innocence is safeguarded through the burden of proof, or also known as the onus of proof, as well as the standard of proof.
- The standard of proof differs in a civil and criminal trial.
- Judges in the adversarial trial system are passive rather than active participants.
- The role of the jury is to hear the evidence and hand down a verdict as to whether the accused is guilty or not guilty.
- Juries are only used in certain trials.
- Parties in a criminal trial are the prosecution and the defence. In a civil trial case, the parties can be the plaintiffs or defendants that could be individuals, companies or government bodies.
- Access to the legal system means that all people should be able to engage with the W.A. legal system and its processes should be impartial and open if the rule of law is to be upheld.

Phases of the trial process:

- There are three phases to a trial: the pre-trial, trial and post-trial processes.
- The purpose of the pre-trial process is to determine if there will be a case.
- The trial phase is based on the assumption that a contest between parties reveals the truth.
- Trials have an impartial adjudicator (judge or jury), parties who run the case and strict rules of admissibility.
- The trial has a four-part sequence: opening each parties case; examining witnesses and presenting evidence and closing the case, followed by the delivery of a verdict.
- Only evidence that has survived scrutiny by the parties is admissible and may be used to reach a decision.
- In a criminal trial, the verdicts are guilty or not guilty in comparison to a civil trial verdict of liable or not liable.
- The post-trial phase will only take place depending on the outcome of the civil or criminal case.
- Rules of evidence include Relevance, Hearsay, Opinion, Character, Propensity.
- It is important to evaluate the extent to which the principles of natural justice have been achieved through the stages of the trial process.

Civil Law

- Civil law is an area of law that regulates disputes between individuals and groups, in an attempt to seek to enforce rights where harm has occurred and rectify a civil wrong by returning the person whose rights have been infringed to their original position.
- There are several types of civil law.
- Taking a civil dispute to court is often expensive and time consuming. Also, there are a range of dispute resolution bodies available to the parties to help them resolve their dispute, rather than accessing the court system with its high costs.
- The pre-trial procedure involves a compulsory mediation step for some matters.
- There are civil pre-trial procedures that need to be followed prior to the trial. This case management includes writ of summons, discovery and inspection of documents and interrogatories.
- The trial process involves an impartial and independent adjudicator. Juries are rarely used in civil trials.
- The purpose of remedies in the post-trial process is for the court to right the wrong that has occurred to the plaintiff.
- There are many types of remedies which include: damages or injunctions.
- Parties in a case have the opportunity to a right of appeal.
- There are dispute resolution methods to reach an agreement and settle an issue before it reaches the court in a civil dispute.
- Mediation helps to achieve the principles of natural justice.
- There are strengths and weaknesses of each form of dispute resolution.

Criminal Law

- Criminal law aims to protect individuals and their property, as well as safeguard individuals' rights and maintain order.
- Criminal law evolved out of common law but has been codified into statutory law at both a state and commonwealth level.
- Crimes can be classified according to their seriousness. There are two broad categories of crimes: Summary offences and Indictable offences.
  - Summary offences are minor offences and determined in the Magistrates Court.
  - Indictable offences are more serious and are dealt with by the District and Supreme Courts.
- A jury can determine the verdict in an indictable offence.
- The accused has the right to silence, the presumption of innocence, and when a person/s cannot afford representation Legal Aid funding can be provided if the state wishes to prosecute a matter.
- The Criminal Procedure Act 2004 (WA) provides the legal framework for all criminal proceedings in W.A.
- There is a pre-trial criminal procedure which involves the police investigation. Their powers of investigation and arrest are limited by the Criminal Investigation Act 2006 (WA).
- The Bail Act 1982 (WA) provides courts with a range of factors to consider when deciding whether or not to grant bail.
- This needs to be balanced between the principle of the presumption of innocence and the risks of the accused in ensuring broader community safety.

- Pre-trial hearings for summary offences are set out in the Court Hearing Notices.
- For Indictable offences, pre-trial hearings commence in the Magistrates Court.
- The Office of the Director of Public Prosecutions conducts criminal prosecutions in the District and Supreme Courts.
- The Trial process is similar to the civil trial procedure and is based on the principles of a fair trial and natural justice.
- The key differences between a civil and criminal trial are the standard of proof and the use of juries in indictable offences.

Juries

- The selection of juries involves the arraignment and empanelment of jurors.
- The eligibility of juries has evolved over time since the 1898 Western Australian Act to include women and Aboriginal people.
- The Juries Legislation and Amendment Act 2011 (WA) was passed to improve the jury system. This was to increase the participation rate of potential jurors and limit the number of ineligible people from serving on juries. In addition, jurors can defer their jury service for up to six months. Fines were also increased for non-attendance, or to employers for prohibiting their employee from attending jury duty. The number of jury challenges without cause was reduced.
- The jury is an integral part of the trial as they apply the law based on the evidence presented. As they do not have to give reasons for their decision, the judge's instructions are closely monitored as any errors could lead to an appeal.
- Jury verdicts usually require a unanimous decision; however, majority verdicts can also be used in some circumstances, but they are not available for murder charges. Commonwealth indictable offences also require a unanimous verdict.
- At times, juror misconduct can result in a miscarriage of justice which undermines the principles of natural justice.
- In the interest of high profile case, some cases can be heard by a judge alone trial. However, this is not allowed in some jurisdictions in Australia.

Exam practice questions

Short answer

1a. Outline what is meant by the term 'justice.'

1b. Explain **one** difference between the 'onus of proof' and the 'standard of proof.'

1c. Discuss how **two** principles of natural justice can be achieved in the adversarial trial system.

2a. Outline what is meant by 'the judge' in an adversarial trial.

2b. Explain **one** role of the jury in a criminal trial.

2c. Discuss **two** processes that uphold the presumption of innocence in the pre-trial criminal process.

3a. Outline what is meant by the term 'civil law.'

3b. Explain **one** factor that parties in a civil case face when attempting to resolve their dispute through the civil trial process.

3c Discuss **two** reasons why the use of dispute resolution bodies can help to achieve the principles of natural justice.

4a. Outline what is meant by the term 'criminal law.'

4b. Explain **two** differences between summary and indictable offences.

4c Discuss **two** strengths of the key processes of criminal trials in Western Australia in resolving criminal cases.

Source analysis

Source 1 is adapted from: John Eldridge, April 16, 2018,

Trial by judge alone may not be the answer to giving high-profile defendants a fair hearing from https://theconversation.com/trial-by-judge-alone-may-not-be-the-answer-to-giving-high-profile-defendants-a-fair-hearing-94103

The law insists any accused is entitled to test the charges against them before an impartial tribunal. This is one of the core values of our system of justice; it ought to be jealously protected.

In an age of search engines and social media, the likelihood of prospective jurors being exposed to prejudicial publicity in the lead-up to a trial has never been greater.

Faced with these difficulties, some have suggested that notorious defendants ought to, in some cases, be tried by judge alone, rather than before a jury. This course of action is not available in all parts of Australia. Where such trials are available, the conditions under which they are permitted vary.

In short, there is little clear empirical evidence to suggest judges are significantly more capable than jurors of putting prejudicial information to one side in decision-making. Despite having examined several empirical studies conducted over a considerable span of years, we were unable to identify a firm foundation for the overwhelming confidence in judges' superior capabilities.

First, this conclusion does not call into question the integrity, commitment, or diligence of either judges or jurors. To say both judges and jurors may similarly struggle with the impact of prejudicial publicity is not to say that trials of notorious defendants, whether conducted before a jury or by judge alone, are anything less than fair.

Second, it must be stressed there remains a real need for further research on this subject. The main conclusion we arrived at is that the assumptions that underlie the widespread faith in trial by judge alone merit continued investigation.

It is possible that further research may yield more decisive and satisfying answers than are currently available. If it leads to the conclusion the judiciary is more capable than jurors of ignoring prejudicial publicity, this may act as an impetus for the expansion of the availability of trial by judge alone.

Refer to Source 1.

5a. Outline what is meant by the term 'juror.'

5b. With reference to Source 1 discuss, in your own words, 'there is little clear empirical evidence to suggest judges are significantly more capable than jurors of putting prejudicial information to one side in decision-making.'

5c. With reference to examples, discuss **two** ways that the reform of the Juries Legislation and Amendment Act 2011 (WA) has improved the jury system in Western Australia.

5d. Evaluate the extent to which the post-trial criminal trial processes in W.A upholds the rule of law and natural justice.

Refer to the Garlett Depth Study on page 171

6a Outline what is meant by the term 'appeal' in the legal system.

6b. With reference to the Garlett Case Study discuss, in your own words, the reasons for the decision to uphold the constitutional validity of the Act.

6c. With reference to examples, discuss **two** purposes of sentencing.

6d. Evaluate the extent to which the W.A. political and legal system can impact the ability of Indigenous people to achieve justice.

Essay response

7. The key processes of civil and/or criminal trials in Western Australia uphold fully the principles of natural justice. Evaluate this claim with reference to examples from your studies.

8. Analyse how, and to what extent, the recent reforms in the Western Australia political and legal system uphold the rule of law and judicial independence.

Investigation

9. Several counter-terrorism laws have been introduced since 2013 to improve national security. One of these laws, is the *Counter-Terrorism Legislation Amendment Act (2019 Measures No.1) Act 2019 (Cth).*

Your task:

Examine how and why these laws, including the 2019 legislation, can be argued to reverse the burden of proof and limit the presumption of innocence which are vital to upholding the principles of natural justice in our legal system.

The following websites may be of assistance:

- https://humanrights.gov.au/our-work/legal/human-rights-guide-australias-counter-terrorism-laws
- https://www.ruleoflaw.org.au/principles/presumption-of-innocence/
- https://law.uq.edu.au/article/2021/09/australian-counter-terror-laws-are-we-safer

Note: If your School Library has access to JSTOR, there are some good articles about this topic for you to review.

Sources:

Figure 7.1 Source: Matt Golding, 2014, http://www.threefingers.com.au/
Figure 7.2 Source: High Court of Australia, 2014, http://www.hcourt.gov.au/justices/former-justices/former-chief-justices/sir-adrian-knox-pc-kcmg-kc, Public Domain, https://commons.wikimedia.org/w/index.php?curid=66300348
Figure 7.3 Source: Haylie Pepper and Ken Maddess, 2024
Figure 7.4 Source: https://en.wikipedia.org/wiki/Family_Court_of_Western_Australia#/media/File:FamilyCourtofWA.jpg
Figure 7.5 Source: Rosslyn Marshall, 2024
Figure 7.6 Source: Rosslyn Marshall, 2024
Figure 7.7 Source: AAP https://photos.aap.com.au/search/clive%20palmer%20court?q=%7B%22pageSize%22:25,%22pageNumber%22:1,%22SearchKeywords%22:%5B%7B%22Keyword%22:%22mcgowan%22,%22Operator%22:%22AND%22%-7D%5D%7D
Figure 7.8 Source: https://www.pc.gov.au/ongoing/report-on-government-services/2023/justice/rogs-2023-partc-overview-and-sections.pdf
Figure 7.9 Source: Dunkarton, Robert (1744–1811/17); painter: Devis, Arthur William (1762–1822) - http://via.lib.harvard.edu:80/via/deliver/deepLinkItem?recordId=olvwork178120&componentId=HLS.LIBR:96992Transferred from en.wikipedia by SreeBot, Public Domain, https://commons.wikimedia.org/w/index.php?curid=16963602
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Figure 7.12 Source: By Michal Lewi - Own work, CC BY-SA 4.0, https://commons.wikimedia.org/w/index.php?curid=44681167
Figure 7.13 Source: Mike Faulk from USA - Jury Selection, CC BY-SA 2.0, https://commons.wikimedia.org/w/index.php?curid=2791467
Figure 7.14 Source: Section 248, *Criminal Code Compilation Act 1913* (WA)
Figure 7.15 Source: AAP https://photos.aap.com.au/search/bradley%20edwards?q=%7B%22pageSize%22:25,%22pageNumber%22:8,%22SearchKeywords%22:%5B%7B%22Keyword%22:%22serial%20killer%22,%22Operator%22:%22AND%-22%7D%5D%7D
Figure 7.16 Source: Section 313(1) *Criminal Code Compilation Act 1913* (WA)
Common assault
Figure 7.17 Source: https://live-production.wcms.abc-cdn.net.au/88163771b3992fa602d00b90728a444d?src
Figure 7.18 Source: Section 29, *Criminal Code Compilation Act 1913* (WA)
Figure 7.19 Source: https://i.redd.it/fk40o8vh96my.png with info from en: Defense of infancy, CC BY-SA 4.0,
Figure 7.20 Source: https://commons.wikimedia.org/w/index.php?curid=68143179.

All sources last accessed 26/7/24.

Representation and elections in Australia

Syllabus points:

- **To reflect the updated changes to the syllabus: The Western Australian and Commonwealth electoral and voting systems since Federation including:**
  - **Compulsory voting**
  - **Preferential voting**
  - **Proportional voting**
  - **The Franchise**
- **Advantages and disadvantages of the electoral and voting systems in Australia with reference to a least one recent (the last ten years) election**
- **A recently implemented or proposed reform (the last ten years) to the electoral and voting systems in Australia**

Representation

Representation separates modern democracies from ancient Athens' form of **direct democracy**. In ancient Athens, every citizen had to be present at the assembly to vote and govern, but they had to limit citizenship to make it work. This is unacceptable in today's democracies.

The 18th-century European Enlightenment questioned established beliefs - like **absolute monarchy** and aristocracy - and saw a revival of older ideas such as Athenian **democracy**.

Political thinkers of the time asked, "What political system is most compatible with **individual** liberty?" John Stuart Mill suggested a solution: **representative democracy**. In this system, **citizens** choose **representatives** to speak for them in an assembly of representatives, making it easier for more people to participate.

In Mill's representative democracy, citizens **delegate** authority to their representatives and entrust them to act in their best interest. These representatives can serve as delegates or **trustees** elected by citizens.

Delegation and trusteeship are the links which bind a body of citizens to their representatives:

1. to delegate is to give authority for someone to act on your behalf; and
2. to entrust is to place your confidence in another to act in your best interest (not their own or other interests)—they are a **trustee**.

Representatives elected by citizens may act as delegates or trustees or both.

Political Rights and Freedoms Enable Representation

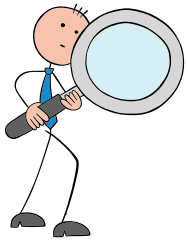
Representation and participation are the cornerstones of democracy. They rely on the **equality of political rights** and freedoms.

Rights are fundamental freedoms and **entitlements** that empower people to thrive. They are categorised into different types, including civil, political, economic, social, and cultural rights. Respecting these rights is vital in a **liberal democracy** and essential to the **rule of law**. Citizens need these rights to engage in self-governance actively.

Political rights are a subset of **human rights**, falling within the civil rights category. Civil rights encompass principles of equality and freedom from discrimination, while political rights are the specific freedoms and entitlements that enable citizens to participate in their **government**.

The core political rights and freedoms include:

- The right to vote;
- Freedom to associate with others;
- Freedom to gather in groups with political objectives;
- Access to political information through a free press and media; and
- Freedom of political communication, a form of freedom of speech.



Looking ahead: Human rights

Political rights are nested within the broader category of civil rights. Without civil rights, such as freedom from discrimination, political rights cannot thrive. This underscores the concept of the "indivisibility of rights," which becomes important later in Unit 4. For **political participation**, having political rights is essential. Recognising that all rights must be protected for any right to be enjoyed is essential.

> *Representative democracy makes an electoral system necessary.*

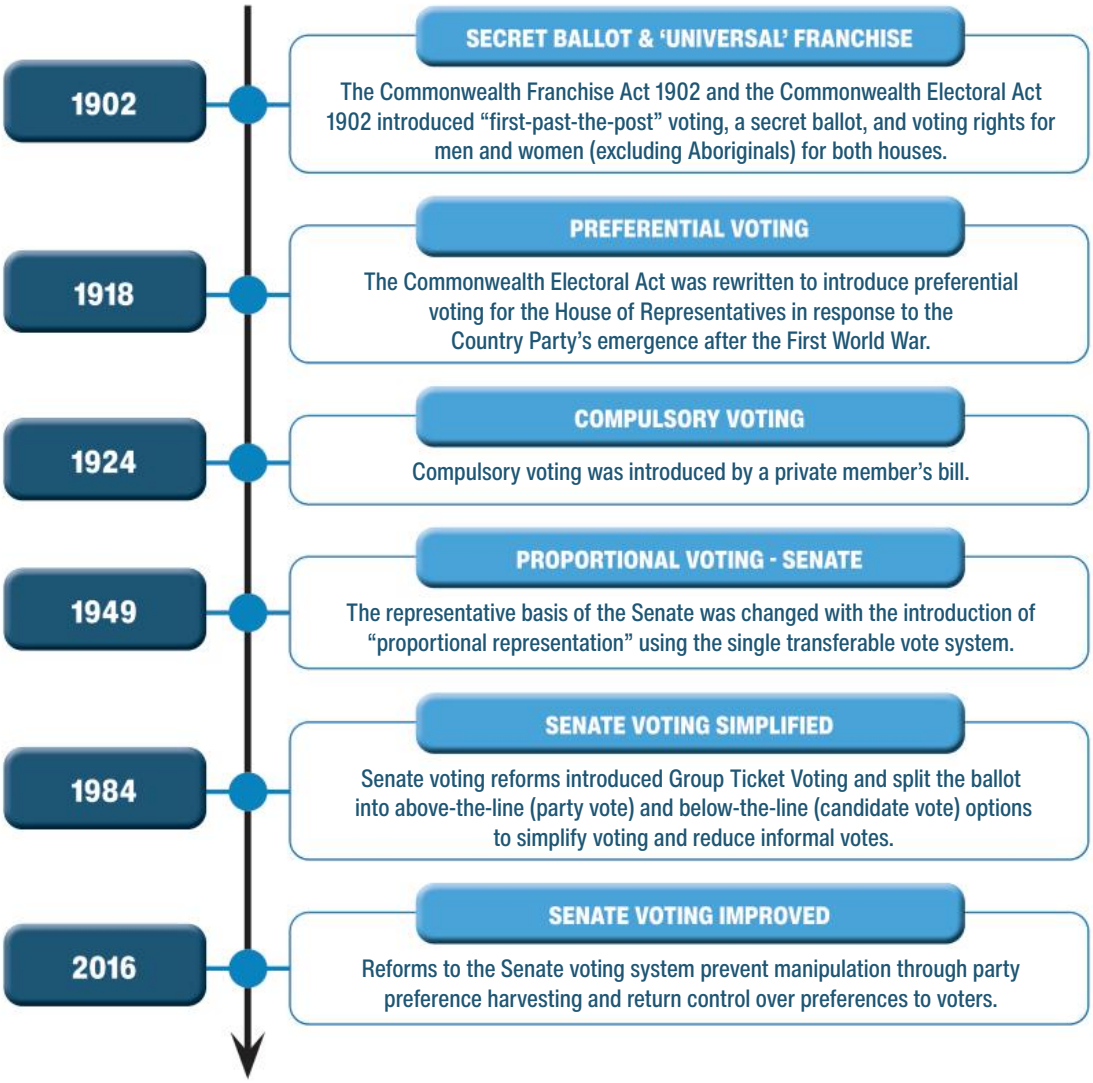
Democracies: Direct and Representative

Democracies are categorised as either direct or representative.

In a direct democracy, citizens create laws and govern themselves - representatives have no role. Every qualified citizen is entitled to a position in the **legislature**, participating in debates and voting on proposed laws. Ancient Athens' law-making assembly, the Ekklesia, is the first example of this form of democracy. Every Athenian citizen was an Ekklesia member. There is no need for **elections** in a direct democracy.

In representative democracies, citizens have a say in law-making and governance, but they do so indirectly. Instead of every citizen holding a legislative seat, they choose a subset of citizens to represent them in law-making and government. Representative democracy makes an **electoral system** necessary.

Australia is a representative democracy with an electoral history tracing back to 1856 – see Figure 8.1. From 1890, all six pre-federation Australian colonies operated as quasi-independent representative democracies within the British Empire under the British **Parliament**. Australia



■ Figure 8.1 — The history of electoral reform at the Commonwealth level. For a discussion of the **Franchise** see Chapter 1.

has pioneered electoral system innovations, such as introducing the **secret ballot**—known internationally as the 'Australian ballot'.

Today, the Australian Electoral Commission (AEC) is so well regarded that emerging democracies seek its guidance to conduct their elections, underscoring Australia's leadership in electoral best practices.

Parliament: The Representative Assembly

Australians directly elect the legislative branch, the **Commonwealth Parliament**. However, the executive branch consisting of the **Prime Minister** and **Cabinet** aren't directly elected; Westminster convention determines the formation of the government. The majority party in the lower house forms a parliamentary **executive** government, with its leader assuming the role of the Prime Minister.

There's no fixed duration between elections. However, the Constitution mandates a maximum term of three years for a parliament. Thus, Australians must vote at least every three years to choose their representatives. Additionally, state and territory parliaments

■ Figure 8.2 — Australians have the opportunity to elect their representatives every three years (even if they are not always happy about it).

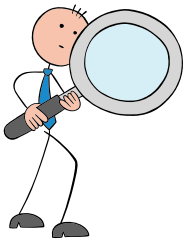
have their own electoral systems. For instance, Western Australia follows a fixed four-year term, and its government formation also follows the **Westminster system**.

Both federal and state governments are representative and embody the **majority rule** principle because democratically elected lower houses form them.

Parliamentary Representation in the Constitution

The Constitution guarantees regular elections to ensure the Commonwealth Parliament remains responsive to the people's will. The people directly choose both houses. However, representation differs between the houses:

- SECTION 28 establishes a maximum three-year term for the **House of Representatives**. SECTION 24 prescribes that its 150[1] **electorates** are allocated to **states** according to population and are re-elected triennially. Thus, the lower house represents the people more or less equally.
- SECTION 7 stipulates senators have a six-year tenure, with half the **Senate** elected every three years[2], that is, in rotation. Each state, irrespective of its population, has 12 senators, while the two territories have two senators each, totalling 76. Thus, the upper house represents the states equally.



Looking ahead: Constitutional sections

Knowledge of relevant sections of the Constitution are necessary for Units 3 and 4. They are not essential, assessable, or examinable in Year 11.

The Senate rotation—inspired by the US—ensures continuity and stability in governance by ensuring a portion of the previous parliament remains in a new parliament.[3]

Calling an election

The Prime Minister advises the **Governor-General** to dissolve the House of Representatives within three years of its first session. While SECTION 28 of the Constitution empowers the Governor-General with the legal **power** to dissolve the parliament, the authority to call an election rests with the Prime Minister. In situations of legislative deadlock, an election might be called under SECTION 57.

Figure 8.3 — The Australian Senate chamber.

House of Representatives: The People's House

The House ensures equal **political representation** with 150 electorates of approximately 107,000 electors each.[4] Every electorate elects a single member. Candidates may be selected by the two major parties, a range of minor and micro parties or run as independents.

Senate: The States' House

The Senate, with 76 senators, ensures states have equal representation. In general elections, 36 state and four territory senators are elected. Each state is a single **multi-member electorate** where candidates contest the six available seats. The territories[5] elect two senators each. In a SECTION 57 double dissolution election, all 12 seats are contested. Each state sends 12 senators, while territories send two, representing multi-member electorates. Candidates are selected by parties or run as independents.

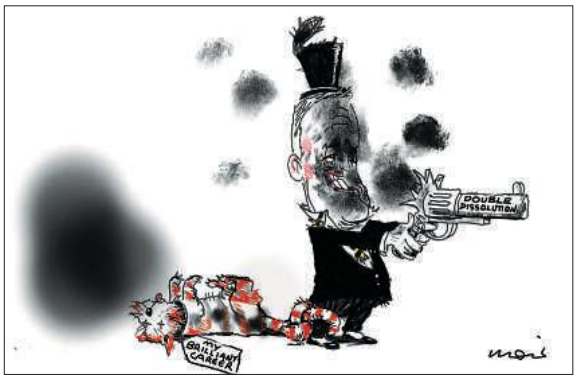


Figure 8.4 — Occasionally, the Prime Minister will advise the Governor-General to dissolve both houses - as Malcolm Turnbull did, calling the 2016 election.

1 The number of House of Representatives seats decreased from 151 to 150 in September 2023.

2 Except for a SECTION 57 double dissolution election—a type of election designed to break a deadlock between the two houses. A double dissolution election elects all 76 senators.

3 *Senex* is Latin for 'older person'. The Roman Senate was a house of 'wise elders' whose wisdom came from experience.

4 SECTION 24 of Constitution says that the six original states shall have "five members at least" in the House of Representatives. Because of its small population, Tasmania's five electorates have approximately 77,000 electors.

5 The Northern Territory and the Australian Capital Territory are mainland territories. Australia has offshore territories like Norfolk Island. External territories do not have Senate representation.

Electoral systems

An electoral system is a mechanism for choosing parliamentary representatives and, in some countries, executive officials. While many nations opt for direct elections to choose their primary executive figure, such as a President, Australia follows the **Westminster conventions**. In the Australian context, a parliamentary election is convened, resulting in the formation of a parliament. Subsequently, following convention, the majority faction within the elected parliament chooses the executive government. This executive remains accountable to the parliament until subsequent elections are held.

Defining Electorates

An electorate - sometimes called an electoral division or seat - is a geographical region comprising many citizens with the political right to elect representatives to speak and act on their behalf in the legislative assembly. There are two types of electorates:

1. **Single-member electorates**: This type chooses a singular representative for the entire electorate.
2. **Multi-member electorates**: In this arrangement, multiple individuals are elected to represent the interests of a single electorate.

Ideally, there should be an equal number of citizens per electorate to ensure equality of the political right to vote.

Background information: Types of representation

Electors hold the ultimate power in governance, known as **popular sovereignty**. However, they choose representatives to act on their behalf for a time. These representatives can relate to their electors (called constituents) in different ways:

1. **Delegate Representation**: This is when representatives actively communicate with their constituents, understanding their values and concerns. They then convey these views directly in parliament. Their personal beliefs don't influence their actions.
2. **Trustee Representation**: Constituents trust their representative in parliament to make the best decisions. These representatives don't need to communicate with their constituents about every issue. Instead, they often act based on what they believe is right.

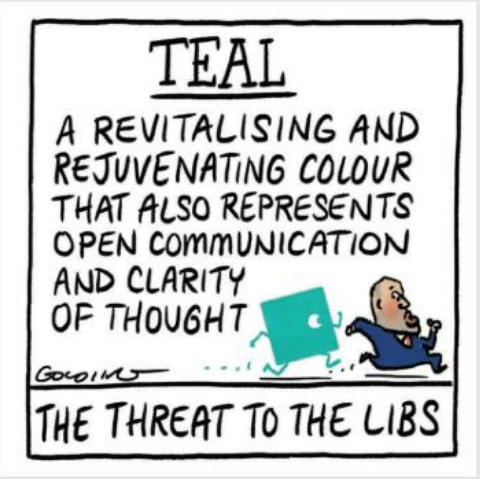


Figure 8.5 — Teal candidates exemplify the delegate model of representation.

3. **Partisan Representation**: In this type, representatives follow their **political party**'s beliefs and directions. Most electors choose their representatives based on party affiliation, so they expect these representatives to act in line with party policies.[6]
4. **Mirror Representation**: This is when the legislature's composition mirrors society's diversity. For example, the legislature should reflect the gender ratio of society.

Understanding Electoral Systems

The function of Electoral Systems

All electoral systems offer electors a selection of candidates on a ballot. Electors indicate their preference for one or multiple candidates. After votes are cast, they're counted, and the most favoured candidate secures a seat in parliament.

Put simply, electoral systems transform electors' choices into parliamentary representation.

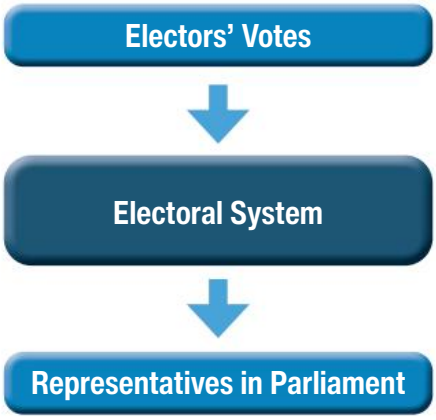


Figure 8.6 — Simple diagram showing how electoral systems convert votes into seats in parliament. The electoral system is shown as a dark box because there are many different systems, and each system converts votes into seats differently.

6 Political parties often command their MPs to align with party stances, sometimes against their personal beliefs or constituents' wishes. For example, despite personal and public support, party constraints prevented many MPs from supporting marriage equality until 2017.

Significance of Electoral Systems

Students will recognise the pivotal role of electoral systems in representative democracy. Ill-designed systems can weaken a democracy's operating principles, including majority rule, equal political rights, freedoms, and participation. The type of electoral system adopted has profound implications for political representation.

Electoral systems come in many forms, each translating votes into seats differently. Grasping how different systems yield varying results is crucial for understanding their consequences for representation.

Moreover, not all electoral systems are created equal. Some may be fairer, while others favour major parties.

Criteria for Fair Elections

Central to any electoral system is the notion of fairness. Fairness demands that:

- All citizens have the right to vote;
- Electors should be free from intimidation or undue influence;
- Every elector's vote should have equal weight;
- Candidate eligibility should be broad, transparent and inclusive; and
- All political parties deserve equal treatment.

Additionally, a just electoral system upholds democratic principles such as:

- A majority of votes leads to a majority of seats;
- Safeguarding minority rights;
- Electoral regularity is sufficient to ensure parliaments remain attuned to the people; and
- Electoral frequency is sufficient to hold representatives accountable.

The following four principles exemplify a fair electoral system and uphold the principles of democracy:

1. Generate a robust, stable government that mirrors the majority's will.
2. Ensure representatives are accountable and maintain a strong connection with their electorate.
3. Treat all electors, candidates, and parties equitably.
4. Ensure representation spans society's diverse spectrum regarding gender, age, values, etcetera.

Figure 8.7 — Fairness criteria for political systems.

The Quest for an Ideal System

The perfect electoral system would encapsulate all four principles. While various systems exist – some straightforward, others complex – each system prioritises different principles. Despite the number of options, no system flawlessly embodies all four criteria.

No electoral system is without flaws. Some might excel in ensuring stability and **accountability**, while others shine in representing diversity and fairness. Balancing stability with fairness or accountability with diversity remains a challenge.

> *No electoral system is without flaws.*

The most pragmatic approach involves striking a balance between different electoral systems. Australia exemplifies this compromise by employing two distinct systems - one for each house of Parliament. See Figure 8.1.

Classifying Electoral Systems

Electoral systems are divided mainly into two categories:

1. Majoritarian systems
2. **Proportional systems**

Majoritarian systems are all based on single-member constituencies and excel at promoting:

- Majority rule; and
- Strong bonds between parliamentarians and their constituents.

However, majoritarian systems have drawbacks, including:

- Exaggerating the winner's margin in both constituencies and parliament; and
- Limiting the representation of minor parties, thereby potentially decreasing overall political engagement.

Proportional systems are all based on multi-member constituencies and excel at ensuring the following:

- Equitable representation for political parties, and
- Diversity in representation.

Yet, proportional systems also have their pitfalls:

- They can weaken majority rule; and
- They weaken the bond between elected representatives and their constituents.

A genuinely fair electoral system may necessitate combining the two types of systems, either working side by side or merging into a singular hybrid system. Such combinations compensate for the shortcomings of each system.

Australia's approach involves two complementary systems electing each house separately. This chapter delves deeper into the electoral systems used for the Commonwealth Parliament since 1901 and explores the evolution of Australian electoral reforms.

New Zealand employs a unique hybrid system to elect its **unicameral** parliament, detailed in Chapter 9.

Majoritarian Electoral Systems

Single-member constituencies are at the heart of all **majoritarian electoral systems**, each delivering a single representative to parliament.

First Past the Post

The First Past the Post (FPP) system, also known as plurality voting, is relatively straightforward, characterised by:

- A **simple majority** – called a plurality – is required to win; and
- Electors choose one candidate from a list.

Advantages

- Its simplicity makes it easy for electors and ensures quick vote counting;
- The system amplifies the winner's margin, resulting in pronounced majorities in parliament; and
- Accountability is high, with only one representative per **constituency** facilitating direct public scrutiny.

> *"Single-member constituencies are at the heart of all majoritarian electoral systems."*

Disadvantages

- The system generally fosters a two-party system by amplifying the representation of winning candidates and parties by eliminating all others - the **winner's bonus**;
- "Vote wastage" is high, with votes for non-winning parties effectively being disregarded; and
- The system is prone to "vote splitting," which can favour less preferred parties if similar parties split the majority vote.

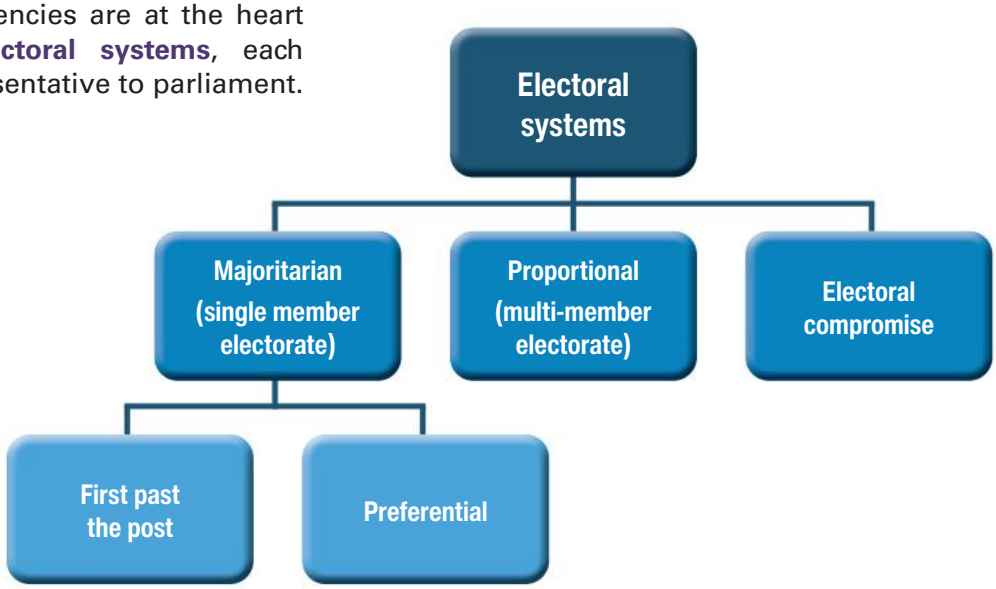
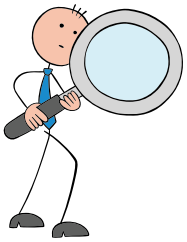


Figure 8.8 — Classifying electoral systems.



Looking ahead: Accountability of the Parliament through elections

Unit 4 investigates the accountability of the parliament through elections. Majoritarian electoral systems are best for holding individual MPs to account because there is one MP per electorate – creating a strong bond between the MP and his or her constituents.

First past the post—A simple example

To illustrate, consider a First Past the Post (FPP) election scenario: In Table 8.1 and Figure 8.9, parties A1 and A2 appeal to the same voter base, causing a vote split among A-supporters. Even though most electors prefer "A" ideas over "C" ideas, Party C wins. There is 55% vote wastage as no A candidate gets elected. Using the FPP system, only one member from Party C is elected, turning 45% of votes into 100% representation – an enormous winner's bonus.

First Past the Post	
Required to win = plurality	
Party A1	25
Party A2	30
Party C	45
Total Votes	**100**

Table 8.1 — First past the post example.

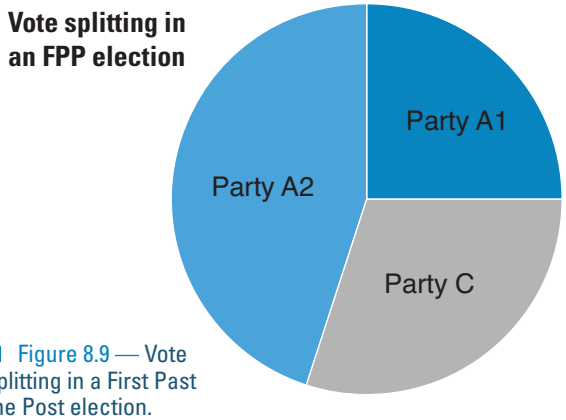


Figure 8.9 — Vote splitting in a First Past the Post election.

First Past the Post in Australia

Australia's first Commonwealth Parliament was elected in 1901 using six different colonial electoral systems.[7] This changed with the introduction of the *Commonwealth Franchise Act 1902* and the *Commonwealth Electoral Act 1902*. Both the House of Representatives and the Senate initially used First Past the Post, which remained in place until it was superseded by an amended *Commonwealth Electoral Act 1918*.

> *Though slightly more complicated Preferential Voting (PV) retains many of its benefits while circumventing some limitations.*

The Impact of First Past the Post on representation

Using First Past the Post (FPP) for both houses often resulted in decisive majorities, with the Senate frequently captured by the governing party in the lower house. Such Senate dominance hampered effective debate and scrutiny, undermining its roles in both the constitutional context - that is, state representation - and the Westminster context - that is, house of review. In this situation, the Senate was a 'rubber-stamp' upper house. At other times, it would be controlled by the **opposition** party - and become 'obstructionist'.

In both 'rubber stamp' and 'obstructionist' modes, debate on bills and scrutiny of the government were undermined.

Preferential Voting

Though slightly more complicated than First Past the Post, Preferential Voting (PV) retains many of its benefits while circumventing some limitations. Features include:

- A need for an **absolute majority** to win - i.e. 50% + 1 vote;
- Electors ranking candidates by preference - they may be required to exhaust choices by numbering all candidates (exhaustive preferential) or only a specified number of candidates (optional preferential); and
- If no candidate secures a majority of primary votes, votes for less preferred candidates are distributed according to electors' preferences until a candidate achieves an absolute majority.

Advantages

1. **Enhanced Majority Rule**: Preferential Voting requires an absolute majority to win, ensuring that the elected candidate is an electorate's preferred choice. This prevents situations like the one seen in First Past the Post, where the most popular candidate may not necessarily be the majority preferred choice.

7 Before 1901, there was no Commonwealth Parliament to enact a federal electoral law. Therefore, the first Commonwealth Parliament was elected using various colonial electoral systems. Only Western Australia and South Australia permitted women to vote in this first election. See: Australian Electoral Commission, 'Events in Australian electoral history', <https://www.aec.gov.au/Elections/Australian_Electoral_History/reform.htm>.

2. **Elimination of Vote Splitting:** Preferential Voting allows electors to indicate their preferences in order. Thus, if their first choice is eliminated, their vote can be transferred to an alternative candidate[8] - likely one with a similar worldview. This prevents the splitting of votes among similar parties or candidates and ensures that votes continue to count until an absolute majority is reached.
3. **Reduced Vote Wastage:** Unlike First Past the Post, where votes for the defeated candidate are wasted, Preferential Voting ensures that more votes contribute to the outcome. A vote continues to be transferred based on preferences until a majority is achieved, ensuring that fewer votes are wasted.
4. **Promotion of Accountability:** Like First Past the Post, Preferential Voting elects a single representative per electorate, making it easier for constituents to hold their representative accountable. Electors know who to approach with their concerns and who to hold responsible for the quality of representation they receive.
5. **Opportunity for Smaller Parties:** Smaller parties or candidates can negotiate preference deals with larger parties. These arrangements can give smaller parties a chance to influence the policies of successful candidates, even if they don't win a seat.

> *Preferential Voting's most significant disadvantage in modern Australia is that it cannot fully represent society's diverse nature*

Disadvantages

1. **Complexity:** Preferential Voting is still simple but more complex than First Past the Post. Electors need to number candidates in order of preference, which might confuse some, leading to more informal or incorrectly filled ballots.
2. **Vote Wastage:** Despite reducing the wastage seen in First Past the Post, Preferential Voting still results in some wasted votes. Those whose vote preferences don't contribute to electing a representative will waste their votes. However, the maximum possible wastage is capped at just under 50% because of the winner's need to achieve 50% + 1 vote.

■ Figure 8.10 — Exhaustive preferential voting requires electors to number their preferences from most to least preferred.

3. **Overrepresentation of Major Parties:** Although it does provide more diverse representation than First Past the Post, Preferential Voting can still lead to the overrepresentation of major political parties, leading to the underrepresentation of smaller parties or independent candidates.
4. **Complicated Preference Deals:** While preference deals can be advantageous, they can also be hidden from electors, undermining transparency. They might not always work in the electorate's best interests, as they are sometimes driven more by political strategy than policy alignment. Moreover, these deals are not enforceable, leading to potential breaches of trust.
5. **Potential for Skewed Results:** A party's distribution of support across the electorates can impact results. For example, if the more popular 'red' party's supporters are geographically concentrated in fewer seats, it will win them by large margins. Conversely, if the less popular 'blue' party's supporters are evenly distributed across many electorates, it could win more seats by small margins, which could lead to scenarios where the 'blue' party wins more seats - and forms government - with fewer overall votes than the 'red' party; which is a problem for the majority rule principle.
6. **Limited Reflection of Societal Diversity:** Preferential Voting, being a single-member system, might not adequately represent the diverse demographics of society. The system

8 Preferential voting is also known as the 'alternative vote'.

tends to favour 'conventional' or 'safe' candidates over 'diversity candidates' due to their perceived electoral risk.[9] This results in overrepresenting specific demographics, such as white, middle-class, tertiary-educated males. The House of Representatives in the 47th Parliament is only 38% female.

While Preferential Voting addresses some of the issues of the First Past the Post system, it is not without its own set of challenges. The Australian electoral system adopted it in 1918 to balance simplicity with fairness. Still, debates around its effectiveness and potential areas of improvement continue - particularly as the diversity of Australian society increases.

Preferential Voting's most significant disadvantage in modern Australia is that it cannot fully represent society's diverse nature. Ironically, this disadvantage is due to its advantage in promoting the majority rule principle through its inherent winner's bonus.

Without deliberate interventions like **quotas** - which can promote diverse candidates in winnable seats - single-member electoral systems like First Past the Post and Preferential Voting can inadvertently suppress diverse representation and undermine the equality of minorities' political rights.

Preferential voting—A simple example

Imagine the same election results as in Table 8.1 but this time in a Preferential Voting election.

Preferential Voting	
Required to win = *absolute majority* (51 votes)	
Party A1	25
Party A2	30
Party C	45
Total Votes	**100**

Table 8.2 — Preferential voting example

Counting the votes—Primary votes

The results above are produced by counting electors' first preferences only. An elector's first preference is their primary vote, that is, where they put the number '1'.

In this election, no candidate has achieved an absolute majority of 51 votes, so no one has won the election on primary votes.

To proceed, the candidate with the least votes is eliminated from the count. Therefore, Party A1 is eliminated, and independent electoral officers examine their votes to determine where the second preferences were allocated on each ballot paper (for those electors who voted for candidate A1).

Second preferences from A1 ballots are distributed to Party A2 and Party C candidates. They are added to their first preference votes.

We can assume that an A1 voter, following A1's **How to Vote Card**, would prefer the A2 candidate over the C candidate. In this simple example, all A1 second preferences flow to A2.

Preferential Voting			
Required to win = *absolute majority* (50% + 1 vote)			
	Primary Votes	Distribution of Second Preferences	Totals
~~Party A1~~	25	Eliminated	—
Party A2	30	+25 (from A1)	55
Party C	45	+ 0	45
Total Votes	100	100	100

Table 8.3 — Preferential voting example – distribution of preferences.

After the distribution of the eliminated A1 candidate's votes (according to the preferences expressed by A1 electors), A2 has achieved an absolute majority and is elected as the single representative for the electorate.

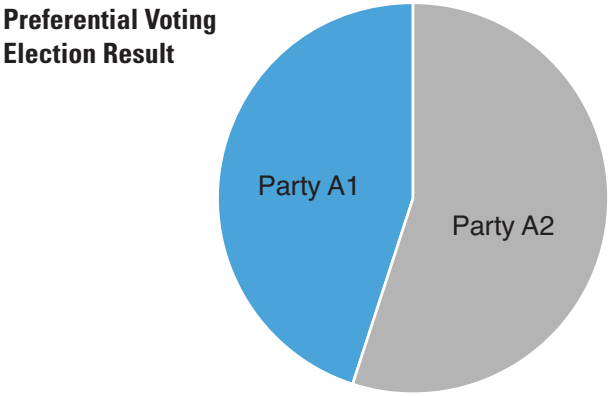


Figure 8.11 — After elimination, Party A1's second preferences are distributed.

In Figure 8.11, A2 has achieved an absolute majority and won the electorate. There is no vote splitting between the A parties because votes for A1 flowed to the alternative A candidate, A2. There is also a reduction in vote wastage. Wastage cannot be more than half the votes. However, all Party C votes are wasted. A2 is the beneficiary of a reduced, but still significant, winner's bonus—they are the preferred candidate of 55 per cent of electors but have won the only seat – that is, 100% representation. A preference deal between A1 and A2 has allowed A1 to influence A2's policies and achieve indirect representation via A2 so long as A2 keeps to the deal.

9 'Diversity candidates' refer to individuals outside Australia's demographic mainstream, including Indigenous people, non-English speaking migrants, non-European minorities and LBGQTI+ people.

Background information: The winner's bonus, representation and women in Parliament

The winner's bonus - impact on fairness

In 1951, almost 98% of the votes went to the two major parties. For several decades, **major party** support has been falling. By the 2022 election, this number was at an all-time low of 68.3%. Labor and **Coalition** primary votes were 32.8% and 36.1%, respectively. This indicates that a record number of Australians are voting for minor parties or independents - and neither major party has an absolute majority of support. Yet both Labor and the Coalition continue to win a majority of lower house seats, enabling them to form **majority governments.** How is this possible?

Figure 8.12 — Adam Bandt, Greens member for the federal seat of Melbourne since 2010, has not been disadvantaged by Preferential Voting.

The answer is single-member electorates. Both Preferential Voting and First Past the Post are single-member systems. They are "winner-takes-all" systems. They have an inherent winner's bonus that amplifies the representation of the winner by excluding all the losers from parliament.

Further, single-member systems can skew results so far that they undermine the majority rule principle. For example, a party benefits when its supporters are evenly distributed across numerous electorates. This way, it can secure victories in many electorates, albeit by narrow margins. Conversely, a party with a high concentration of supporters in fewer seats finds itself at a disadvantage, winning those seats by significant margins. An example is the 1998 federal election: Kim Beazley's ALP secured 50.98% of the national vote but won only 67 seats. In contrast, Prime Minister John Howard's Liberal National Party Coalition captured 80 seats with just 49.02% of the vote, granting them a majority - and thus government - in the 150-seat House of Representatives. The ALP's disadvantage was due to its voter concentration in fewer electorates, resulting in victories with larger margins. On the other hand, the broader vote distribution for the Coalition enabled the Coalition to win more seats but with slimmer margins. Ultimately, the number of seats won is crucial for forming a government.

Regional party representation - the Nationals

Australia's political landscape is not strictly a two-party system. The Nationals, a **minor party**, isn't disadvantaged by Preferential Voting (PV). They garner roughly the same support as the Greens nationally. However, while the Greens' support is thinly spread over the 151 electorates, barring the inner-city electorate of Melbourne, which they won in 2010, the Nationals' stronghold lies in rural areas of NSW and Queensland. Their concentrated support in these agricultural regions allows them to achieve absolute majorities and secure lower house seats. Hence, Australia's political system can best be described as a 'two-and-a-half party system' due to the Nationals' representation in the lower house.

Representation

Preferential Voting (PV) doesn't capture society's diversity accurately. Two-party representation, a byproduct of all single-member systems, often sidelines many parties. Additionally, because there is only one seat to win per electorate, the 'winner takes all' approach of these systems means parties tend to choose 'conventional' or 'safe' candidates. This practice risks sidelining 'diversity candidates' due to concerns they might polarise the electorate. Whether valid or not, there's an underlying belief that 'non-mainstream candidates' - such as ethnic or religious, LGBQTI+, disabled or others- - present higher electoral risks. This often leads to overrepresenting a specific demographic, such as white, middle-class, tertiary-educated males. To address this, the ALP has implemented quotas for women, increasing the number of Labor women in the House of Representatives.

In contrast, the Liberal Party doesn't use quotas, which resulted in only 28% of its members being women after the May 2022 election. While it's up to students to assess the value of such quotas, without interventions like these, single-member electoral systems inherently favour conventional and safe candidates. The 47th Parliament's ratio of women to men MPs was 101/126 - the highest in history.

Female representation

According to data from David McEwen (2022), female representation increased from the 46th to the 47th Parliament as follows:

Commonwealth Parliament

- Increased from 38% to 44%; and
- The first Albanese Cabinet had ten women out of 23 members (~44%).

House of Representatives

- Increased from 31% to 38%.

Senate

- Increased from 53% to 57%.

Party-wise Female Representation:

Coalition:

- Overall, female representation increased from 26% to 28%; and
- In the House of Representatives: Decreased from 20% to 19% (11 female MPs).

Labor (ALP):

- In the House of Representatives: Female MPs increased from 43% to 47% (36 MPs); and
- Overall, female representation increased from 49% to 52%.

The Greens:

- Senate: Maintained their female representation at two-thirds of their 12 seats;
- House of Representatives: 1 out of 4 seats is held by a woman; and
- Parliament: 56% of Green's federal members are women.

Independents

- Seven new independents in the lower house, all of whom are women; and
- Six new "teal" independent MPs come from the 11 wealthiest electorates. Five of the six women independents replaced male Liberal MPs.

Diversity in Parliament

- The 47th Parliament is the most diverse to date;
- Around 7% of the House of Representatives are diverse and Indigenous MPs, which under-represents the proportion of the Australian population; and
- Of the 58 female MPs, at least 49 are mothers.

Other representation

The 47th Parliament is the most representative of women; women comprise 38% of the House of Representatives and 57% of the Senate. Indigenous members constitute 9.6% of the Senate and 1.2% of 151 House of Representatives seats. Three members of the House of Representatives are LGBTQI. Four members are Jewish. The first two Muslim **ministers** in history were sworn in the Albanese Cabinet. Senator Jordan Steele-John (WA) is the first wheelchair user elected to parliament.

Figure 8.13 — West Australian Senator Fatima Payman is the first hijab wearing Muslim in the Australian Parliament.

Preferential Voting in Australia

Australia has used **exhaustive Preferential Voting** for federal elections since 1918, replacing the First Past the Post (FPP) system. Preferential voting continues today for the House of Representatives, but the Senate discontinued its use in 1949.

> *Majority governments have been a feature of the Australian political landscape since 1910.*

Preferential Voting, Representation, and the Commonwealth Parliament

Preferential voting (PV) shares characteristics with the First Past the Post (FPP) as a majoritarian single-member electoral system, so the change in voting systems didn't significantly alter the composition of the Parliament. A rigid two-party system with large majorities in both houses persisted due to the winner's bonus. Minor parties remained underrepresented, and adversarial partisanship endured. This trend continues in the House of Representatives but has lessened in the Senate following the 1949

Figure 8.14 — The use of preferential voting meant that the Australian Senate could not fulfil its function as a house of review.

modifications - see proportional representation below.

Large majorities in the House of Representatives (HoR) enabled the formation of stable governments. Majorities are desirable as the HoR is the government-forming house, and democratic governance must reflect the majority rule principle. Additionally, its single-member electorates reinforced the bond between citizens and their representatives, which is vital for a representative democracy.

Majority governments have been a feature of the Australian political landscape since 1910. Recent examples include the Turnbull Government with a slim one-seat majority and the Abbott Government with a 14-seat lead. The Howard and Hawke/Keating Governments consistently held majorities throughout their tenures.

In contrast, the Gillard Government (2010–2013) was an anomaly. It was the first **minority government** in many years, resulting in a hung House of Representatives that took 17 days of negotiation to form a government. During this period, Prime Minister Julia Gillard, sought alliances with several independents and the lone Greens' Member of the House Representative, Adam Bandt, to secure guarantees for confidence and supply - the necessary conditions to form a government.[10]

Under Preferential Voting (PV), between 1918 and 1949, the two major parties dominated the upper house. Government-controlled Senates echoed the government's stance, diminishing its capacity for effective oversight (rubber-stamp model, while Opposition-controlled Senates took on an opposing role (obstructionist mode). The PV system did little to encourage the Senate's review function or boost its potential to represent states, promote party fairness or mirror society's diversity.

Yet, Preferential Voting ushered in greater electoral fairness. Its ability to prevent vote splitting reduced the potential for less preferred parties to triumph by fragmenting the majority vote. As a result, the House of Representatives more closely resembled the electorate's majority preference, solidifying the majority rule principle.

> *The key feature of Proportional representation systems is multi-member electorates.*

There was also a marginal increase in fairness towards minor parties. Negotiating preferences gave them some leverage in bargaining policy agreements with major parties. However, these preference deals lacked enforceability post-election. While considered more of an informal commitment than a binding agreement, any deviation from such promises could lead to repercussions for major parties in subsequent elections.

Proportional Representation Systems

Proportional representation (PR) systems aim to equate the percentage of votes a political party receives with the percentage of seats they win in parliament. For example, if a party wins 30% of the vote, it should secure 30% of the parliamentary seats.

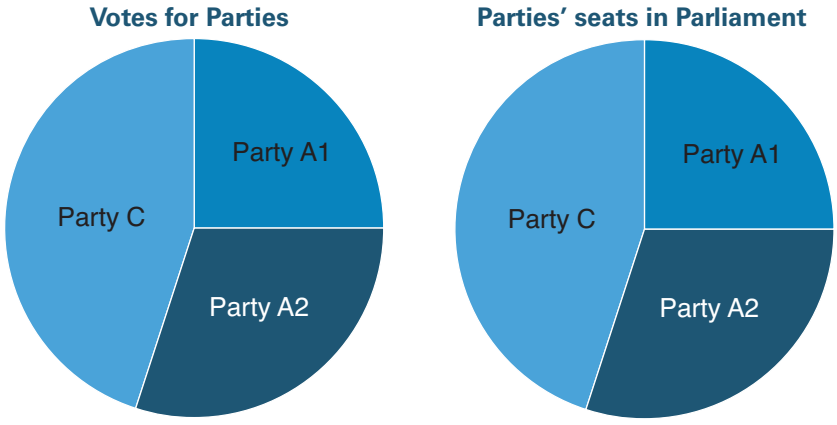


Figure 8.15 — Proportional representation systems fairly allocate seats to parties based on the percentage of the vote they received.

10 'Confidence' refers to non-government MHRs backing a minority government in the House of Representatives on confidence motions. 'Supply' relates to essential money bills. Under the Westminster conventions, a government's inability to secure confidence or supply necessitates its resignation. While majority governments efficiently manage both, minority governments are more vulnerable since they cannot control non-government MHRs.

This is distinct from majoritarian systems, which operate on a 'winner-takes-all' principle, while proportional systems operate on a 'get-what-you-deserve' basis. Note that Proportional Representation (PR) systems are fairer to political parties. In contrast, majoritarian systems, such as Preferential Voting (PV), often result in exaggerated majorities due to winner's bonuses. PR ensures that minor parties gain seats proportionate to their electoral support – see Figure 8.15.

The key feature of Proportional Representation systems is multi-member electorates. Each electorate elects multiple candidates to the legislature. Such systems typically produce more diverse chambers with broader party and independent representation. PR systems also better capture society's diverse nature and are well-suited to heterogenous communities - like Australia's multicultural society - where many minorities strive for adequate representation.

> *Unlike majoritarian systems, where a majority is the key to winning, STV/PR hinges on achieving a quota of votes.*

Single Transferable Vote Proportional Representation (STV/PR)

From 1949, the Senate adopted **Single Transferable Vote** Proportional Representation (STV/PR). This marked the first time in Australian federal history that the House of Representatives and the Senate employed differing electoral systems. Consequently, the Senate's composition began to differ significantly from the House's.

In Australia, Single Transferable Vote Proportional Representation (STV/PR) is complex, with the following features:

- Each state and territory is an electorate - so there are eight Senate electorates. States elect 12 representatives each, and territories have two;
- Candidates need a quota, not a simple or absolute majority, to secure a Senate seat;
- One quota is allocated per seat to be filled. In a regular half-Senate election, the quota is six per state. In a double dissolution election, the quota is 12. The two territories elect both their Senators at each election, so there are always two quotas per election. Quotas are calculated using a formula and add up to 100% of the vote;
- On the ballot paper, electors rank candidates (below-the-line) or parties (above-the-line) by preference;
- If a candidate wins a quota on primary votes, they are elected;
- An elected candidate's surplus votes (votes over a quota) are redistributed to other candidates based on elector preferences but at a diminished value - called the transfer value; and
- Preferences are distributed until all quotas are fulfilled.

Unlike majoritarian systems, where a majority is the key to winning, STV/PR hinges on achieving a quota of votes. Quotas are a set proportion of votes needed to win a seat. A quota of votes is usually much less than a majority - making it easier for minor parties and independents to get elected. A quota's size depends on the population size of the state or territory. For example, a quota is approximately 20,000 in Tasmania and 350,000 in New South Wales.

By replacing the majority requirement with a quota, STV/PR can elect candidates from varied parties to represent the same electorate.

Advantages

- Single Transferable Vote Proportional Representation is fairer for all stakeholders: electors, candidates, and parties;
- Quotas are always lower than majorities, making it easier for diverse candidates to get elected;
- STV/PR fosters a multi-party system and better mirrors societal diversity;
- It encourages the election of 'diversity candidates', such as individuals from various backgrounds, orientations, and genders;
- Hung Senates, common under STV/PR, necessitate negotiation and compromise, encouraging the Senate's review function; and
- Since minorities are better represented and can review legislation, STV/PR protects rights, especially for minority groups.

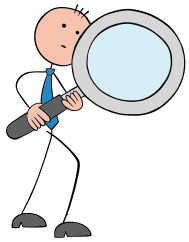
Disadvantages

- STV/PR's complexity makes it challenging for electors to grasp. After its introduction informal voting rose to 10%;[11]

11 Green, A, 'The origin of Senate group ticket voting, and it didn't come from the major parties', *ABC News*, 2018, <http://www.abc.net.au/news/2015-09-23/the-origin-of-senate-group-ticket-voting-and-it-didnt-come-from-/9388658>.

Figure 8.16 — Polling officials counting Senate ballot papers.

- There are many representatives per electorate, diluting the link between electors and representatives, which weakens accountability;
- Hung Senates can lead to legislative impasses if consensus isn't reached; and
- It can undermine the majority rule principle in a powerful upper chamber like the Australian Senate.



Looking ahead: Accountability of the Parliament through elections

Unit 4 investigates the accountability of the Parliament through elections. Proportional electoral systems are less effective for holding individual MPs to account because there are multiple MPs per electorate – creating a weak bond between each MP and his or her constituents.

Single Transferable Vote Proportional Representation in Australia

Since its adoption in 1949, the Single Transferable Vote Proportional Representation (STV/PR) has undergone significant reforms due to its complications.

Initially, electors had to mark a preference for every candidate on the ballot paper, known as a 'candidate vote'. As the number of candidates increased due to the increasing number of minor parties and independents - who realised STV/PR gave them a real chance - the requirement to preference every candidate became onerous. For example, NSW Senate ballot papers featured 100 or more candidates. The lengthy list and the need to sequence preferences accurately led to many **informal votes**. Many citizens found it challenging to navigate the complexities of STV/PR when exercising their voting rights, threatening to undermine the political right to vote.

The challenges of the original system prompted two major reforms in 1984 and 2016. The 1984 reform introduced the option for electors to make a far simpler 'party vote' using Group Ticket Voting (GTV) on a separate part of the ballot paper above a thick black line. A political party's GTV contained a list of its preferences. Voting' above-the-line' meant an elector accepted a party's GTV preferences, mostly without knowing the party's preferences on the GTV list. Electors could still make a 'candidate vote' by voting 'below the line' to preference individual candidates rather than parties - as before. GTV's traded electors' ability to decide preferences for simpler voting. The main beneficiaries were political parties - *see Background information: Group Ticket Voting, 'preference whispering' and electoral reform*.

The 2016 reform aimed to reverse some of the negative effects of GTVs by restoring electors' voting power and preventing parties from exploiting GTVs for electoral advantage.

> *"GTV's traded electors' ability to decide preferences for simpler voting"*

Background information: Group Ticket Voting, 'preference whispering' and electoral reform

The introduction of GVTs allowed parties to:

1. Pre-register a list of candidates with the AEC before an election. Party GTVs were publicly accessible
2. Control the allocation of preferences for electors who voted for their party
3. Negotiate the flow of preferences from their surplus votes with other parties

From 1984, electors were presented with two voting options on the ballot. A heavy black line divided the ballot. Above this line, electors could vote for a party by marking '1' beside their chosen party. While simplifying the process, this approach transferred control of the elector's preferences to the selected party. Below the line, electors could number all candidates, keeping control of their preferences.[12] The 1984 reform eased 'candidate voting' below the line by permitting up to three breaks in sequence and only 90% of boxes to be filled for a vote to be formal.

12 Western Australian upper house (Legislative Council) elections use almost the same system. The Western Australian Legislative Council ballot papers are divided vertically, with the party vote to the left of the heavy black line and the candidate vote to the right.

The majority of electors, approximately 85%, opted for the above-the-line voting. This method, while straightforward, weakens the connection between electors and representatives, rendering models like the delegate and trustee representation models virtually unworkable in the Senate because electors are voting for a party, not an individual representative.

GTVs led to intricate inter-party preference trading via GTV deals, often far removed from electors' intentions - a process called 'preferencing harvesting'. Preference harvesting sometimes resulted in the election of Senators preferred by a tiny fraction of electors, potentially undermining democracy.

Preference harvesting and the 'preference whisperer'

A case in point is the 2013 election of Ricky Muir from the Australian Motoring Enthusiast Party. Despite securing only 0.51% of the primary vote, Mr Muir secured a Senate quota through preferences flowing from 23 other minor parties' GTVs. This strategy - called 'preference harvesting' - orchestrated by Glenn Drury, famously known as the 'preference whisperer', ensured that at least one candidate from the collaborating 24 minor parties would secure a seat by leveraging each other's preferences. Mr Muir's election, a record for the lowest primary vote for an elected senator, underscores the pitfalls of preference harvesting. This method places undue power in the hands of political entities and brokers, sidelining electors. Organised preference harvesting corrupted Senate elections until it was abolished in 2016.

Figure 8.17 — Ricky Muir from the Australian Motoring Enthusiast Party was elected to the Senate in 2013 as a result of preference deals.

2016 Senate electoral reform

The Turnbull Government reformed Senate voting in 2016 to address the issues stemming from the preference harvesting tactics that corrupted the STV/PR system.

Implemented through the *Commonwealth Electoral Amendment Act 2016*, these reforms abolished GTVs, altered the voting procedure, and enhanced party identification on the ballot papers. Parties must still nominate their Senate candidates and register them with the AEC - this enables the AEC to determine who is elected for each quota a party receives.

Electors may still vote for political parties (above-the-line) - their choices contribute to the election of party candidates listed with the AEC. Alternatively, they may vote for individual candidates (below the line). Significantly, political parties lost the ability to dictate the flow of electors' preferences.

The reform's central purpose was to return control over preferences to electors, regardless of whether they voted above or below-the-line. When voting above-the-line, electors must now indicate their party preferences by numbering parties from '1' to '6' or more - eradicating preference harvesting via GTVs. The process for below-the-line voting was streamlined. Electors no longer need to indicate a preference for every candidate. They must list preferences for at least 12 candidates, numbering them from '1' to '12' or more. If electors opt for the minimum 6 above or 12 below-the-line, they risk their vote being exhausted - and wasted. In both voting methods, electors can choose to number preferences beyond the minimum requirement to ensure their vote continues to count throughout the transfer of preferences.

The new system of above-the-line preferencing by electors superseded the previous group ticket preferencing by parties. It also simplified below-the-line voting, making it less intimidating for electors. By reducing the preference boxes to 12, more electors will feel encouraged to vote for individual candidates rather than parties, strengthening the constituent/representative link.

Finally, the 2016 reforms mandated the inclusion of political party logos on the ballot papers for both the Senate and the House of Representatives. This change aimed to minimise confusion among electors, especially for parties with similar-sounding names like the Liberal Party of Australia and the Liberal Democrats.

The electoral uniqueness of Tasmania

Tasmanian State elections use the Hare-Clark electoral system to elect the lower house. Hare-Clark is a Proportional Representation (PR) system closely related to STV/PR. Consequently, Tasmanian electors are far more experienced with PR systems than other Australians - except the ACT, which also uses PR.

While only 15% of mainland electors typically choose the demanding below-the-line option, nearly 23% of Tasmanian electors voted below the line in 2022.

Tasmanians' familiarity with below-the-line voting makes it possible to run a "below-the-line strategy" where an independent candidate, or even a party candidate who has fallen out of favour with their party, can appeal directly to electors and bypass parties entirely. In 2016, Labor demoted its Tasmanian senator, Lisa Singh, to an unwinnable position on its AEC list of registered candidates. She responded with a 'below-the-line' strategy - asking Tasmanians to preference her below-the-line ahead of the Labor Party above-the-line. She made history by winning a full quota of below-the-line votes, beating her party's preferred candidate to a Senate seat.

Single transferable vote proportional representation (STV/PR) in Australia - an example

The Senate comprises eight electorates—six states and two territories. Each state elects 12 representatives and each territory elects two. Half of each state's senators (six out of twelve) and all territory senators are elected at a regular general election.

Calculating quotas

To determine the Senate quotas, the AEC uses the formula:

- (Number of formal ballot papers / (Number of seats to be elected + 1)) + 1 = One quota

For example, in a hypothetical STV/PR election with 2,000,000 electors, the quota would be:

- (2,000,000 / (6 + 1)) + 1 = 285,715 votes per quota.

In a regular half-Senate election, a quota is approximately 14.3% of the total votes; in a double dissolution, it is 7.7%.

Vote counting and preference distribution

Candidates achieving the quota on primary votes are elected. If they get more votes than the quota, these surplus votes are then distributed. A candidate's surplus votes are:

- Total votes - quota = surplus votes.

Using the hypothetical election, if a candidate gets 385,242 votes, there are 99,527 surplus votes. Distinguishing which votes fall within the quota and which are surplus isn't possible. Therefore, all votes are transferred, but at a diminished 'transfer value'. This transfer value is:

- Surplus votes / total votes = value of votes to be distributed according to preferences

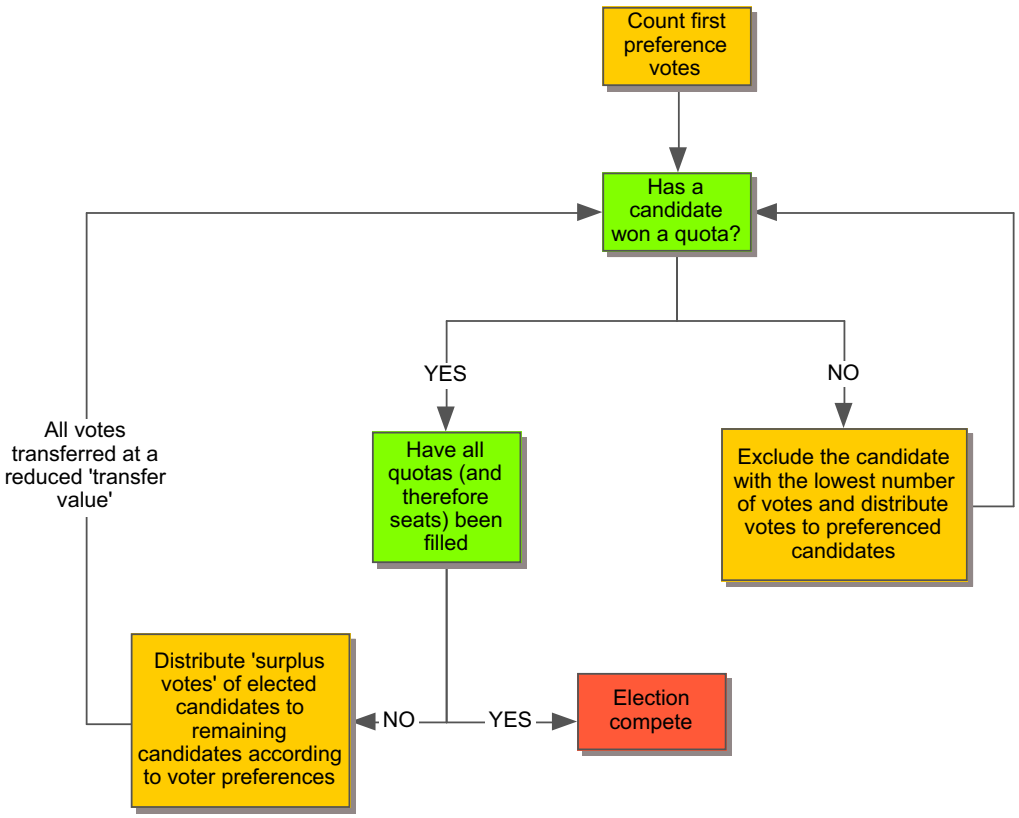


Figure 8.18 – Single transferable vote proportional representation in action. Count first preference votes. If no candidate achieves a quota, exclude the candidate with the least votes and distribute their votes according to electors' second preferences. Repeat until a quota is reached. Candidates who win a quota are elected to the Senate.

This would be 99,527 / 385,242 for the hypothetical scenario, yielding a transfer value of 0.25835 per vote. This process eliminates vote wastage and ensures that votes keep circulating per the electors' preferences.

Finalising the count

Should no additional quotas be achieved, the candidate with the fewest votes is eliminated, and their votes are reallocated according to the electors' preferences. This sequence lasts until all Senate seats are occupied. Due to the complexity of this system, many electors remain unaware of how their votes are counted and candidates elected.

Impact of Single Transferable Vote Proportional Representation (STV/PR) on the Commonwealth Parliament

The introduction of STV/PR revolutionised the Senate by disrupting the two-party system, ensuring neither major party could easily dominate the upper house. Since the 1980s, a single party has rarely controlled the Senate. Instead, Labor and the Coalition win the lion's

■ Figure 8.19 —The QR code links to the AEC's YouTube channel. There are videos on elections, integrity measures, voting, counting votes and other topics.

> *The introduction of STV/PR revolutionised the Senate by disrupting the two-party system*

share - but short of a majority of seats. The '**balance of power**' typically falls to minor party and independent senators, giving them significant influence over law-making.

The 'balance of power' condition of the Senate, created by STV/PR, amplifies its house of review function, enabling it to check and challenge the House of Representatives and the government formed within it.[13] As a result, the executive government must often negotiate Senate support for its bills, opposition parties can overturn government proposals, and Senate **committees** act as accountability watchdogs within the political system. *See Background information: Senate's Role in Review: The Housing Australia Future Fund (HAFF) Bill Case.*

13 Australia's political system exhibits 'strong bicameralism.' The Senate, with powers parallel to the House of Representatives (except for money bills under Section 53), can counter the government-controlled House. This resistance underscores Australia's distinct **Washminster hybrid** governance.

The *Housing Australia Future Fund (HAFF) Bill 2022* is an example of the impact of STV/PR, the 'balance of power' it creates, the voice it gives to minorities and the way the Senate can perform is house of review function.

Background information: Senate's Role in Review: The Housing Australia Future Fund (HAFF) Bill Case

The Australian Senate, acting as a house of review, often examines legislation in detail to ensure more representative outcomes. An example is the Albanese Government's *Housing Australia Future Fund (HAFF) Bill* **amendments**.

The Greens, seeking to represent renters, used their Senate power to force amendments to government legislation to benefit a broader spectrum of Australians:

1. **Additional Funding**: The Greens refused to support the Labor government in the Senate unless it agreed to allocate an additional $1 billion to public housing.
2. **Efforts to stabilise rents**: The Greens, emphasising the importance of housing affordability, pushed for rent caps. Although they couldn't secure an immediate agreement on this matter, they remained committed to using future housing legislation as a strategic leverage against the Labor government.
3. **Call for immediate action**: The Greens proposed a commonwealth/state strategy to be organised by the National Cabinet. Their suggestion involved offering states and territories - which have power over tenancy laws - an annual incentive fund of $1 billion to implement a two-year freeze on rent increases, introduce rent caps, and strengthen renters' rights.
4. **Advocacy for direct spending**: The Greens proposed a minimum of $2.5 billion per annum to be directly invested by the government in public housing.

The Australian Electoral Compromise

The "Australian electoral compromise" combines majoritarian and proportional systems to create an 'ideal' electoral system in **bicameral** parliaments. The electoral compromise is used in all parliaments except the unicameral Queensland, ACT and NT parliaments and Tasmania, which uses the Hare-Clark PR system to elect its lower house. Figure 8.21 illustrates how two complementary electoral systems combine to elect the Commonwealth Parliament.

■ Figure 8.20 — The Albanese Government's Housing Australia Future Fund (HAFF) Bill is an example of the Senate acting as a House of Review.

Each system creates a pattern of representation and power that is suited to the functions of the house it elects.

Compulsory voting

Compulsory voting is a hallmark of Australia's electoral system. The mandatory enrolment of eligible electors has been enshrined in law since 1911. Over the years, the *Electoral Act 1902* has been strengthened by various amendments to promote the political right to vote and popular participation. A significant milestone was in 1915 when Queensland pioneered laws mandating electors to attend polling stations, register their presence on the electoral roll, and obtain ballot papers.

> *The "Australian electoral compromise" combines majoritarian and proportional systems to create an 'ideal' electoral system*

A **private member**'s **bill** led to the *Commonwealth Electoral Act 1924*, which legislated compulsory voting for federal elections.[14] The following elections witnessed a dramatic surge in voter turnout, from 60% in the 1922 elections to 91% in 1925. High turnout remains consistent, dwarfing figures from similar democracies like the UK, US, Canada, and New Zealand. Over subsequent years, all states, including Western Australia in 1936, embraced compulsory voting.

Advantages of Compulsory Voting

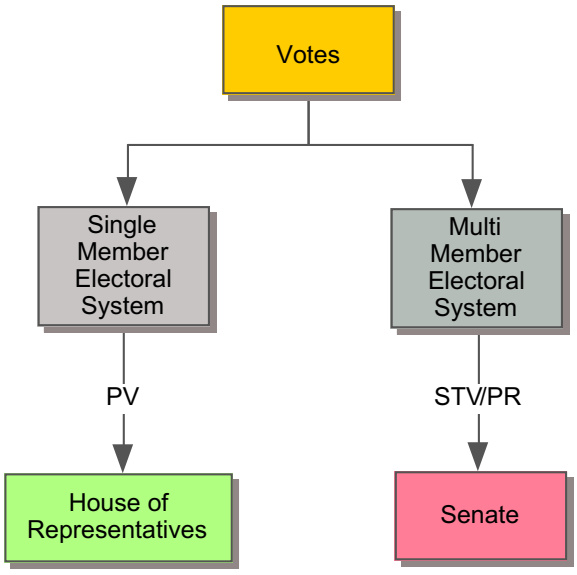
Compulsory voting has many benefits:

- **Enhanced voter engagement**: It undeniably increases elector turnout, deepening political engagement;
- **Better informed citizenry**: It promotes a more knowledgeable populace, aware of their political rights;
- **Strengthening democratic principles**: It highlights the democratic principle of majority rule;
- **Increased legitimacy and authority**: Compulsory voting gives a robust mandate to governments and parliaments;

> *Compulsory voting is a hallmark of Australia's electoral system.*

- **Mitigation of extremist influences**: It dilutes the electoral influence of fringe political ideologies; and
- **Policy-centric political debate**: Compulsory voting drives issues and policy over politicking and sloganeering to mobilise supporters to vote.

Liberal democratic principles, detailed in Unit 1, are supported by compulsory voting. Majority rule becomes more robust with heightened political participation. Governments have a stronger claim to legitimacy and authority when



■ Figure 8.21 — Australia's combined Preferential Voting + STV/PR electoral system uses two complementary systems to elect each house.

14 The bill was the third successful private member's bill to pass since 1901. It was introduced by Senator H J M Payne (a Tasmanian National). See: Electoral Commission of Australia, 'Compulsory voting in Australia', <https://www.aec.gov.au/About_AEC/Publications/voting/index.htm>.

elected by votes from all eligible electors - important when governments must implement difficult policies and laws.

Disadvantages of Compulsory Voting

Criticisms of compulsory voting include:

- **Impact of disinterested electors**: The inclusion of indifferent or uninformed electors can skew results via donkey or informal votes. Donkey votes are **formal votes** and are counted. They may affect the outcome in a close contest; and
- **Freedom concerns**: Compelling voting can be seen as an affront to individual freedom.

> *Donkey votes are formal votes and are counted. They may affect the outcome in a close contest.*

The integrity of Australian elections

Elections can be vulnerable to errors. They can be poorly designed or intentionally manipulated, especially in non-democratic countries.

The Australian Electoral Commission

It is essential to separate the administration and organisation of elections from those who stand to gain from them. Thus, as beneficiaries of elections, political parties and parliamentarians should not manage elections.

> *The AEC's impartiality, independence, and objectivity ensure fair elections.*

Established by the *Commonwealth Electoral Act 1918*, the Australian Electoral Commission (AEC) is an independent **statutory authority** responsible for upholding Australian citizens' right to vote.[15] The **Act** entrusts the AEC with the management of Australia's electoral processes. AEC employees must remain politically neutral. The law prohibits their affiliation with any political party.

Each Australian State operates an electoral commission. For example, the Western Australian Electoral Commission (WAEC) is responsible for local and state elections and **referendums** and sometimes manages elections for significant non-government entities such as unions.

15 Australian Electoral Commission, 'Overview of the AEC', <https://www.aec.gov.au/About_AEC/>.

The AEC's impartiality, **independence**, and objectivity ensure **fair elections**. It manages electoral rolls, hires and trains temporary staff, for polling stations, adjusts electoral divisions to guarantee equal voting rights, counts votes, and declares results. The AEC plays a crucial role in eradicating electoral malpractices that undermine the equality of political rights, like **gerrymandering**. The AEC recently introduced a Disinformation Register for federal electoral events – like general elections, **by-elections**, and referendums – to guarantee electors access to accurate information about electoral procedures. The register bolsters the AEC's Reputation Management Strategy, safeguarding Australian elections from disinformation. - see *Background information - equality of the political right to vote.*

Background information - equality of the political right to vote

In a liberal democracy, equal political rights are paramount. Beyond just voting, the value of each vote should be equivalent.

The doctrine of 'one vote, one value' means equal voting power for each citizen. For instance, an electorate of 100,000 electors represented by one MP has double the voting power of one with 200,000 electors represented by a single MP. In the latter case, to ensure fairness, it would be necessary to split the larger electorate in two, each represented by its own MP.

The House of Representatives gets it right - mostly

The *Commonwealth Electoral Act 1918* requires that electorates have a population within 10% of the average for a state or territory. Adjustments - called redistributions - are triggered if deviations occur beyond this

Figure 8.22 — The entrance to a polling station run by the Australian Electoral Commission for an Australian federal election.

range. Therefore, as populations change, so must electorates.

The AEC divides the number of registered electors in a state or territory by its number of electorates to determine the average electorate size. Redistributions may happen for various reasons, such as the time since the last redistribution or significant population shifts.

There have been shifts in electorate entitlements. A redistribution occurred after the 2022 general election, with effect from the election in 2024 or 2025. Its results were:

- New South Wales reduced from 47 to 46 seats;
- Victoria reduced from 39 to 38 seats;
- Western Australia increased from 15 to 16 seats; and
- The House of Representatives reduced from 151 to 150 seats.

These changes were based on Census data indicating population changes.

With its small population, Tasmania is overrepresented because the Constitution guarantees a minimum of five seats for all states. Territories like the Australian Capital Territory (currently three seats) and the Northern Territory (two seats) also present unique challenges due to their small populations. The *Electoral Amendment (Territory Representation) Act* specifies a "harmonic mean" method for calculating the number of ACT and NT seats. The method amplifies representation for the two territories to compensate for their small size but is capped at three seats.

The Senate gets it wrong - malapportionment

In the Senate, equal state representation - specified by SECTION 7 of the Constitution - undermines the 'one vote, one value' principle.

All states, regardless of their population size, have 12 senators. The significant voting inequality between large and small states led to criticisms, famously expressed by an exasperated Prime Minister Paul Keating, who labelled the Senate 'unrepresentative swill' after it repeatedly frustrated his government's legislative agenda.

Before reforms in 2021, Western Australia's Legislative Council exhibited inequality between city and country electorates - with 'rural weighting' increasing the voting power of regional WA - *see Background information - Western Australian electoral reforms.*

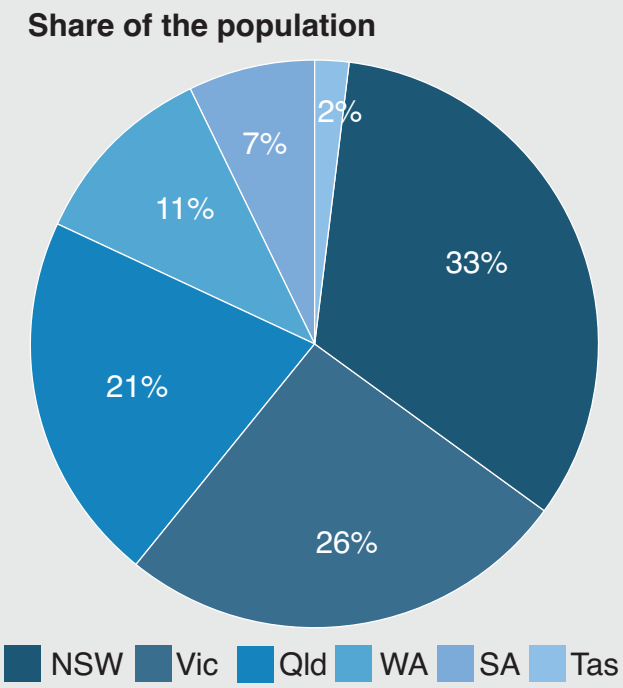


Figure 8.23 — Malapportionment is constitutionally embedded in the election of the Senate where each state has 12 Senators despite varying population sizes.

Considering all factors - excluding constitutionally entrenched malapportionment in the Senate - Australia has generally done well in upholding the equality of the political right to vote embodied in the principle of 'one vote, one value'.

Gerrymandering

The term 'gerrymander' originates from an 1812 incident where Massachusetts Governor Elbridge Gerry redrew electoral boundaries to his party's advantage, resulting in an electoral district shaped like a salamander.[16] Gerrymandering involves manipulating electoral boundaries to disadvantage an opposing political party.

Such manipulations are less likely in Australia due to the independent nature of the AEC and its powers to establish Redistribution Committees.[17] In contrast, gerrymandering is common in the US, particularly in states like North Carolina, primarily because political parties in control of state legislatures influence electoral boundaries to disadvantage their opponents.

16 If they are not gerrymandered, electorates should have a regular shape to an untrained eye. Of course, geography and population distributions can result in oddly shaped, but fairly drawn, electorates.

17 SECTION 60 of the *Commonwealth Electoral Act 1918* gives the AEC the power to appoint a Redistribution Committee. The AEC is independent of political parties and has no interest in who wins elections.

Background information - Western Australia's electoral reforms

Under former Premier Mark McGowan's leadership, WA Labor achieved an unprecedented victory, securing 53 out of 59 lower house electorates and, for the first time, a majority in the Legislative Council (the Upper House).

The Legislative Assembly (the Lower House) uses a preferential voting system based on single-member electorates that reflect the principle of 'one vote, one value'.

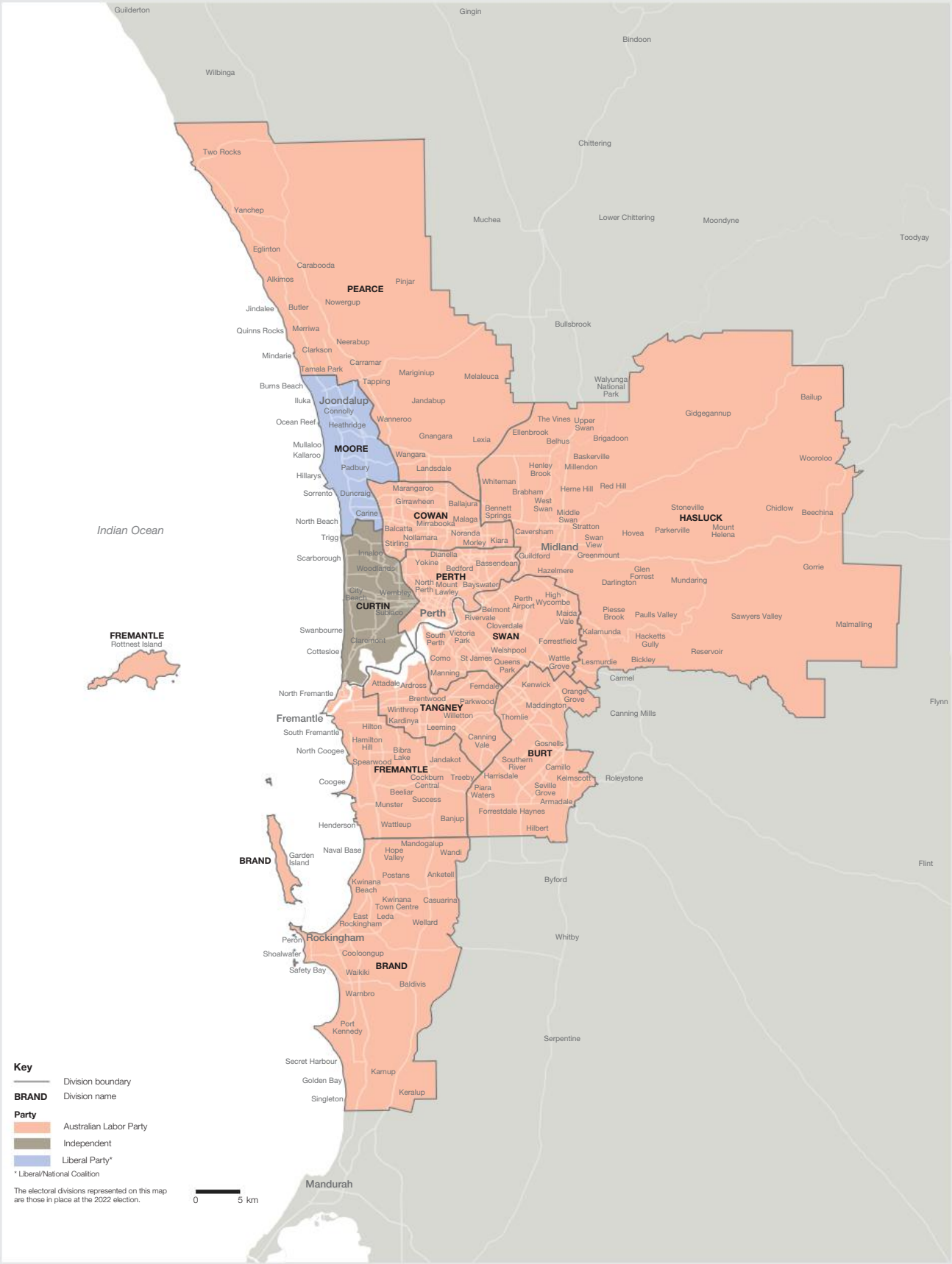
Meanwhile, Wilson Tucker from the Daylight Saving Party secured a Legislative Council seat with merely 98 primary votes, leveraging the Group Ticket Voting (GTV) and preference harvesting to win a quota. Tucker's election intensified the demand for reforms which had increased significantly since the Turnbull Government had amended the federal Senate's voting system in 2016 to mitigate similar issues.

Following WA Labor's landslide win, the McGowan Government proposed abolishing GTVs to eliminate preference harvesting and rectify rural vote weighting, an issue that compromised the principle of equal representation. Previously, six multi-member electorates (three urban and three regional) would select members for the 36-member chamber. However, the number of electors varied significantly, with urban electorates having over 300,000 electors each, while regional electorates had much fewer. This discrepancy favoured rural electors over their urban counterparts.

The proposed reforms made the entire state of Western Australia a single 37-member electorate - making all votes perfectly equal. The changes embed fairness in the upper house's electoral system by empowering electors to set preferences and emphasising equal representation.

The *Constitutional and Electoral Legislation Amendment (Electoral Equality) Act 2021 (WA)* implemented the reforms for use by the 2024 election.

One notable outcome of the electoral reform is the reduced quota, calculated at 2.63%. This tiny quota - far smaller than the Senate's - will enhance diversity in representation and strengthen the Legislative Council's review capability by making a single-party majority more challenging.



■ Figure 8.24 — 2022 Map of House of Representatives electorates in the Perth area. The shape of electorates is influenced by things such as roads and natural features and size varies because of population density. A redistribution of the boundaries was in progress in 2024.

Criteria	Majoritarian Systems	Proportional Systems
	House of Representatives	**Senate**
Type of electorate	• Single-member (one representative per electorate) • 151 electorates across the nation • Each electorate has approx. 107,000 electors (+/- 5 per cent of the average), achieving equality of the political right to vote ('one vote, one value') • Number of electorates varies from state to state based on population (NSW = 47, WA = 16, Tas = 5)	• Multi-member (more than one representative per electorate) • Each state/territory is a single electorate • Each state electorate has 12 representatives • Each territory electorate has 2 representatives • Each state has a different population, undermining equality of the political right to vote (there is no 'one vote, one value')
Strengths	• Strong links between representative and electors • Winner's bonus tends to exaggerate House of Representative majorities, forming more stable majority governments in the 'house of government'. The principle of majority rule is thus achieved • Simple to use • Quick to count. Results are known quickly • Preferential voting, adopted in 1918, eliminated vote splitting	• Fair to all parties (they win seats in proportion to their votes) • Creates a diverse Senate • Tends to prevent control of the Senate by either major party, creating the need for negotiation and consensus, which supports the 'house of review' role • Senate usually free of government dominance and able to check the lower house majority, which supports the 'house of review' role • 'Diversity candidates' more likely to be nominated by parties • No vote wastage • No vote splitting • No winner's bonus
Weaknesses	• Unfair to minor parties • Vote wastage • Winner's bonus reduces diversity in the House of Representatives • Results in parties selecting conventional and safe candidates • Vote splitting (First Past the Post suffers from this, but has not been used in federal elections since 1918)	• Can give too much power to minor parties. They may be able to veto bills in the Senate, yet only represent a small proportion of the total electorate. Undermines the principle of majority rule • Voting has two options, which leads to a higher number of informal votes • Complex to count, taking weeks to finalise the count
Why is the system used?	It is the 'best fit' for the House of Representatives' roles as: • a 'house of the people' because of the link between electors and representatives; and • a 'house of government' because of the need to win a majority to form a government. A majority is exaggerated creating more stable government.	It is the 'best fit' for the Senate's role as: • A 'house of review' because of the need for consensus and negotiation, and the input of diverse and minority views. Strong bicameralism assists the Senate perform this role; and • A 'house of the states' since each state is equally represented as an electorate.
Achieving 'key principles of liberal democracy' (See Chapter 1)	The following fundamental principles of liberal democracy are achieved: • equality of political rights; • majority rule; and • political freedom.	The following fundamental principles of liberal democracy are achieved: • political participation; and • political freedom.
Value emphasised	Democratic values because: • winner's bonus exaggerates the majority and firmly establishes majority rule, which is a fundamental concept for democracy.	Liberal values because: • rights of minorities are protected by 'balance of power' senators from minor parties wielding the power of the Senate.

Table 8.4 — Comparing Majoritarian and Preferential systems of voting

Summary

- Australia's Constitution (SECTIONS 7 and 24) mandates that both houses of the Commonwealth Parliament be "directly chosen by the people," enshrining representative democracy.
- Electoral systems convert votes into parliamentary seats. MPs, often partisans - but also delegates and trustees - represent electors. A parliament's composition would ideally mirror society's demographics, but this depends on the electoral system.
- Almost all Australian citizens engage in politics through elections due to compulsory voting. The Constitution caps the Commonwealth Parliament's term at three years, with no minimum, while Western Australia has a fixed four-year term. Regular elections ensure popular participation and officials' accountability.
- Ideal electoral systems:
  - Guarantee the right to vote;
  - Safeguard electors from intimidation;
  - Assign equal value to each vote;
  - Maintain transparency; and
  - Treat all candidates and parties fairly.
- Electoral systems should reflect liberal democratic principles by promoting majority rule, respecting minority rights, ensuring political equality, and fostering accountability.
- There are two classes of electoral system:
  - Majoritarian systems, like First Past the Post (FPP) and Preferential Voting (PV), rely on single-member electorates.
  - Proportional systems, like Single Transferable Vote Proportional Representation (STV/PR), utilise multi-member electorates.
- First Past the Post, although simple, has flaws, favouring a two-party system and suffering from high vote wastage and vote splitting. It operated federally from 1902 to 1918.
- Preferential Voting, employed federally since 1918 for the House of Representatives and in most state lower houses - including Western Australia's Legislative Assembly - generates a two-party system, reduces vote wastage, eliminates vote splitting and gives minor parties some influence through preference trading.
- STV/PR, used for Senate elections since 1949, delivers fairness to parties, encourages negotiation and consensus in parliament, and eliminates vote wastage. Variations of STV/PR elect state upper houses like Western Australia's Legislative Council.
- The "Australian electoral compromise" combines majoritarian and proportional systems to create an 'ideal' electoral system in bicameral parliaments. The electoral compromise is used in all parliaments except the unicameral Queensland, ACT and NT parliaments and Tasmania, which uses the Hare-Clark PR system to elect its lower house.
- Preferential Voting is favoured for the House of Representatives due to its direct constituent-representative bond and ability to generate stable majorities.
- STV/PR suits the Senate's review role, discouraging overpowering majorities and promoting collaborative law-making. It enables checks and balances between the Senate, the House of Representatives and the executive formed within it.

continued overleaf

- Australia uses compulsory voting, which:
  - On the one hand, ensures high turnout, maximises mandates, minimises the influence of polarising ideas, and focuses political speech on issues.
  - On the other hand, may lead to uninformed voting and infringe on the 'right not to vote'.
- The AEC is an impartial body overseeing federal elections, guaranteeing fair representation, and declaring results. State-based commissions handle state elections. It prevents gerrymandering and electoral corruption.
- The Constitution (SECTION 7) produces malapportionment in the Senate by ensuring equal state representation despite population disparities. Neither the parliament nor the AEC can rectify this constitutional limitation, which also affects the House of Representatives concerning Tasmania (SECTION 24).

Exam practice questions

Short answer

1a. Outline what is meant by the term 'representation.'

1b. Explain **one** difference between a delegate and a trustee representative.

1c. Discuss **two** impacts of First Past the Post on representation.

2a. Outline what is meant by the term 'electoral system.'

2b. Explain **one** reason why political rights are important in a liberal democracy.

2c. Discuss **two** ways that the operating principle of majority rule is upheld in Australia's electoral system.

3a. Outline what is meant by the term 'electorate.'

3b. Explain the role of the Governor-General in the electoral process.

3c. Discuss the extent to which Australia's electoral system achieves fairness.

4a. Outline **two** features of proportional representation voting.

4b. Explain **one** potential impact of a recently implemented or proposed reform to electoral and voting systems in Australia.

4c. Discuss how a recent state or federal election in Australia upheld political participation. *(See CS1 and CS7).*

Source Analysis

Source 1 is adapted from: Amy Remeikis 03 February 2024, Albanese reiterates support for four-year terms amid questions of election timing, from https://bit.ly/3TBMYK2

The Prime Minister was asked on Wednesday if Australia would be headed to voting booths this year, with rumours the government would want an early election if its polling fortunes reverse to get a mandate to act on issues such as the stage-three tax cuts. In confirming the election is not due until May 2025, Albanese added he believed the lower house parliamentary terms were too short and he would like to see standardisation with the states, which have set four-year terms.

"I think that our terms are too short with just three years," he said. "Our view, our long-term policy, and we've put it to the Australian people, is for four-year terms, but I don't anticipate that happening any time soon and I think that's unfortunate."

Most Westminster-based parliamentary systems began as unfixed terms, which gives the government of the day the discretion to choose the election date within a set time frame.

Changing the parliamentary term would require a national referendum as well as changes to the Senate terms, which are set at six years for the states, in order to fit in new lower house terms. Proponents of four-year fixed terms believe it would give governments more opportunity to implement their agendas and carry out reforms.

Critics of the policy note unpopular governments would be in power for longer and governments would be less accountable. The Greens support fixed, three-year terms for the lower house, which would remove the power of governments to choose the election date but not add any time between visits to the voting booth.

The Liberal National party MP David Coleman introduced a private member's bill in 2017 for fixed four-year terms, which had the in-principle support of ministers in the Turnbull government, and then Opposition leader Bill Shorten, but the legislation did not move forward.

continued overleaf

https://www.theguardian.com/australia-news/2024/jan/03/federal-labor-under-pressure-to-stop-idling-on-car-fuel-efficiency-standards After r*aising the issue of four-year terms, Albanese pointed out 2024 would be a year of elections for Australia's allies and regional partners.*

5a. Outline what is meant by the term 'election.'

5b. With reference to Source 1, discuss in your own words why there is support for a four-year parliamentary term.

5c. Discuss the impact of **one** contemporary issue centring on representation in the Commonwealth Parliament.

5d. With reference to **one** recent federal or state election, evaluate the Preferential Voting system in the lower house of parliament.

Essay responses

6. Analyse how, and to what extent, Australia's electoral systems reflect the operating principles of a liberal democracy.

7. The "Australian electoral compromise" combines majoritarian and proportional systems to create an 'ideal' electoral system.

Evaluate this claim.

Investigation and discussion

8. Prepare a debate on the topic: 'Australia should remove compulsory voting from federal elections'.

9. Investigate a recent state or federal election. Consider the following in your research:
    - Preference votes for major and minor parties, as well as Independents in the lower house.
    - Number of candidates achieving the quota on primary votes.
    - Number of Australians enrolled and who voted in the election.
    - Number of informal votes.

10. Investigate the voting reforms passed through the Commonwealth Parliament in 2016.
    - Explain the changes in electoral process and procedure made by the Commonwealth Electoral Amendment Act 2016;
    - Record the advantages and disadvantages of these reforms; and
    - Consider expert opinions, such as psephologist Antony Green, on how this has affected representation in the Senate after the 2016 double dissolution election.

11. Investigate the history of electoral reform at the commonwealth level. Create a podcast or panel discussion of federal electoral reform after Federation in 1901.

Sources

Figure 8.1 Source: Stephen King 2024
Figure 8.2 Source: Matt Golding, The eternally disappointed swinging voter, 2014, <https://twitter.com/stansteam2/status/523594376631418882> and <http://www.threefingers.com.au/>
Figure 8.3 Source: J J Harrison, Australian Senate, Parliament of Australia, Canberra, Australia, 2012, CC BY-SA 3.0, <https://commons.wikimedia.org/w/index.php?curid=18231283> and <https://en.wikipedia.org/wiki/Australian_Senate#/media/File:Australian_Senate_-_Parliament_of_Australia.jpg>
Figure 8.4 Source: Alan Moir, Turnbull backfires, 2016, <https://twitter.com/moir_alan/status/749437230960087040>
Figure 8.5 Source: Matt Golding, 2022, <https://www.smh.com.au/national/nsw/teal-candidates-are-the-real-deal-for-the-disaffected-20220505-p5aivi.html?js-chunk-not-found-refresh=true>
Figure 8.6 Source: Stephen King, 2018
Figure 8.7 Source: Nicol Davis, 2018
Figure 8.8 Source: Nicol Davis, 2018
Figure 8.9 Source: Stephen King, 2018
Figure 8.10 Source: Hshook, 2016 House of Representatives ballot paper used in the Division of Higgins, 2016, CC BY-SA 4.0, <https://commons.wikimedia.org/wiki/File:2016-ballot-paper-Higgins.png#/media/File:2016-ballot-paper-Higgins.png>
Figure 8.11 Source: Stephen King, 2018
Figure 8.12 Source: Kajute, Bandt in 2010, 2010, CC BY-SA 3.0, <https://commons.wikimedia.org/w/index.php?curid=10901182> and <https://en.wikipedia.org/wiki/Adam_Bandt#/media/File:AdmbandtJuly2010.jpg>
Figure 8.13 Source: Government of South Australia 2022, CC BY 3.0, https://commons.wikimedia.org/w/index.php?curid=135470474 and https://en.wikipedia.org/wiki/Fatima_Payman#/media/File:Dai_Le_Fatima_Payman_Circles_(cropped).jpg
Figure 8.14 Source: National Library of Australia, The Australian Senate in 1923, 1923, Public Domain, <https://en.wikipedia.org/wiki/Australian_Senate#/media/File:Australian_Senate_1923.jpg> Figure 8.15
Figure 8.15 Source: Stephen King, 2018
Figure 8.16 Source: Australian Electoral Commission, Polling officials counting Senate ballot papers, 2016, CC BY 3.0, <http://www.aec.gov.au/media/image-library/dec-votes.htm> and https://en.wikipedia.org/wiki/Electoral_system_of_Australia#/media/File:AEC-Senate-counting-MtIsa-1.jpg
Figure 8.17 Source: By DPS Auspic/David Foote, http://old.gg.gov.au/events/swearing-new-senators, CC BY 3.0, https://commons.wikimedia.org/w/index.php?curid=122420329
Figure 8.18 Source: Stephen King, 2018
Figure 8.19 Source: https://www.youtube.com/AECTV
Figure 8.20 Source: Matt Golding, 2023, < https://www.smh.com.au/national/nsw/beware-falling-for-the-developer-housing-con-20230425-p5d30o.html>
Figure 8.21 Source: Stephen King, 2018
Figure 8.22 Source: Johnscotaus, Entrance to polling station run by the Australian Electoral Commission (Australian Federal Elections 2016), CC BY-SA 4.0, <https://commons.wikimedia.org/w/index.php?curid=52468473> and <https://en.wikipedia.org/wiki/Australian_Electoral_Commission#/media/File:Polling_station.jpg>
Figure 8.23 Source: Nicol Davis, 2018
Figure 8.24 Source: Australian Electoral Commission, 2022 federal election results map. Western Australia. https://www.aec.gov.au/Elections/federal_elections/2022/files/maps/WA-2022-results-map.pdf
Table 8.1 Source: Stephen King, 2018
Table 8.2 Source: Stephen King, 2018
Table 8.3 Source: Stephen King, 2018
Table 8.4 Source: Stephen King, 2018

All sources last accessed 3/8/24.

UNIT 2

Electoral representation in another country

Essential understandings

- **The principles of fair elections**
- **Political participation**

Syllabus points

- **The electoral systems of another country**

Other countries' Electoral Systems – An Overview

Countries use **electoral systems** to choose their **executive** and **legislative** branches. Ideally, electoral systems enable **political participation** in **government** and fairly represent the people. Electoral systems vary widely, each with a different approach to achieving **political representation**.

Table 9.1 below shows examples of electoral systems used in democratic countries other than Australia.

Each system has its strengths and weaknesses. PR systems are praised for their inclusivity and ability to reflect a broader range of views, but they can lead to less stable governments. FPP is simpler and often results in clear majorities, but it can distort the representation of parties. Mixed systems combine the best of both, offering a

Electoral System	How it Works	Countries	Advantages	Disadvantages
Proportional Representation (PR)	Parties gain seats in proportion to the number of votes they receive. For example, if a party wins 40% of the vote, it gets 40% of the seats in the **legislature**.	Used in many European countries.	It fairly and accurately reflects the **electorate**'s preferences, allowing for a diverse range of political parties and viewpoints to be represented in the legislature.	It may lead to fragmented legislatures with multiple small parties, making it difficult to form a government.
First-Past-the-Post (FPP)	FPP elects a single **representative** per electorate. The candidate with the most votes in each electorate wins, regardless of whether they achieve an **absolute majority**.	Common in northern hemisphere English-speaking democracies like Britain, Canada and the USA.	It is straightforward and tends to produce stable governments with clear majorities.	It leads to 'wasted votes' where votes for losing candidates contribute nothing to the overall result, potentially leading to a legislature that does not adequately represent the people. It can also split votes between similar parties. It results in a two-party system.
Mixed Electoral Systems	Combines elements of PR and FPP. In these systems, electors cast two votes: one for a local representative (FPP) and another for a **political party** (PR), or for candidates.	Some countries, like Germany and New Zealand. Australia's two-system electoral compromise is a type of mixed system. See Chapter 8.	It achieves an 'electoral compromise' between the direct representation of FPP and the proportional representation of PR, ensuring a broader and more accurate representation of the electorate while maintaining constituent / representative links and stable governments.	It can be complex and suffers from the disadvantages of both FPP and PR systems.
Preferential Vote (PV) Also known as **ranked-choice voting** and the **Alternative Vote (AV)**	PV is used in Australia for **House of Representatives elections**. Papua New Guinea uses PV to elect its National **Parliament**, and Ireland uses it for presidential elections. Britain attempted to introduce AV, but it was rejected by a **referendum** in 2011.	Electors rank candidates in order of preference. If no candidate achieves a majority, the candidate with the fewest votes is eliminated, and their votes are redistributed according to the second preference. This process continues until a candidate has an absolute majority	It ensures that the elected representative has broad support, and eliminates the issue of 'split votes' common in FPP systems.	Marginally more complex than FPP. **Exhaustive Preferential Voting** forces electors to choose candidates for whom they do not wish to vote.

Table 9.1 — Various electoral systems are used to elect the executive and legislative branches in countries other than Australia.

compromise between stability and proportional representation. The choice of an electoral system depends on how a democratic country values the balance between direct representation, proportional outcomes, government stability and other factors. See *Background information: US Republican* ***Democracy****.*

Background information: US Republican Democracy

How democratic are US elections? This question often arises because of how the US electoral system works. Some argue that it does not provide equal political rights, limits political participation, and occasionally goes against **majority rule**. But does this mean the US is not a democracy?

The form of democracy practised in America is known as 'republican democracy'. This isn't the same as a pure democracy. In a pure **representative democracy**, decisions are made according to majority rule, meaning what most people want happens. By contrast, in the words of President Abraham Lincoln (1861-1865), American democracy, or republicanism, is described as "government of the people, by the people, and for the people". This means that while the government is elected by and represents the people, it doesn't always follow the majority's wishes because "the people" is more than just most of the people.

American republican values can sometimes conflict with democratic principles like majority rule and equal political representation. In a **majoritarian** democracy, it's assumed that the majority, through their elected representatives, won't oppress themselves. Therefore, a '*tyranny of the majority*' isn't seen as a threat.

However, American republicanism is more cautious about majority rule. It strongly emphasises **individual** rights and the protection of the rights of people in minority communities. This approach stems from a concern that a powerful majority could overpower the many minorities that make up American society, which was largely founded by groups fleeing persecution in Europe.

Note that each state is one of 50 in the nation. They vary greatly in character, size, and population – compare Utah with California and Texas with Maine. Thus, students should note that the states are the most significant minorities in the "United States". They are protected by US republican democracy – *and this explains the strong state bias in the US electoral system.*

Democracy is a key part of the American republican government; however, the US system aims to balance majority rule with protecting individual and minority rights. This creates a unique form of democratic government where the principles of fair elections are secondary to republican values.

Therefore, US republican democracy is a compromise between two competing political value systems – democracy and republicanism. Note that many of the US electoral system's apparent failures result from the compromise between these two political values.

The United States of America

Electoral System

The US electoral system employs FPP for presidential elections and elections to both houses of Congress. There is no attempt to incorporate proportional representation in any elections for the national or state levels of government. At this level, US electoral systems are simple yet flawed because of FPP's inherent weaknesses – see Table 9.1 and Chapter 8.

While FPP is simple, certain aspects of the US electoral system are complex. Most notably, the Electoral College system used to elect the President is unique, antiquated and complicated.

The United States of America holds elections for many of its public offices. At the national level, there are separate elections for the executive (president/vice president) and the legislative branches (both Houses of Congress).

At the state level, there are elections for 50 state executives (governors) and state congresses, all elected separately. County and city elections also occur for local governments. Several states even have elections for **judges**, attorneys-general, and secretaries of state. Additionally, elections are held for many positions in government bureaucracies, such as school boards and sheriffs.

This Chapter concerns the electoral systems used to elect the United States government's federal that is national, executive and legislative branches.

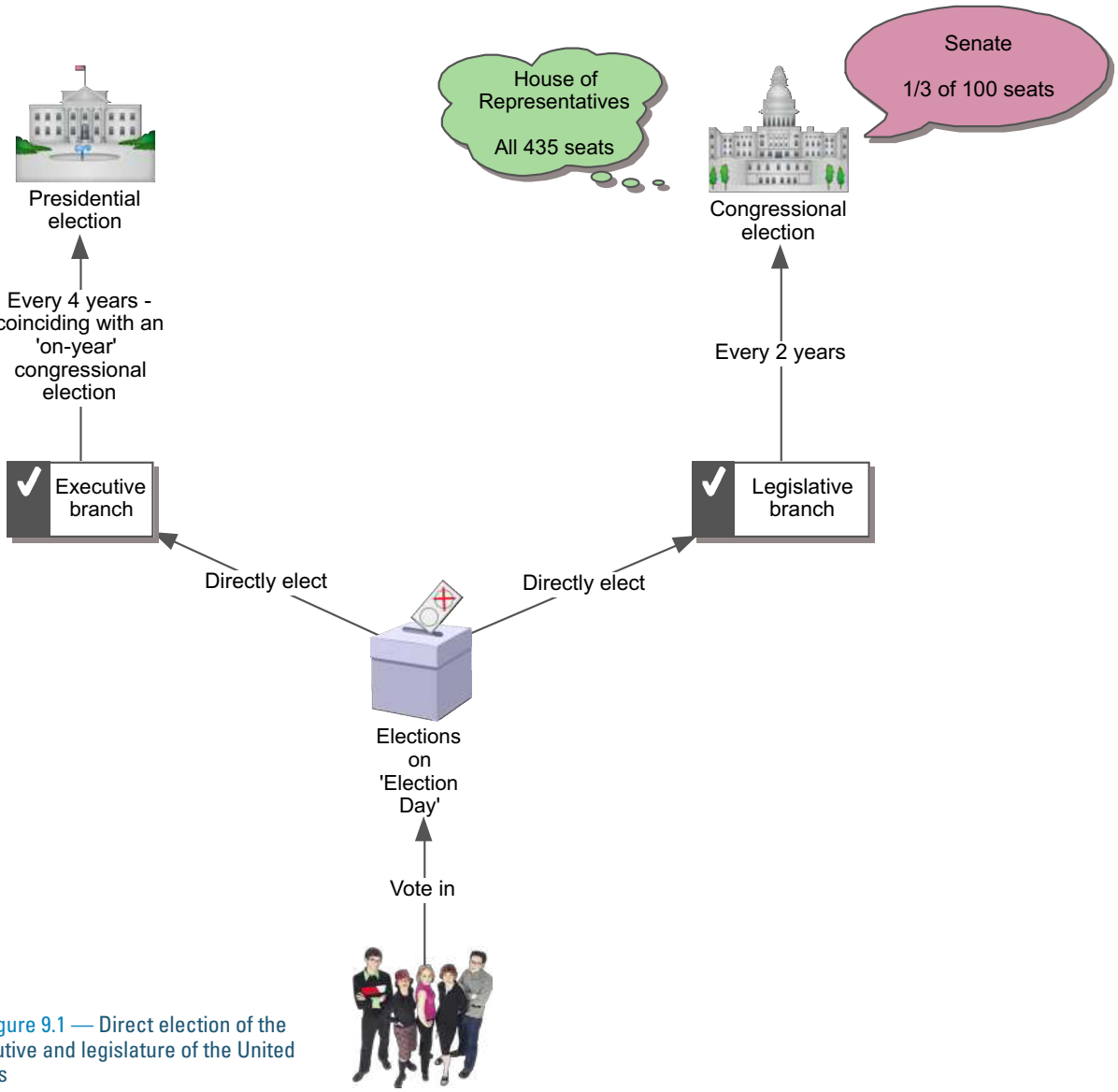


Figure 9.1 — Direct election of the executive and legislature of the United States

Presidential and Congressional Elections

As noted above, the US electoral system employs FPP for presidential elections and elections to both houses of Congress.

The election of the executive branch is a key distinguishing feature between *parliamentary* systems like Australia's and *presidential* systems like that of the United States. Chapter 8 deals with the election of the Australian executive and legislature through a single parliamentary election. By comparison, it is worth noting here that the United States has two separate elections - one for its executive and one for its legislative branch.

Voluntary Voting and Management of Elections

Voluntary voting

The United States has voluntary electoral enrolment and voting. Voluntary voting makes mobilising electors integral to the electoral process. Political parties and candidates strive to encourage supporters to enrol and vote because the **law** does not compel electoral participation.

Electoral participation is a form of political participation; thus, voluntary voting reduces political participation.

States run national elections

All 50 states run independent electoral systems for both Presidential and Congressional elections within the limits of the Constitution. As a result, there is no nationally consistent electoral system. States use various methods to enrol electors, cast ballots, count votes, and declare results. There is a wide variance between state electoral processes, especially the laws governing political rights, such as the right to vote. The result is inequality of political rights, a problem that disproportionately affects African Americans and other minorities.

Students should note that the most significant minorities protected by US republican democracy are the

states themselves – *and this explains the strong state bias in the US electoral system*... as a result, there is no nationally consistent electoral system – *see Background information: US Republican Democracy.*

The Federal Election Commission

The Federal Election Commission (FEC) is an independent agency appointed by the President and confirmed by the **Senate**. The FEC oversees campaign financing and donations to political parties and candidates. It does not organise and run elections.

Compared to the Australian Electoral Commission (AEC), which independently administers all Australian elections, the FEC is significantly weaker in upholding the principles of fair elections – largely because state congresses control electoral processes.

Election timing

Election Day is set by law for a Tuesday in early November. Weekday – that is, workday – voting reduces political participation as many people cannot leave work to vote or require their employer's permission to attend a voting place.

Electing the Federal Executive

The executive of the United States consists of an elected President and Vice President and a **cabinet of secretaries** appointed by and accountable to the President. Section 1, Article 2 of the United States Constitution outlines the process for electing the federal executive.

The President is elected for four years and, since 1947, is limited to two terms by the 22nd Amendment of the Constitution. A President's two terms do not have to be consecutive. Grover Cleveland is the only President to have served non-consecutive terms. He served as the 22nd President from 1885 to 1889 and then again as the 24th from 1893 to 1897. If Donald Trump is elected in 2024, he will become the second President to serve non-consecutive terms.

Choosing the Parties' Presidential Candidates - Primaries and Caucuses

The Republican Party and the Democratic Party are the two major US political parties.[1] Primaries and caucuses are state-by-state electoral processes run by the major parties to choose their presidential candidates. Primaries are votes by **secret ballot**, whereas caucuses are open meetings where members discuss and informally vote for candidates.

1 US **politics** is completely dominated by the two major parties because of the FFP system – a winner-takes-all electoral system that prevents the political representation of minor parties.

Figure 9.2 — US Vice President Kamala Harris was the second woman and first woman of colour when she ran for President in 2024.

Primaries and caucuses are held in the early months of a presidential election year, with the Iowa Republican Caucus being the first in mid-January, followed by the New Hampshire Primaries for both parties in late January. Many states hold their primaries on a Tuesday in March – called 'super-Tuesday".

Primaries have become the dominant process used by both parties to choose their presidential candidates and are run state-by-state. Some states still use the caucus method, notably Iowa – notable because it's the first state to run the selection process.

> *Parties' national conventions are major public events in the electoral calendar designed to energise party supporters and mobilise electors, which is essential in a voluntary voting system.*

The procedures and processes for primaries and caucuses vary between parties and states. Ordinary party members, in some states even non-party members, can vote for a party's presidential nominee. See *Background information: Types of Primaries and Caucuses.*

Many candidates compete to become their party's presidential nominee. The primaries and caucuses elect the final candidate for each party over the first months of a presidential election year. The selected candidate must qualify for election to the office of President. See *Background information: Qualifications, Registration, Ballot Access and Write-in Ballots.*

Primaries and caucuses send their state **delegates** to their party's national convention.

The Parties' National Conventions

The successful presidential nominee usually chooses their Vice-Presidential running mate between the last state primaries and caucuses in June and their party's national convention in July or August.

The national conventions formally elect a party's presidential candidate. The current President's party holds its national convention in August; the other party, or 'out party', traditionally holds it in July. Each party's national committee – which runs its campaign – decides where to hold its convention.

The two national conventions are significant events in the electoral process. They are major public events in the electoral calendar designed to energise party supporters and mobilise electors, which is essential in a voluntary voting system. The election campaign period begins in earnest when the national conventions conclude, with the conventions providing the springboard.

Election Day is always a Tuesday in November. It is the culmination of the election campaign period during which presidential candidates' campaign across the country, aiming to win majorities in as many states as possible. See *Background information: Swing States.*

Parties' national conventions are major public events in the electoral calendar designed to energise party supporters and mobilise electors, which is essential in a voluntary voting system.

Background information: Swing States

In a US presidential election, a swing state is any state that could be won by either the Democratic or Republican candidate in a statewide election. Both major-party campaigns heavily target these states. Swing states can change from election to election. Some examples of traditional swing states include Ohio, Florida, Pennsylvania, Michigan, Nevada, Wisconsin, North Carolina, and Arizona.

The Australian equivalent to a swing state is a marginal electorate – that is one which either **major party** could win. Both swing states in the US and marginal electorates in Australia matter because they often determine the outcome of elections in both countries.

Primaries, caucuses, and conventions as opportunities for political participation

Primaries and caucuses provide many opportunities for grassroots political participation by ordinary party members – and even non-party members in some states – to participate in selecting a presidential candidate. *See Background information: Types of Primaries and Caucuses.*

Moreover, the state-by-state process ensures a presidential candidate is chosen by a process representing all the states and, thus, the nation.

Background information: Types of Primaries and Caucuses

1. **Open Primaries**: In open primaries, any registered voter can vote in either the Democratic or Republican primary – that is they do not have to be party members. There are 20 states where at least one party conducts open primaries.
2. **Semi-Closed Primaries**: Registered party members and non-party voters can vote in semi-closed primaries. There are 14 states where at least one political party conducts semi-closed primaries.
3. **Closed Primaries**: Only people registered in a particular political party can vote in that party's primary. There are 15 states where at least one political party conducts closed primaries.
4. **Caucuses**: Unlike primaries, which state governments organise, caucuses are not organised by state governments, and only party members can vote. This means that independent (that is non-party) voters in the states with caucuses are not allowed to participate.

Eight states allow non-party voters to participate in primaries: Arizona, Colorado, Kansas, Maine, Massachusetts, New Jersey, Rhode Island, and West Virginia.

The Electoral College – Electing the President

The US Constitution establishes the Electoral College as the legal mechanism for electing the President and Vice President. This system entails the selection of 'presidential electors' (also known as Electoral College delegates), who are representatives elected by voters in each of the 50 states and the District of Columbia. There are 538 presidential electors in the Electoral College.

The Electoral College was established to prevent 'mob rule' and 'tyranny of the majority,' reflecting the republican scepticism of direct majority rule. See *Background Information: US Republican Democracy.*

On Election Day, voters in each state do not directly vote for a candidate but for a group of state electors aligned with a particular presidential candidate. The Electoral College

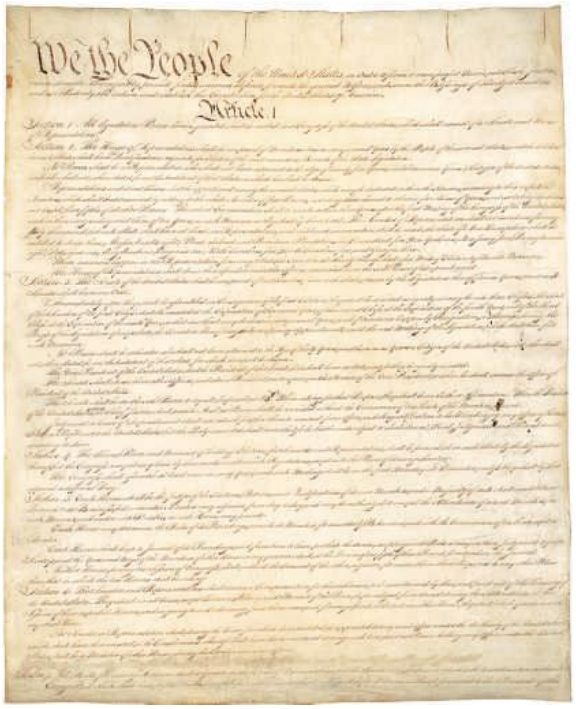


Figure 9.3 — The Constitution of the United States of America established the Congress.

assembles in December when its electors gather after Election Day. At this meeting, the president is legally elected by 538 people. The Electoral College votes by a **first past the post electoral system (FPP)**. Most Electoral College delegates vote as a bloc for the candidate who won their state's popular vote, with Maine and Nebraska being exceptions. See *Background information: The Electoral College – How and Why?*

The number of Electoral College delegates per state equals its total representation in Congress (**House of Representatives** plus Senate). For example, with 53 House seats and two Senate seats, California has 55 Electoral College votes. This allocation gives more populous states greater representation, aligning with the principle of majority rule.

Since 1824, the usual system in most states is 'winner-take-all,' where a candidate winning the majority of a state's popular vote gets all its Electoral College votes (hence the bloc voting at the Electoral College). Maine and Nebraska, however, proportionally allocate their Electoral College votes based on the candidates' share of the state's popular vote on Election Day.

Note that some states are far more important than others in the Electoral College and, thus, presidential elections. Two factors influence the importance of a particular state and how much effort each candidate will expend trying to win its Electoral College delegates.

1. The state's population. Population affects a state's Congressional representation and, thus, the number of its Electoral College delegates. Thus, big states like California, Texas and Florida are important. It is extremely unlikely a candidate could win without winning in at least one of these states.
2. Whether a state is a swing state or not. Campaigns will focus their limited resources on the states that either candidate could win. It is wasteful to expend resources on states that strongly support a candidate or his/her opponent – that is, states where the result is almost certainly known before the election.

California is the largest state and is firmly in the Democratic Party camp. Texas is traditionally strongly Republican, but recent demographic change – brought about by the state becoming more urban, younger and less white – has seen it drift towards the Democratic Party. Florida is the third-largest state by population *and* a swing state – making it one of the most contested states in presidential elections.

Feature	Role in Popular Participation
Qualifications: Candidacy for Office	**Citizens** must meet age (at least 35), residency (14 years in the U.S.), and natural-born citizenship requirements. This ensures candidates have a fundamental connection with the electorate.
Caucuses and Primaries	These are state-level elections where party members vote for their preferred presidential candidate. They enable citizens to have a direct say in who becomes the party nominee. *See Background information: Types of Primaries and Caucuses.*
Parties' National Conventions	Delegates from each state, chosen through primaries and caucuses, officially nominate a presidential candidate. This event involves grassroots participants and reflects the collective will of party members.
Election Day	On Election Day, citizens cast their votes directly for their preferred candidate. The popular vote influences the Electoral College decision, allowing citizens' preferences to impact the final outcome. Election Day being a Tuesday (that is, on a working day) limits participation.
Electoral College	Voters indirectly elect the president through the Electoral College, where each state's number of electors is based on its congressional representation. It's a blend of state and population-based voting. The 538 members of the Electoral College legally elect the president in December.

Table 9.2 — Opportunities for US citizens to participate in the election of the US President.

Background information: The Electoral College – how and why

The Electoral College is a unique mechanism in the United States electoral process, where states play a pivotal role in electing the national executive (that is, the President and Vice President) through a group of designated individuals known as 'presidential electors'. The Electoral College's origin was influenced by 18th century concerns about allowing too much public power in elections.

Historically, state legislatures chose their presidential electors. However, by 1824, democratic reform resulted in most states electing their Electoral College delegates through a statewide popular vote. This method typically follows a winner-takes-all approach, where the candidate winning the majority of votes in a state receives all of that state's Electoral College votes.

By 1880, every state had adopted the practice of selecting their presidential electors via direct popular vote. However, Maine (in 1972) and Nebraska (in 1996) broke from the winner-takes-all system. These states allocate one elector to the winner in each congressional district and two more to the candidate who wins the most votes nationwide – linking their results to the national popular vote.

All state presidential electors, currently 538, meet in December after Election Day to formally elect the President and Vice President, who then assumes office on January 20th, known as Inauguration Day. A **simple majority** of 270 Electoral College votes is required to win the presidency.

The Electoral College system reflects the United States' tremendous diversity. Firstly, it recognises that states are minorities within the larger union of 50 states. Secondly, within each state are other minorities, varying geographically (rural v urban), economically (services v manufacturing v agriculture/mining), religious beliefs, and political ideologies.

The Electoral College ensures that a presidential candidate must win *many small majorities within various minorities*, creating broad-based national political representation in the executive branch. This system safeguards against a simple national majority – a tyranny of the majority in republican thinking – possibly representing a narrowly focused interest, from single-handedly determining the election outcome and being unrepresentative of other interests. Instead, the Electoral College is a system that requires presidential candidates to appeal to a representative cross-section of American society.

To be elected President, a candidate needs 270+ of the total 538 Electoral College votes. A candidate may win fewer states by larger margins, while their opponent may win more states by smaller margins. Such an outcome can result in a candidate winning the majority of Electoral College votes with less than a majority of the national vote, as happened in the 2016 election when Hillary Clinton won the national popular vote but had fewer Electoral College votes than Donald Trump. Mr Trump was elected President. In this way, the Electoral College system can undermine the majority rule principle.

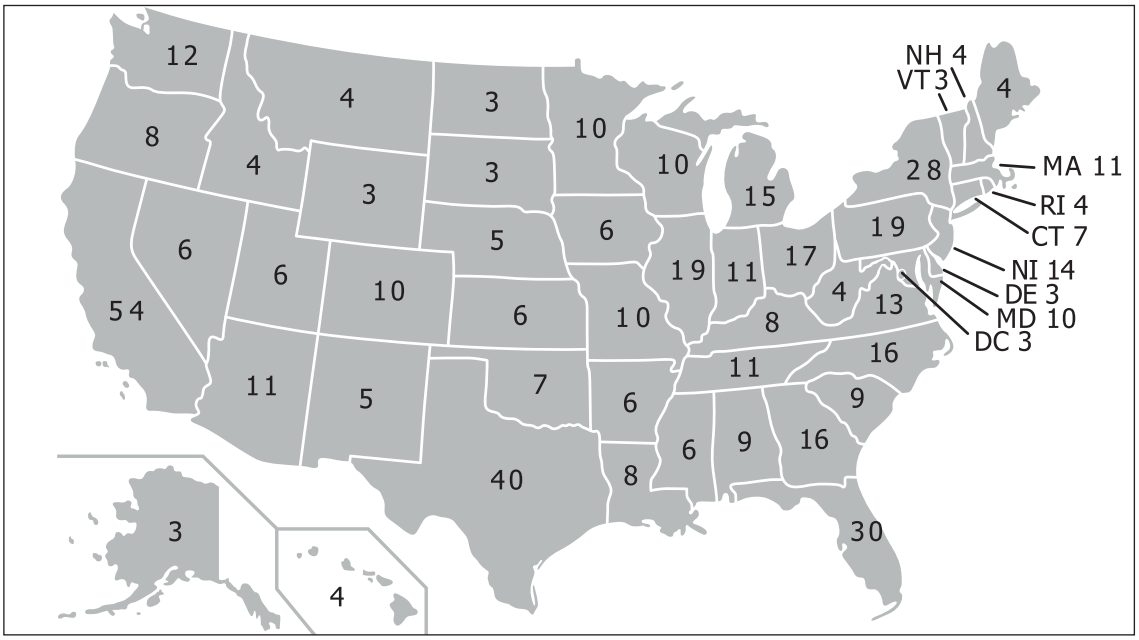


Figure 9.4 — Electoral College votes in the 2016 US Presidential election.

Electing the Legislature

The delegates at the Philadelphia Convention of 1787 – at which the US Constitution was drafted – faced a dilemma. How were they to achieve political representation that balanced popular versus state representation?

Benjamin Franklin, a delegate from Pennsylvania, summarised the dilemma:

> *"If a proportional representation takes place, the small States contend that their liberties will be in danger. If an equality of votes is to be put in its place, the large States say their money will be in danger. When a broad table is to be made, and the edges of planks do not fit the artist takes a little from both, and makes a good joint."* [2]

The Philadelphia Convention settled on the *Connecticut Compromise* to make 'a good joint' between popular and state representation. Also known as the Great Compromise, the agreement was to adopt a **bicameral** legislature which gave proportional representation to the states based on their population (that is, popular representation) in a lower house and equal representation to the states in an upper house. Thus, the lower house would be a democratic house of the people - like the British House of Commons; and the upper house a house of the states - a uniquely American republican innovation. Both houses have roughly equal powers to check and balance the two forms of representation. This is the origin of America's (and Australia's) **strong bicameralism**.

The bicameral US Congress has two main functions:

1. Represent US citizens in districts and states; and
2. Make laws.

Figure 9.5 — Incumbent Republican president Donald Trump was challenged by former Vice President Joe Biden in the 2020 election.

2 Proportional Representation: https://history.house.gov/Institution/Origins-Development/Proportional-Representation/

The House of Representatives is a people's chamber; it represents the people of each state in proportion to their population. There are 435 Representatives in the House, with California having 53 seats, the most of any state, due to its large population. The seven smallest states each have a single representative.

The Senate is a federal chamber where states are equally represented, with two senators from each state in the 100-member chamber.

Background information: Qualifications, Registration, Ballot Access and Write-in Ballots

The US Constitution specifies the qualifications for election to the office of President, to the House of Representatives, and the Senate.

To run for **President of the United States**, a candidate must meet the following qualifications.

- Be a 'natural-born citizen' of the United States;
- Be at least 35 years old; and
- Have been a resident of the United States for 14 years.

To run for the **US Congress** requires the following qualifications:

For the House of Representatives

- Be at least 25 years old;
- Have been a US citizen for at least seven years; and
- Be living in the state they choose to represent.

For the Senate

- Be at least 30 years old; and
- Be living in the state they choose to represent.

Those who qualify must register as a candidate to "access the ballot".

To register as a Presidential or Congressional Candidate: An individual becomes a candidate when he or she raises or spends more than $5,000 for their campaign. Within 15 days after becoming a candidate, they must establish a campaign committee.

Meet State-Specific Requirements: Registering as a candidate varies from state to state. Candidates can seek the nomination of a political party, run as an independent (often requiring a petition to have their names printed on the general election ballot), or run as a write-in candidate - see below.

Ballot access refers to the procedure for candidates to get their names on the ballot paper. Typically, candidates are nominated by the political parties, overwhelmingly the Republican Party and the Democratic Party. However, the decentralisation of the US electoral system means that ballot access rules vary between states. Many states uphold popular participation by allowing voters to write-in the name of their preferred candidate on their ballot paper.

Ballot access laws in forty-one states and the District of Columbia permit write-in ballots. Write-in ballots allow independent (that is, non-party) candidates to campaign for election by asking voters to write their names on the ballot paper and then vote for them. It is a strategy often used to split the vote of one of the major parties – the so-called 'spoiler effect'.

Write-in candidates have won elections to the House of Representatives and the Senate. They sit in Congress as independents. Strom Thurmond was a Democrat whose party rejected his Senate candidacy because he supported Republican President Eisenhower. He ran as a write-in candidate in 1954 and won. Dale Alford ran as a write-in candidate for the House of Representatives in Arkansas. He was a school board member and used popular opposition to the racial integration of schools to campaign as a write-in candidate. He won by about 1200 votes.

States run elections for the national legislature

There is no nationally consistent single electoral system for the US Congress. State congresses make electoral laws for electing their representatives to the US House of Representatives and the Senate. Thus, electoral laws and processes vary state by state.

State congresses also control the boundaries of electoral divisions, putting electoral boundaries under political control. The result is **gerrymandered** federal congressional districts in some states. Gerrymandering deliberately reduces the **equality of political rights** and undermines the democratic principles of majority rule, participation and fair elections.

These features contrast sharply with Australia, where one national electoral law governs elections, and elections are administered entirely by the independent AEC. Australia upholds the equality of the right to vote and the principles of fair elections significantly more than the United States.

The fundamental reason for the US's "democratic deficit" is that the US system compromises democratic principles to achieve its republican values. Australia's electoral system is designed to prioritise democratic principles. *See Background information: US Republican Democracy.* See also *Looking ahead: Gerrymandering and Voter Suppression.*

There is no nationally consistent single electoral system for the US Congress and in some states gerrymandering deliberately reduces the equality of political rights and undermines the democratic principles of majority rule, participation and fair elections

Election timing and its impact on political representation

Congressional elections occur every two years, one of the shortest electoral cycles of any democracy. The full House of Representatives is elected every two years, and one-third of the Senate is elected simultaneously with the House, meaning senators have six-year terms. The 'Senate rotation' ensures two-thirds of experienced senators remain after every election, providing stability to the government. Thus, the Senate is a 'continuing house'. See *Background information: The US House and Senate.*

"There is no nationally consistent single electoral system for the US Congress and in some states gerrymandering deliberately reduces the equality of political rights and undermines the democratic principles of majority rule, participation and fair elections"

Every second congressional election coincides with a presidential election. These are called 'on-year elections'. Alternate congressional elections are called 'mid-term elections' or 'off-year elections', as they occur halfway through a president's four-year term.

Alternating congressional elections have different impacts on political representation due to the presence or absence of a concurrent presidential election.

- On-year elections have higher turnouts because of the additional momentum the presidential election campaign provides. Generally, the successful presidential candidate's party does better in an on-year election because their appeal enhances their party's congressional vote.
- Off-year (mid-terms) elections have lower turnouts, averaging 17% less than on-year elections. Mid-terms are sometimes considered virtual referendums on the performance of a President. Typically, the president's party does worse for this reason. For example, the 2018 mid-terms saw the Democratic Party win control of the House of Representatives, which some interpreted as a judgment on Republican President Trump's performance – it was also the highest mid-term turnout in over 100 years. The 2022 mid-terms saw President Biden's Democratic Party lose control of the House of Representatives.

The high frequency of congressional elections means that the House of Representatives remains in "intimate sympathy" with the people – which is appropriate to its function as the people's house. Members of the House are constantly checked and accountable to the people. Rufus King, a delegate from Massachusetts at the 1787 Philadelphia Convention at which the US Constitution was drafted, argued that:

> *"It seems proper that the representative should be in office time enough to acquire that information which is necessary to form a right judgement, but that the time should not be so long as to remove from his mind the powerful check upon his conduct, that arises from the frequency of elections, whereby the people are enabled to remove an unfaithful representative, or to continue a faithful one.*[3]

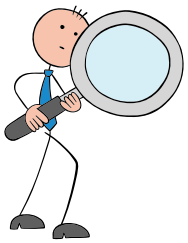
The high frequency of elections enables Americans to enjoy highly responsive political representation.

First past the post

Voting for the 435 House of Representatives electoral districts is by the first past the post system (FPP) system, with the number of single-member electorates in each state generally proportional to state populations.

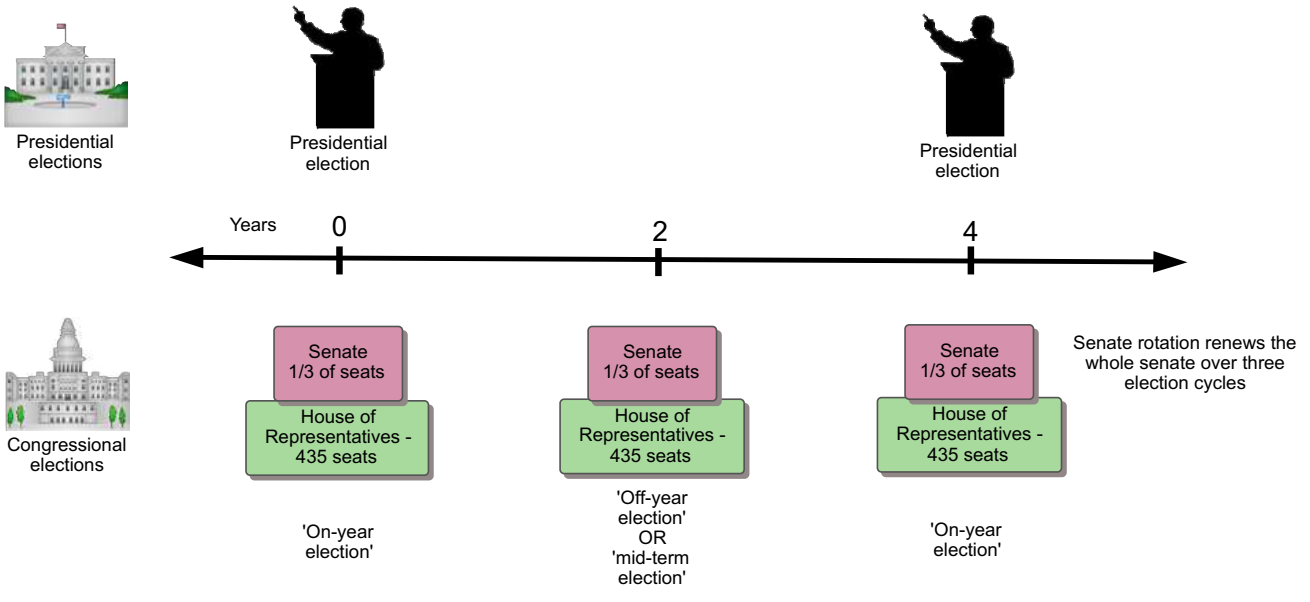
Senate seats are elected using FPP in so-called 'at-large' elections where each state is an electorate.

Using the same electoral system for both houses means the US cannot achieve the 'electoral compromise' that Australia and other countries with mixed electoral systems can. Moreover, FPP is a flawed system that has serious consequences for political representation. See Table 9.1.



Looking ahead: Gerrymandering and Voter Suppression

Unit 4 looks closely at how a country other than Australia undermines the democratic principles of political representation and popular participation. Gerrymandering and voter suppression are two tactics that can undermine these principles. Additionally, these tactics undermine the principles of fair elections relevant to Unit 2.



■ Figure 9.6 — Election cycles of the United States

3 Biennial Elections: https://history.house.gov/Institution/Origins-Development/Biennial-Elections/

Gerrymandering is drawing electoral district boundaries in a way that gives an unfair advantage to one group over another. This can be done to favour a political party or any other section of the electorate. The US Supreme Court declared racial gerrymandering unconstitutional in *Shaw v Reno (1993),* because it infringed the 14th Amendment to the Constitution. However, it hasn't done the same for partisan gerrymandering. As a result, many states use the tactic to give an edge to a particular political party in congressional elections. Currently, the practice tends to benefit the Republican Party in several states.

Gerrymanders undermine the quality of political rights by reducing the voting power of some citizens. It undermines the principles of fair elections by being unfair to political parties and distorting the people's will.

Voter suppression involves tactics aimed at making it harder for certain people to vote. This can include strict laws about who can vote and methods like limiting voting opportunities. For example, in 2020, some areas saw a reduction in ballot drop-off points, which are used for early voting. A notable example was in Harris County, Texas, home to 4.7 million voters, including many Hispanic and African American voters who typically support the Democratic Party. The Republican Governor of Texas, Greg Abbott, limited each county to just one ballot drop-off point, making early voting much more difficult. Although a court initially overturned Governor Abbott's order, it was reinstated by three judges on the 5th Circuit Court of Appeals. This action effectively suppressed the vote of Democratic Party supporters in Harris County.

Another way to influence electoral outcomes is by changing the population size of congressional districts. Some states make districts that traditionally vote for the opposition party larger, meaning that the votes in these areas have less value compared to smaller districts. This practice goes against the principle of 'one person, one vote.'

Both gerrymandering and voter suppression are strategies that can significantly affect political representation in the US. They manipulate the electoral system in ways that can disadvantage certain groups, undermining the democratic principle of fair and equal representation.

Background information: The US House and Senate

The House of Representatives dissolves and reconstitutes every two years. All 435 congressmen and congresswomen in the House of Representatives must face election every two years. Such frequent renewal aims to maintain the "intimate sympathy" with the people James Madison envisioned for the people's house. The strong emphasis on political representation derives from the core value for which the American War of Independence was fought – recall the motto "no taxation without representation" which inspired the rebels who triggered the War.

The Senate is a continuing body. Two-thirds of the Senate remain in place at each congressional election. Senators belong to one of three Senatorial Classes - Class I, II and III. Senatorial Classes are composed so that no state has both its senators in the same Class. One Class of senators is elected with the whole House of Representatives every two years. Senators serve six-year terms. Henry Cabot Lodge described the Senate in 1903 in the following terms: *"Administrations come and go, Houses assemble and disperse, Senators change, but the Senate is always there in the Capitol, and always organised, with an existence unbroken since 1789."* [4]

The continuity of the Senate aimed to create a clearheaded and deliberative chamber that would check the democratic urges of the mob. Checking the popular will - represented in the House of Representatives - reflects the delegates' attitudes at the Philadelphia Convention in 1787. They worried about the risks of allowing too much political representation of the people who, it was thought at the time, were *"constantly liable to be misled."* [5]

The US is not a **Westminster system**; nevertheless, it is interesting to note that the continuity of the US Senate breaks a key Westminster convention – that is, a previous parliamentary majority does not bind a current parliamentary majority. Criticisms of the US Senate rest on the argument that the residual two-thirds of the Senate after an election inhibits the newly formed majority in the House - undermining majority rule.

4 Hamilton A: Federalist No 68

5 The Constitutional Convention: https://courses.lumenlearning.com/suny-ushistory1ay/chapter/rights-and-compromises/#:~:text=Ordinary%20voters%2C%20Sherman%20said%2C%20lacked,power%20over%20the%20legislative%20branch.

Australia adopted the US idea of a continuing body when it chose to elect half the Senate at each election. At least in the Australian Senate, the continuing half is never a supermajority and can less frustrate the majority in a newly elected House of Representatives. Because Australian governments are parliamentary executives, Australia differs from the USA in that its Senate can use its majority to check the executive formed in the lower house – a function absent in the US system.

The US Electoral System: Equality of Political Rights and Principles of Fair Elections

The following is a list of features and events that have influenced the development of the US electoral system in terms of political rights and fair elections.

Equality of Political Rights in US National Elections

US national elections are administered by 50 states, leading to significant variations in political rights. While some states adhere to the democratic principle of equality of political rights, others actively undermine it through voter suppression. *See Looking ahead: Gerrymandering and Voter Suppression*.

President Lyndon B. Johnson's Impact on Political and Civil Rights

Democrat President Lyndon B. Johnson (1963 to 1969) was a transformational figure in US political and civil rights, especially after succeeding President John F. Kennedy who was assassinated in 1963. Despite being a 'Southern Democrat' from a faction that historically defended slavery, President Johnson championed civil rights, signing both the *Civil Rights Act 1964* and the *Voting Rights Act 1965*, which expanded political rights for African Americans in particular. [6]

The Role of the Supreme Court

The Supreme Court has played a mixed role in the evolution of political rights. It upheld the equality of political rights in decisions like *Westbury v. Sanders* and *Shaw v. Reno*. However, it also made rulings that undermined these rights, as seen in *Vieth v. Jubelirer* and *Shelby County v. Holder*. See *Background information: The Shelby decision.*

Background information: The Shelby decision

The Supreme Court's decision in *Shelby County v. Holder in 2013* significantly impacted voting rights in the United States. Some negative rights impacts were:

1. It ended the preclearance system, a key part of the Voting Rights Act that required certain areas with a history of voting discrimination to get federal approval before changing election laws.
2. It led to an increase in restrictive voting laws. For example, Texas quickly announced a strict photo ID law right after the ruling, and states like Mississippi and Alabama followed suit.
3. It resulted in the closure of nearly 1,000 U.S. polling places, many in predominantly African-American jurisdictions.
4. It decreased minority representation and voter turnout, so its removal has sparked concerns about losing these gains.

Congress and State Legislatures

Congress has enacted significant political rights legislation like the *Civil Rights Act* and the *Voting Rights Act*. However, state legislatures, which have power over electoral laws, have sometimes undermined these rights by reintroducing voter suppression measures – see the examples of Texas, Mississippi and Alabama at point 2 above in *Background information: The Shelby decision*.

One Vote, One Value Principle

Established by the Supreme Court in *Westbury v. Sanders (1993)* and supported by the *Uniform Congressional District Act 1967*, this principle ensures equal voting power across states. However, gerrymandering within states can undermine this principle – see *Background information: Gerrymandering and Voter Suppression.*

14th Amendment - The Equal Protection Clause

Shaw v. Reno (1993) ruled racial gerrymandering unconstitutional as it infringed upon the Equal Protection Clause of the 14th Amendment. Conversely, *Vieth v. Jubelirer (2004)* allowed states to vary the population of congressional districts, creating inequality in voting power.

The Voting Rights Act 1965

This **Act** outlawed voter qualifications based on race, literacy, and taxes – expanding the **franchise** and reducing states' ability to suppress voters. However, *Shelby County v. Holder*

6 "Civil rights are personal rights guaranteed and protected by the U.S. Constitution and federal laws enacted by Congress, such as the Civil Rights Act of 1964 and the Americans with Disabilities Act of 1990. Civil rights include protection from unlawful discrimination." https://www.hhs.gov/civil-rights/for-individuals/faqs/what-are-civil-rights/101/index.html#:~:text=Civil%20rights%20are%20personal%20rights,include%20protection%20from%20unlawful%20discrimination

(2013) invalidated parts of this Act, allowing states like Texas and Mississippi to reintroduce restrictive voter registration laws targeting African American and Hispanic electors. See the examples of Texas, Mississippi and Alabama at point 2 in *Background information: The Shelby decision*. Also see *Background information: Gerrymandering and Voter Suppression.*

17th Amendment

The 17th Amendment, passed in 1913, introduced the direct popular election of senators, making Congress fully elected and accountable to the people.

US Judiciary's Role in the 2020 Election

The **judiciary**, including many Republican-appointed **judges**, upheld the election results by rejecting most of the Trump campaign's legal challenges to the 2020 election results, demonstrating their independence from the executive branch. An independent judiciary is fundamental to democracy because it checks and limits executive and legislative power by upholding the **rule of law**.

> *Recent developments can potentially undermine democratic principles by eroding public trust in the electoral process.*

Reform Proposal: National Popular Vote Interstate Compact (NPVIC)

The NPVIC is an agreement among several states to allocate their Electoral College votes according to the national vote. This proposal ensures that the presidential candidate with the most nationwide votes wins. Currently, signatory states of the NPVIC hold 196 Electoral College votes, with more states considering joining.

This reform would modernise the Electoral College system by preventing a candidate from becoming President by winning a majority of Electoral College votes but not the national popular vote – as Mr Trump did in 2016. It would enhance American democracy by strengthening the majority rule principle.

Threats to the US electoral system

Freedom House is a non-profit organisation based in Washington, D.C. that is dedicated to the expansion of freedom and democracy around the world. It conducts research and publishes reports on democracy in various countries. It reports the following as threats to the US electoral system post-2020:[7]

1. **Efforts to Undermine Election Results**: The insurgency that attempted to overturn the results of the 2020 election, culminating in the attack on the Capitol on January 6, 2021, has increased public mistrust in the electoral process.
2. **Threats Against Officeholders**: Political participation has been hindered by increased threats against officeholders, like election officials. For example, two former Georgia election workers, Ruby Freeman and her daughter, Shaye Moss, successfully sued former Trump lawyer Rudi Giuliani for false accusations of fraud that led to public threats against them.
3. **Changes in Voting Laws**: Some states have introduced laws that may undermine election integrity and limit voting opportunities for specific population segments. See the examples of Texas, Mississippi and Alabama at point 2 of *Background information: The Shelby decision.*
4. **Influence of Special Interests**: The excessive influence of special interests such as wealthy individuals and corporations in electoral processes is a concern.
5. **Spread of disinformation and misinformation:** The spread false information in the media environment continues to be problematic. Social media amplifies disinformation[8] and misinformation and creates 'silos' within which citizens only receive information from sources that confirm their views – a phenomenon called 'confirmation bias'. News silos and confirmation bias threaten the free flow of accurate information on which democracy depends.
6. **Authoritarian Rhetoric**: There has been an increase in authoritarian language in political campaigns.

These developments can undermine democratic principles by eroding public trust in the electoral process. It is important to note that these are areas of ongoing debate, and their ultimate impact on US democracy is still unfolding in 2024.

7 Reversing the Decline of Democracy in the United States | Freedom House at https://freedomhouse.org/report/freedom-world/2022/global-expansion-authoritarian-rule/reversing-decline-democracy-united-states

8 Disinformation is deliberate spread of false information. Misinformation is unintentional spread of false information.

Recent developments can potentially undermine democratic principles by eroding public trust in the electoral process.

Depth Study: The 2020 Election

The United States 2020 presidential and congressional elections, held on 3 November 2020, were characterised by unprecedented voter turnout, a deeply polarised electorate, and significant challenges posed by the COVID-19 pandemic.

Presidential Election

Candidates

- **Democratic Party:** Obama-era Vice President Joe Biden with Senator Kamala Harris as his running mate; and
- **Republican Party:** Incumbent President Donald Trump with Vice President Mike Pence as his running mate.

Campaign Issues

Several critical issues dominated the campaign:

- The federal response to the COVID-19 pandemic;
- Economic impacts of the COVID-19 pandemic;
- Racial justice and police reform, sparked by the murder of George Floyd and emergence of the Black Lives Matter movement;
- Climate change and environmental policies; and
- The future of the Obama-era *Affordable Care Act* and healthcare policy.

Figure 9.7 — The COVID-19 pandemic was a key issue in the 2020 election campaign.

Voter Turnout

The 2020 election saw the highest voter turnout in over a century:

- Over 159 million Americans voted, representing approximately 66.7% of the eligible voting population, the highest since 1900; and
- The widespread use of mail-in ballots and early voting were significant factors in this high turnout, driven by health concerns due to the pandemic.

Election Results

Figure 9.8 — Joe Biden won the 2020 Presidential election, winning 306 Electoral College votes compared to Donald Trump's 232.

- Joe Biden won the election, winning 306 Electoral College votes compared to Donald Trump's 232;
- Mr Biden received over 81 million votes (51.3% of the national vote), the most votes ever for a presidential candidate; and
- Mr Trump received more than 74 million votes (46.8%), the most for a sitting president.

Congressional Elections

The 2020 elections also included all 435 seats in the House of Representatives and the 35 senators in Senatorial Class II – see *Background information: The US House and Senate.*

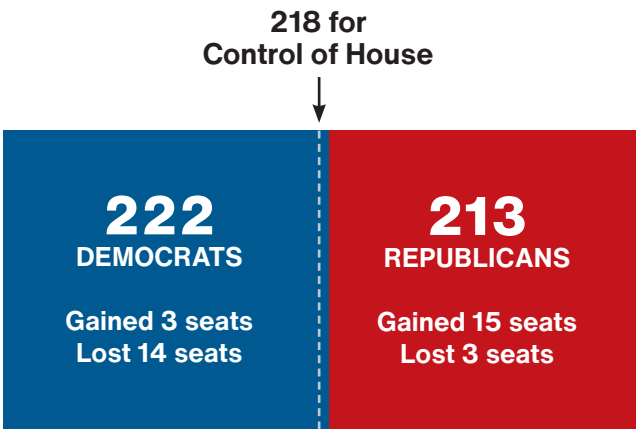


Figure 9.9 — Composition of the US House of Representatives after the 2020 election.

House of Representatives

- Democrats won 222 seats, a decrease from the 235 seats they held after the 2018 midterm elections;
- The Democratic Party maintained control of the House but with a reduced majority; and
- The Republican Party increased its representation to 213 seats.

Senate

- The Republican Party held 50 seats and the Democratic Party 48. Two seats were undecided;
- Control of the Senate was undecided on election night and depended on runoff elections in Georgia because no candidate received more than 50% of the vote on Election Day;
- After the Democrats won the Georgia runoffs, two independents, who vote with the Democrats (that is, they caucus with them), gave the Democrats control of 50 seats;[9] and
- With Vice President Kamala Harris's tie-breaking vote, the Democratic Party gained razor-thin control of the Senate.

Key States

Several states played pivotal roles in determining the election outcome:

- **Critical States:** Pennsylvania, Michigan, Wisconsin, Arizona, and Georgia were crucial. Biden's victories in these states, which Trump won in 2016, were decisive in his overall win; and
- **Georgia:** Georgia's runoff elections for two Senate seats in January 2021 were particularly significant as they determined control of the Senate - see *'Senate'* above.

Electoral Process and Challenges

- Due to the pandemic, the 2020 election featured extensive use of mail-in and absentee voting;
- Allegations of electoral fraud and irregularities were raised, primarily by President Trump and his supporters. These claims led to numerous legal challenges and recounts in several states, but no evidence of widespread fraud was found, and the courts upheld the election results; and
- Electoral officials were threatened in Nevada, Georgia, Arizona, Michigan, Colorado, Pennsylvania and Wisconsin. These threats undermined electoral processes. See the case Ruby Freeman and her daughter, Shaye Moss at point 2 in the section *Threats to the US electoral system* above.

Figure 9.10 — Outside the US Capitol during the 6 January 2021 attack on the building.

The 2020 US presidential and congressional elections show the resilience of American democracy amidst challenges.

Impact and Significance

The election highlighted the US election system's challenges, including:

1. **Foreign Interference**: The US intelligence agencies reported that Russia, Iran, and China were using different tactics to interfere in the election. Methods included hacking and disinformation campaigns. There was also evidence of coordinated use of social media to influence the presidential election.[10]
2. **Domestic Disinformation**: Most election disinformation appeared to be domestic – that is, from within the US. It included posts from troll accounts (that is, fake accounts spreading partisan themes).
3. **Attempts to Overturn the Election Results**: The Trump campaign and its allies, including Republican members of Congress, made numerous attempts to overturn the election results. Attempts included filing lawsuits in several states, most of which were withdrawn or dismissed, spreading conspiracy theories (that is, disinformation / misinformation)
   - alleging fraud,
   - pressuring Republican state election officials and legislators to change results,
   - pressuring the Department of Justice to declare the election corrupt and intervene,

9 Caucus here means that the independents unite with the democrats to promote an agreed-upon cause.

10 Foreign Interference in the 2020 Election: Tools for Detecting Online Election Interference (rand.org) - https://www.rand.org/content/dam/rand/pubs/research_reports/RRA700/RRA704-2/RAND_RRA704-2.pdf

– objecting to the Electoral College certification in Congress, and

– refusing to cooperate with presidential transition arrangements to assist Joe Biden take office.

4. **January 6 2021 Insurrection**: In the January 6 Insurrection supporters of President Trump broke into Congress and tried to prevent the certification of the election results. Some of those who took part were later convicted and jailed for sedition. Mr Trump was still dealing with legal cases related to his role on January 6 at the beginning of 2024, while he was attempting to win the Republican Party 2024 presidential nomination.

5. **Pressure on State Election Officials**: Georgia Secretary of State Brad Raffensperger was pressured in a phone call from Mr Trump to find the 11780 votes needed for him to win Georgia. See also the case of Ruby Freeman and her daughter, Shaye Moss at point 2 in the section *Threats to the US electoral system* above.

The 2020 US presidential and congressional elections show the resilience of American democracy amidst challenges outlined above. The high voter turnout reflected an engaged electorate, and the peaceful transfer of power – despite the January 6 Insurrection – demonstrated the strength of democratic principles.

Figure 9.11 — New Zealand rejected joining the federation of Australian states (1900).

New Zealand

New Zealand is a **liberal democracy** and shares a common heritage with Australia. Like Australia, it was a British colony. It was granted self-government in 1852 and eventually became independent in 1907. As a colony of Britain in Oceania, it was involved in the colonial constitutional conventions which led to the Australian **federation**.[11] New Zealand suggested it may even join the Australian federation, but never did.[12]

Australia and New Zealand are sibling nations; they have fought together as the ANZACs, indicating just how closely related they are.

Aspect	Australia	New Zealand
Government System	Constitutional monarchy with a Westminster system and an elected, representative parliament	
Election Process	**Prime Minister** advises the **Governor-General** to dissolve parliament for elections, three-year maximum parliament terms	
Electoral Commissions	Australian Electoral Commission responsible for elections and referenda	Electoral Commission responsible for elections and referenda, and Representation Commission for electoral boundaries
Parliamentary Structure	Bicameral legislature (House of Representatives and Senate)	**Unicameral** legislature (House of Representatives)
Representation of Indigenous Peoples' Rights	No treaty with Aboriginal and Torres Strait Islanders, lack of special legal status for indigenous people	Treaty of Waitangi with Māori people, special legal status and guaranteed parliamentary representation for indigenous people in dedicated Māori electorates

Table 9.3 — Summary of the political systems of Australia and New Zealand.

11 Oceania is the Pacific region east of Australia. It is close to Australasia, the region containing Australia. British colonies in Australasia (the six Australian colonies) and the leading British Oceanic colony of New Zealand were close neighbours and were all involved in the constitutional conventions of the 1890s when the Commonwealth Constitution (Australia) was drafted. Before withdrawing, Fiji—another British Oceanic colony—was also involved early in the process of drafting the Australian federation.

12 If it had, New Zealand would have become the seventh state of Australia.

Figure 9.12 — Governor-General Dame Cindy Kiro appoints new ministers during a public meeting of the Executive Council in Government House, Wellington, 1 February 2023.

Figure 9.13 — Parliament House, Wellington, New Zealand.

Comparing political and legal systems—Australia and New Zealand

Table 9.3 summarises the Australian and New Zealand political systems.

Australia and New Zealand are very similar liberal democracies. Nevertheless, they have structural differences that affect political representation and how each achieves an 'electoral compromise' – notably their parliamentary structures and the status of their First Peoples.

Overview of New Zealand's electoral system

Democracies – especially European democracies – compromise to achieve the best electoral system. These compromises aim to balance the strengths and weaknesses of different systems. See Table 9.1 "Mixed Electoral Systems".

Chapter 8 examined Australia's solution, which was to mix two different electoral systems – preferential voting to choose the lower house and a proportional system for the upper chamber. However, with its unicameral parliament, New Zealand could not adopt this approach.

Nevertheless, New Zealand's electoral system is a 'mixed system' that aims to achieve several outcomes, such as:

- Effective and stable government that reflects the majority's will;
- **Accountability** of representatives with direct links to electors;
- Fairness to electors, candidates, and political parties;
- Representation of societal diversity; and
- Representation of New Zealand's First People, the Māori, as per the Treaty of Waitangi.

Using a mixed electoral system to elect a unicameral parliament requires a single system that combines features from different electoral systems.

In 1993, New Zealand held a referendum where the public chose to replace the first-past-the-post system with the **mixed-member proportional system** (MMP). MMP was formally adopted in 1996.

MMP is a 'mixed electoral system' (see Table 9.1) that blends ***majoritarian*** and *proportional* elements to elect a unicameral parliament. It combines first-past-the-post (majoritarian) with a party list system (proportional).

Additionally, New Zealand employs *communal* representation to guarantee Māori parliamentary representation.

Therefore, New Zealand's electoral system is a hybrid of three electoral system:

1. First-past-the-post – a *majoritarian* system that elects 'electorate' MPs.
2. Party list – a *proportional* system that elects 'party' MPs.
3. Māori representation – a *communal* system that elects Māori MPs

The MMP+Maori (MMP+M) electoral system excels in ensuring fairness for political parties and diversity. However, every compromise has trade-offs. In New Zealand's case, the principle of 'majority rule' is watered-down, leading to a higher likelihood of **minority governments** and less accountability for parliamentarians selected by parties rather than direct electors.

While some argue that Māori communal representation contradicts the democratic principle of equality of political rights, Māori electors can only vote in one type of electorate – either General or Māori electorates, not both. Additionally, the principle of 'one vote, one value' is maintained across all electorates.

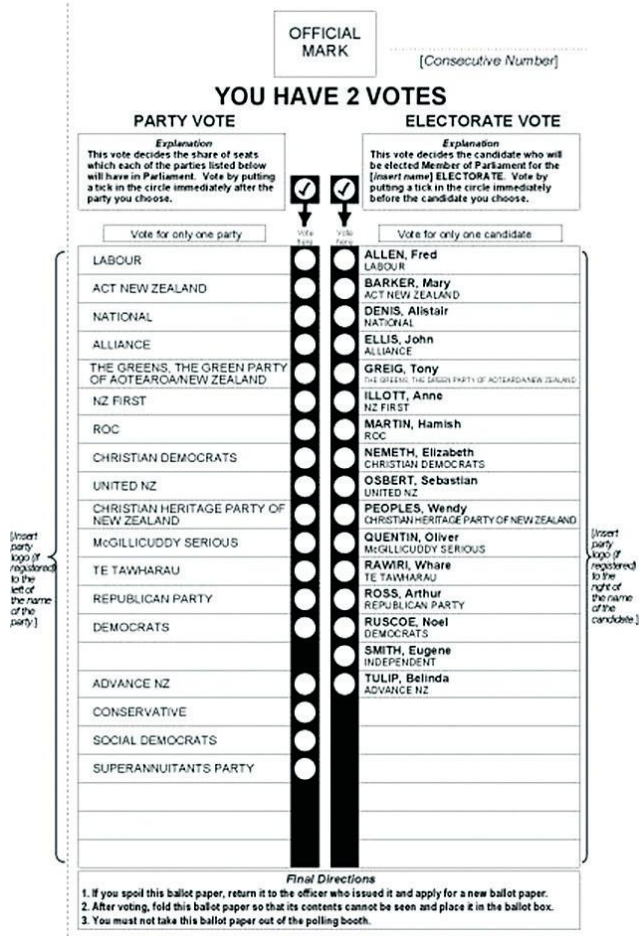


Figure 9.14 — A sample MMP ballot paper.

How New Zealand's MMP+M Electoral System works

By this stage of the course, students will have a sound understanding of the operation of electoral systems. Therefore, the operation of New Zealand's electoral system is presented in a simplified format in the following tables 9.4 to 9.8.

An overview of New Zealand's electoral system

An overview of New Zealand's electoral system, including aspects such as the House of Representatives' structure, voter eligibility, voting process, types of MPs, the party vote system, the selection of list MPs, and the role of the Electoral Commission is shown in Table 9.4.

Aspect	Description
House of Representatives	120 seats (variable) filled by elections from electorates and parties.
Voting Eligibility	Citizens and permanent residents over 18 can vote. Enrolment compulsory, voting voluntary.
Voting System	Citizens have two votes per election: 1. A 'party vote' (for parties), and 2. An 'electorate vote' (for candidates) in a General or Māori electorate. FPP is used.
Types of MPs	Two types of MPs: 1. List MPs (party-nominated), and 2. Electorate MPs (elected in General and Māori electorates).
Party Vote System	Proportional system: parties need to win 5% or more of the party votes, or win at least one Electorate to qualify for seats in parliament.
List MP Selection	Parties control list MP order. Parties can risk selecting less conventional candidates because voters do not vote for specific list MPs, thus increasing political representation of various minorities. Party list MPs are less accountable because voters do not vote directly for them.
Role of Electoral Commission	Counts votes to determine party seat proportions, using party lists after electorate votes are counted.

Table 9.4 — How New Zealand's MMP+M system works.

The electorate vote—Electing Electorate and Māori MPs

An overview of how electorates are filled, the voting system used, the principle of electoral equality, and the process of electing MPs in New Zealand is shown in Table 9.5.

Aspect	Description
Types of Electorates	Two types: 1. General electorates, and 2. Māori electorates (for communal representation). Both types are single-member electorates.
Electorate Voting System	First-Past-The-Post (FPP) system, requiring a simple majority to win.
Equality of Vote	All electorates must have a similar number of electors, ensuring 'one vote one value'.
Electorate Size Determination	Electorate sizes are based on census data. • By law, the South Island has a fixed number of 16 General electorates. • The number of North Island electorates is calculated using the South Island as a standard for the number of constituents per electorate.
Electoral Roll Enrolment	Māori New Zealanders can enrol in either General or Māori electorates, but not both; non-Māori New Zealanders can enrol only in General electorates.
Voting Process	Voters use their 'electorate vote' to vote for their preferred General or Māori electorate candidate.

Table 9.5 — choosing 'electorate' and 'Māori' MPs.

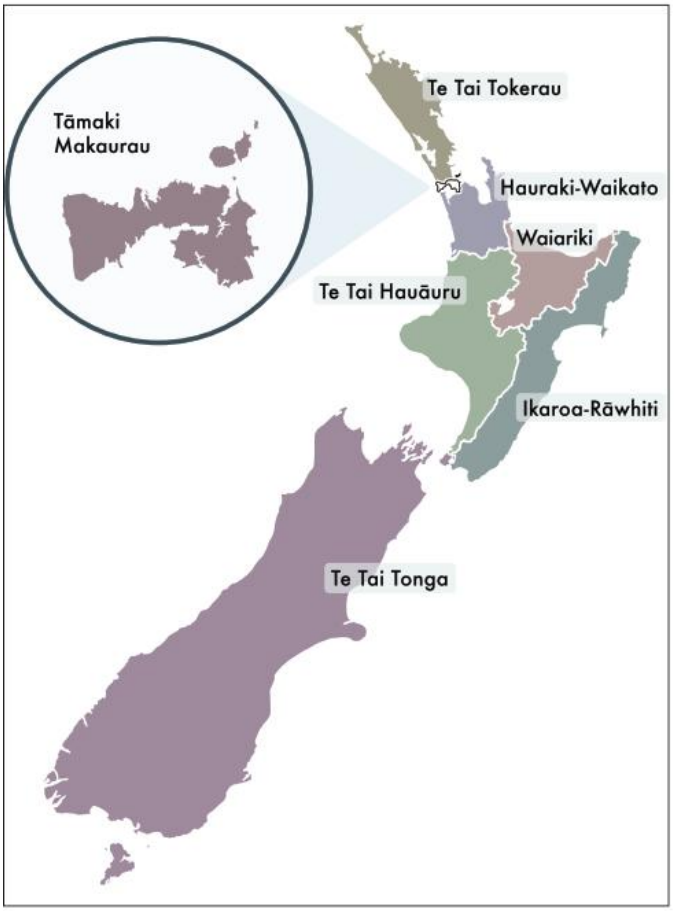


Figure 9.15 — Labelled map of Māori electorates as reformed in 2020.

Choosing 'party' MPs to fill the House of Representatives

The steps involved in choosing 'party' MPs to achieve party proportionality in the composition of the House of Representatives, highlighting the role of both party and electorate votes and the issues that result, is outlined in table 9.6

Step		Process
1	**Counting Party Votes**	'Party votes' counted first to calculate each party's proportion of seats.
2	**Counting Electorate Votes**	Electorate votes counted next – see Table 9.5 above.
3	**Election of Electorate MPs**	Electorate MPs are elected to the House of Representatives first.
4	**Comparing Seats Won to Proportional Entitlement**	The number of single-member electorates won by each party at Step 3 is compared to its proportional seat **entitlement** calculated at Step 1.
5	**Top-up with List MPs**	If a party wins fewer electorates at Step 3 than it is entitled to at Step 1, list MPs are added from the party's nominated list to reach its proportional entitlement.
6	**Adjusting House Size for Overhang Seats**	If a party wins more electorates at Step 3 than its entitled proportion at Step 1, the size of the House increases to maintain proportionality. Thus, the House may have more than 120 MPs after some elections.
Issues		
	Accountability of MPs	Electorate MPs have direct accountability; List MPs have weaker accountability because they are selected by parties and enter parliament to 'make up the numbers' to achieve proportionality.

Table 9.6 — Choosing 'party' MPs to fill the House of Representatives to achieve proportionality

Situation	Representation Problem	Solution	Example
Party Fails to Achieve Proportional Entitlement	After the electorate vote a party has *fewer* Electorate MPs than its entitled proportion (it is underrepresented)	The Electoral Commission tops up with List MPs from the party's list until its entitled proportion of seats is reached.	Party wins 40% of party vote (entitled to 48 seats) but elects 30 Electorate MPs. Commission adds 18 List MPs, resulting in a total of 48 MPs.
Party Exceeds Proportional Entitlement	After the electorate vote party has *more* Electorate MPs than its entitled proportion (it is overrepresented)	The Electoral Commission adds List MPs from other parties, expanding the House size beyond 120 seats to maintain proportionality. The extra seats are called "over-hang seats".	Party wins 30% of party vote (entitled to 36 seats) but elects 40 Electorate MPs. House expands from 120 to 133 seats, creating 13 overhang seats. The party has no List MPs.

Table 9.7 — Resolving political representation problems

Resolving political representation problems

An overview of how the MMP system is shown in Table 9.7. It addresses situations where a party either doesn't win enough electorates or wins too many, ensuring that the proportion of seats held by each party in the House of Representatives aligns with the proportion of party votes they received.

An evaluation of New Zealand's electoral system

The following criteria are used to evaluate New Zealand's electoral system:

- Effective and stable government reflecting the will of the majority;
- Accountability of representatives with direct links to electors;
- Fairness to political parties;
- Political representation of society's diversity; and,
- Political representation of New Zealand's First People—the Māori.

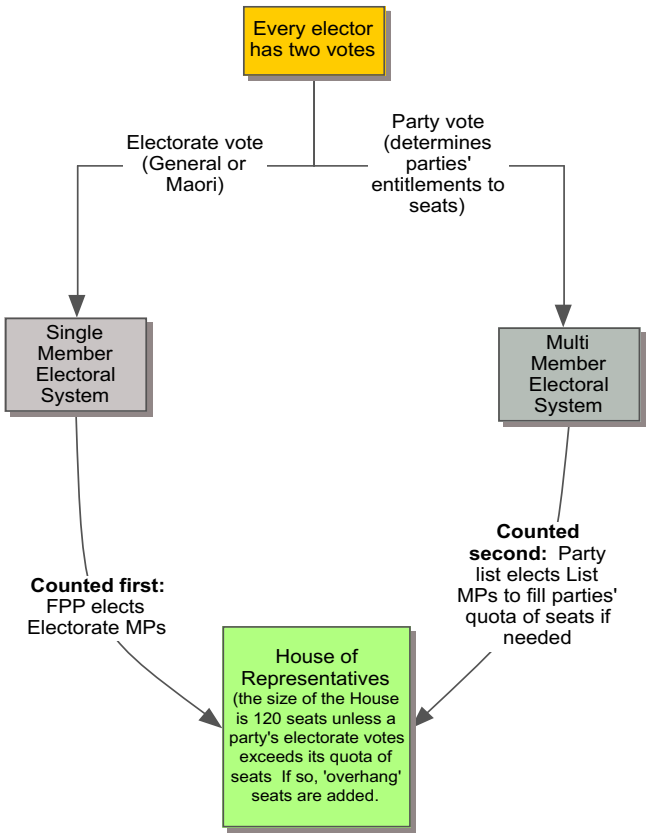
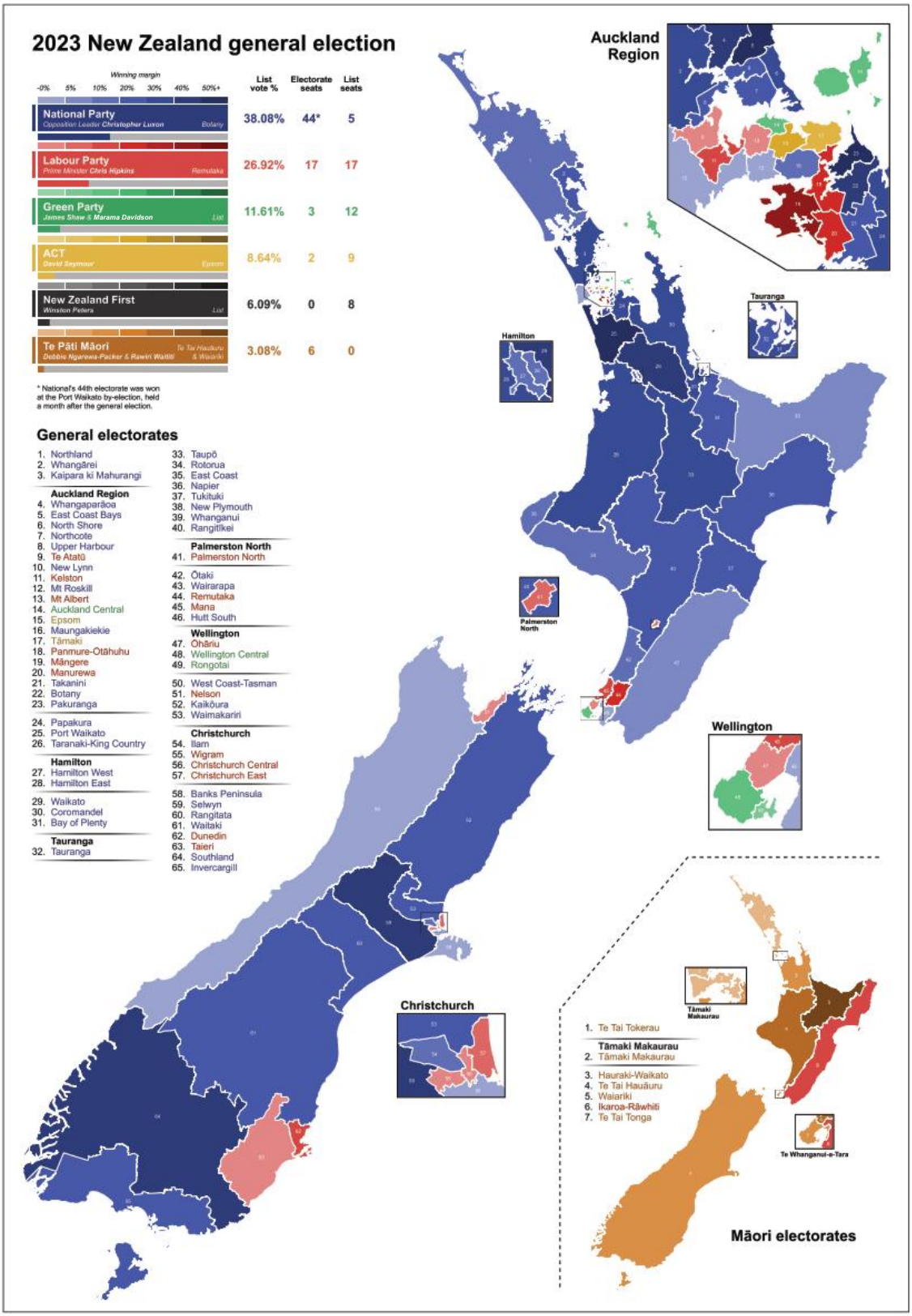


Figure 9.16 — New Zealand's MMP electoral system blends the majoritarian FPP and proportional PL systems to elect one house of parliament.

Criteria		Evaluation
1	**Government Stability**	Despite the risk of unstable minority governments in proportional systems, New Zealand has experienced stable governance since MMP's 1996 introduction, with a trend towards coalition governments.
2	**Representatives' Accountability**	As single members representing an electorate, Electorate MPs have strong voter connections, enhancing accountability. However, List MPs, chosen by parties, have weaker ties to specific electorates.
3	**Fairness to Political Parties**	MMP is fair, allowing parties with at least 5% of the vote or an Electorate seat to gain parliamentary representation. MMP has weakened two-party dominance and increased minor party participation and political representation. MMP has allowed minor parties, like New Zealand First, significant influence in policy and government formation, occasionally challenging majority rule when they join coalition governments.
4	**Diverse Political Representation**	MMP has increased the diversity of political representation, with more parties and female representatives.
5	**Māori Representation**	Māori representation is guaranteed by the Māori seats and the option for Māori people to enrol in Māori electorates. Māori interests are further represented by the Māori Party and Māori candidates in other parties.

Table 9.8 — Evaluating New Zealand's mixed electoral system.



■ Figure 9.17 — Results of the 2023 New Zealand general election, showing the winning margin of elected candidates in each general and Māori electorate.

■ Figure 9.18 — Christopher Luxon, leader of the National Party, has served as the 42nd Prime Minister of New Zealand since November 2023.

Summary

US Electoral System

- US democracy is a 'republican democracy', in which republican values may sometimes override the principles of democracy. Many of the apparent failings of the US electoral system in terms of political representation and fair elections are explained by American republicanism.
- In the United States there are separate elections for the President/Vice President (the executive) and the two houses of Congress (the legislature).
- Each state runs its own electoral system for these elections and voting is by **first past the post**. Enrolling to vote and voting are both voluntary, reducing political participation.
- A presidential election occurs every four years.
  - State primaries and caucuses send delegates to their party's national convention where a presidential candidate is chosen.
  - On Election Day electors in the states choose state delegates to the Electoral College.
  - The Electoral College legally elects the President.
  - Swing states are crucial.
  - The Electoral College system is designed to ensure a president has broad support across the states and prevent a 'tyranny of the (national) majority' representing narrow interests controlling the executive branch.
- Elections for members of the House of Representatives occur every two years.
  - The entire House of Representatives is elected to maintain an "intimate sympathy" with the people.
  - One third of the Senate is elected. Senators serve six-year term, providing stability to government. The Senate is never renewed at a single election and has been a 'continuing house' since 1789.
  - "On-year" elections occur when presidential and congressional elections coincide. The party of the winning presidential candidate is often more successful in a concurrent congressional election and voter turnouts are usually higher.
  - "Off-year" elections – called "mid-term elections" – engage fewer voters, have lower turnouts and are often regarded as unofficial referendums on the performance of a president half-way through their term. The party of the president often does worse.
- The 2020 presidential and congressional election is a Depth Study of an "on-year" election. It had the highest turnout in history and was characterised by emerging threats to US democracy. It also demonstrated the resilience of US democracy in the face of these challenges.

New Zealand Electoral System

- New Zealand shares much with Australia, including a history of electoral reform.
- Like all democracies, New Zealand faces the electoral problem – that is, no electoral system can achieve all the criteria for an 'ideal' or fair electoral system.
- Australia has a two-system solution to the electoral problem, using a majoritarian system to elect its lower house and a proportional system to elect its upper house. The result is an 'electoral compromise' able to solve the electoral problem. New Zealand cannot adopt this solution because it is unicameral, with only one house, its House of Representatives.
- New Zealand uses a blended system, called Mixed Member Proportional (MMP), to solve the electoral problem arising from being unicameral.
- MMP's mixed members are its Electorate MPs and List MPs. Electorate MPs are directly elected to represent districts. List MPs are elected to ensure parties receive their entitled proportion of seats.
- In MMP, electors have two votes—an electorate vote and a party vote. The party vote is counted to determine the proportion of seats each party is entitled to in the House of Representatives. Electorate votes fill single-member electorates with Electorate MPs. List MPs are used to top-up the representation of parties that fail to win enough electorates to achieve their proportion of the seats. Overhang seats can be added to solve the problem of a party having too many Electorate MPs and exceeding their quota of seats.
- Communal voting is used to guarantee Māori representation. Māori people can opt to enrol in General electorates or Māori electorates, but not both. Adding communal voting to MMP can be labelled MMP+M.
- MMP+M achieves most of the criteria of an 'ideal' electoral system.
  - Theoretically, majority rule and stable government is at risk. In practice, most governments elected since MMP was introduced have been stable and successful. There is, arguably, no less stability than Australia's system has been able to achieve since 2007.
  - Accountability of representatives is achieved through the high number of directly elected Electorate MPs representing single-member electorates. It is, however, diluted by List MPs, who are selected by parties.
  - Fairness to parties is a strength of MMP. Many more parties are represented in parliament and in government. Proportionality ensures even parties with low levels of support (%5+) can be elected.
  - Diversity is represented through the proportionality element of MMP. Parties nominate more diverse candidates through the party lists, and many women and other traditionally less represented groups are now achieving much higher levels of representation through the List MP pathway into parliament.
  - A special minority, the Māori are well represented through communal voting in the seven Māori seats. The high capacity of MMP to represent diversity also contributes to higher Māori representation through the party lists.

Exam practice questions

Short Answer

1a. Outline what is meant by the term 'mixed electoral system.'

1b. Explain the importance of electoral systems in democratic countries.

1c. Discuss **one** strength and **one** weakness of an electoral system used in a democratic country.

2a. Outline what is meant by the term 'republican democracy.'

2b. Explain why the principle of majority rule can conflict with American republican values.

2c. Discuss **two** features of presidential elections in the United States that enhance popular participation.

3a. Outline what is meant by the term 'first past the post.'

3b. Explain the difference between the election of the executive branch in Australia and the United States.

3c. Discuss **two** factors that can undermine fair elections in the United States.

4a. Outline what is meant by the term 'swing state.'

4b. Explain **one** difference between primaries and caucuses when choosing the Parties' Presidential Candidates.

4c. Discuss **two** ways that political participation is undermined in the United States.

Source Analysis (See The United States of America page 210-224)

5a. Outline what is meant by 'the Parties' National Conventions.'

5b. With reference to the Background information: The Electoral College- how and why, page 215, discuss in your own words how a President is elected in the United States.

5c. With reference to examples, discuss how primaries and caucuses provide opportunities for political participation.

5d. Evaluate the extent to which the principle of majority rule is upheld in the United States electoral system.

Essay questions

6. Analyse how, and to what extent, the development of the United States electoral system achieves political rights and fair elections.

7. The 2020 U.S. Presidential and Congressional elections demonstrate the strength of democratic principles.

   Evaluate this claim.

8. Analyse how and to what extent both Australia and New Zealand achieve a fair electoral system which uphold the principles of democracy.

Investigation

9. Research the results of the recent 2024 United States Presidential and Congressional elections (435 House seats and 34 Senate seats in US Congress).

   Consider:

   - The results of the Electoral College.
   - Composition of the House of Representatives and Senate.
   - Voter turnout -statistics, examples of states with higher or lower voting turnout.
   - Impact of states' electoral laws on participation.
   - Impact of the redistricting system on the election results.

Sources

Figure 9.1 Source: Stephen King 2019
Figure 9.2 Source: https://en.wikipedia.org/wiki/Kamala_Harris
Figure 9.3 Source: https://upload.wikimedia.org/wikipedia/commons/thumb/6/6c/Constitution_of_the_United_States%2C_page_1.jpg/495px-Constitution_of_the_United_States%2C_page_1.jpg
Figure 9.4 Source: Chessrat, Electoral College 2020.svg, CC0, https://commons.wikimedia.org/w/index.php?curid=104428453
Figure 9.5 Source: Alan Moir https://www.cartoonmovement.com/cartoon/trump-v-biden
Figure 9.6 Source: Stephen King, 2019
Figure 9.7 Source: Owen Yancher, Own work, CC BY-SA 4.0, https://commons.wikimedia.org/w/index.php?curid=95755323
Figure 9.8 Source: Adam Shultz, Public Domain, Presidential portrait, <https://en.wikipedia.org/wiki/Joe_Biden#/media/File:Joe_Biden_presidential_portrait.jpg
Figure 9.9 Source: https://edition.cnn.com/election/2020/results/house
Figure 9.10 Source: Tyler Merbler, CC BY 2.0, <https://commons.wikimedia.org/w/index.php?curid=100214051>
Figure 9.11 Source: Scatz, 'How we see it', New Zealand Graphic, 1900, Public Domain, <https://en.wikipedia.org/wiki/History_of_New_Zealand#/media/File:Australian_ogre_1900.jpg>
Figure 9.12 Source: By New Zealand Government, Office of the Governor-General - https://gg.govt.nz/image-galleries/appointment-new-ministers-and-allocation-portfolios, CC BY 4.0, https://commons.wikimedia.org/w/index.php?curid=128293113
Figure 9.13 Source: Michal Klajban, Parliament House. Wellington, New Zealand, 2015, Own work, CC BY-SA 4.0, <https://commons.wikimedia.org/w/index.php?curid=37718950> and <https://en.wikipedia.org/wiki/51st_New_Zealand_Parliament#/media/File:Parliament_House,_Wellington,_New_Zealand_(50).JPG>
Figure 9.14 Source: New Zealand Parliament, 'Form 11, Schedule 2 of the Electoral Act 1993', 1993, Public Domain, <https://en.wikipedia.org/wiki/Electoral_system_of_New_Zealand#/media/File:New_Zealand_MMP_voting_paper.jpg>
Figure 9.15 Source: CC BY-SA 4.0, < https://en.wikipedia.org/wiki/M%C4%81ori_electorates#/media/File:New_Zealand_M%C4%81ori_electorates_(since_2020).svg>
Figure 9.16 Source: Stephen King, 2018
Figure 9.17 Source: Erinthecute, CC BY-SA 4.0, < https://en.wikipedia.org/wiki/2023_New_Zealand_general_election#/media/File:2023_New_Zealand_general_election.svg
Figure 9.18 Source: New Zealand National Party (New Zealand National Party), CC BY-SA 4.0, https://commons.wikimedia.org/w/index.php?curid=141350498 https://en.wikipedia.org/wiki/Christopher_Luxon#/media/File:LUXON,_Christopher_-_Botany_(cropped).png

All sources last accessed 3/8/24

Representation and participation — Individuals, Political Parties and Pressure Groups

Syllabus Points

- **political representation with reference to the role of individuals, political parties and pressure groups**
- **ways individuals, political parties and pressure groups can participate in the electoral processes in Australia**
- **at least one contemporary issue (the last three years) centering on representation**

Overview

Political Representation

Political representation is a foundational concept in democratic theory and practice. At its core, it involves electing **individuals**—politicians, lawmakers, and other officials—to act and make decisions on behalf of the people. Elected **representatives** must voice their constituents' interests, needs, and aspirations within the legislative and **executive** branches of **government**. Political representation is the mechanism by which **democracy** is implemented, making the government accountable to the governed and executing the people's collective will.

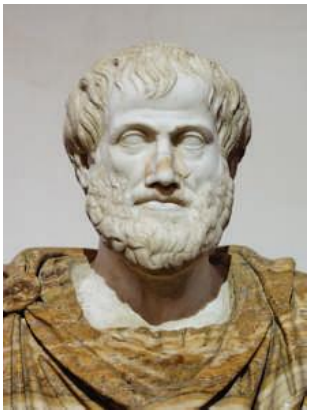
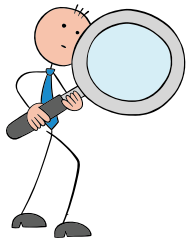


Figure 10.1 — Aristotle, ancient Greek philosopher and scientist (384–322 BCE).

Australia's political system is based on political representation and embodies the principles of **representative democracy**. Representative democracy is implied by SECTIONS 7 and 24 of the Australian Constitution, which specify that both houses of **parliament** are "directly elected by the people". The Australian political system, with its representative **legislatures** and **compulsory voting**, emphasises the role of representation in ensuring that all segments of society have a voice in government. The system supports broad electoral participation and a diverse range of viewpoints expressed in legislation and policy, enhancing the legitimacy and responsiveness of the government.



Looking ahead: Political representation and how another country uphold it

Political representation and how Australia and another country uphold or undermine it is a topic in the Unit 4 Syllabus. As students study this Unit 2 topic, they are encouraged to think about how Australia upholds or undermines political representation through political parties and **pressure groups**, and how individuals can achieve political representation, as it will prepare them for further studies in Unit 4.

Participation in Electoral Processes

Participation is an operating principle of democracy. In a healthy democracy, **citizens** always participate through activities like **lobbying** and activism—or even simply by staying informed. However, participation is important in electoral processes. During **elections**, participation enables the people's will to be reflected in the political system.

While voting is compulsory, many other avenues exist for informed and engaged citizens to participate in electoral processes. These include:

- Paying attention to political debate during an election period;
- Campaigning for political parties or independent candidates or issues; and
- Standing as a candidate for election to Parliament.

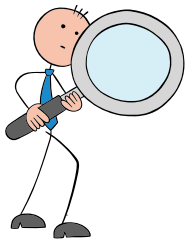
Citizens exercise their political rights and freedoms when they participate. Participation ensures their voices are heard at an election, and active participation between elections ensures a healthy democracy. Election processes hold officials accountable, keep government actions in alignment with citizens' interests, and fosters a pluralist political culture where different perspectives are tolerated and heard.

> *"Elections are important for accountability in representative democracies because they allow citizens to judge their representatives and either renew their mandate for another term or choose new representatives."*

Moreover, participation supports the legitimacy of the political system. High participation rates and election turnout signal a healthy democracy, where citizens feel their input matters and that the political system is responsive to their needs. Conversely, apathy and disengagement - the antithesis of active participation - are causes and symptoms of declining trust in the political system, diminishing the quality of representation and weakening democracy.

In the Australian context, compulsory voting guarantees participation but not active engagement. Australia's election turnout rates are notably high, which helps ensure that elected representatives reflect the broader will

of the people. However, declining **political party** membership and participation in the electoral process are challenging Australia's democracy.



Looking ahead: Popular participation

Popular participation and how Australia and another country uphold or undermine it is a topic in the Unit 4 Syllabus. Participation in electoral processes is an aspect of popular participation covered in Unit 2 and this chapter. As students study this topic, they are encouraged to think about how Australia upholds or undermines popular participation by learning how political parties, pressure groups and individuals participate in electoral processes, as it will prepare them for further studies in Unit 4.

Roles of Political Parties and Pressure Groups in Political Representation and Participation

Political parties and pressure groups are the principal agents of political representation and participation within the Australian political system. Political parties, like the Australian Labor Party and the Liberal Party of Australia and various smaller parties and independents, serve as the primary vehicles for electoral participation. Parties distil individual preferences into coherent policy platforms, nominate candidates for public office, and, if elected to parliament, participate in the **legislative process**, and implement policies reflecting their electoral mandates. Through organisational structures like local branches and state and national conferences and councils, parties provide avenues for citizens to participate in **politics**, contribute to policy development, and pursue electoral office.

On the other hand, pressure groups operate alongside and often independently of the formal 'party system'. These organisations—from business lobbies and trade unions to environmental advocacy groups and civil rights organisations—try to influence public policy, legislative agendas, and political discourse without directly contesting elections. Does this mean they do not participate in electoral processes? No. During election periods, pressure groups attempt to influence the policies of political parties and support parties representing their members' interests or causes. They may assist favoured political parties financially through donations, intellectually through policy advice or physically by helping with election logistics like handing out how-to-vote cards at polling places. On a broader scale, they mobilise public opinion to exert pressure on political parties through electoral advertising and conducting public campaigns. Through these methods, pressure groups enhance the participatory aspect of democracy. They serve diverse interests, particularly those that might be underrepresented by mainstream political parties.

The Nature of Political Representation in Australia

Definition and Theories of Political Representation

Australia is a 'representative democracy', meaning its political system is based on citizens participating in government by choosing representatives to govern on their behalf for a period between one election and the next. Elections are important for **accountability** in representative democracies because they allow citizens to judge their representatives and either renew their mandate for another term or choose new representatives.

Thus, 'political representation' in Australia means the public's interests are represented in government. It hinges on the operating principles of **liberal democracy**, where individuals enjoy **political freedoms** and rights that enable participation, including the right to elect representatives to make decisions and enact policies.

As discussed in Chapter 8, theories of political representation pivot around two main concepts: the **delegate** model, in which representatives act strictly according to their constituents' wishes, and the **trustee** model, in which representatives use their judgment to make decisions they believe are in their constituents' best interests.

In practice, Australian parliamentarians (that is, the citizens' elected representatives) operate within a Westminster context that limits the ideal theories of political representation. In this context, political parties emerged as associations with the organisation, structure and discipline capable of representing diverse constituencies while operating in a Westminster system that rewards party unity and diversity.

As a result, most Australian parliamentarians

Figure 10.2 — Teal independents, such as the member for Curtin, Kate Chaney, enabled people to express a world view that emphasised the importance of dealing with Climate Change.

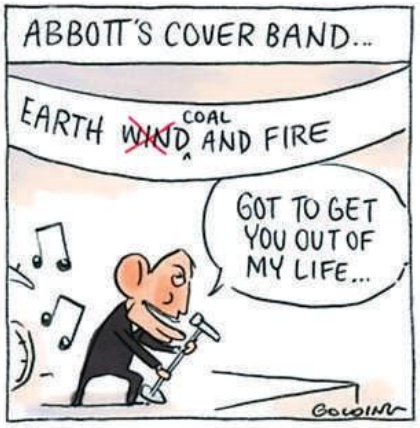


Figure 10.3 — Former Prime Minister Tony Abbott would like to see the government buy and operate coal-fired power stations.

are members of political parties, making them 'partisans'. **Partisan** MPs blend the delegate and trustee models *within* their parties while acting as united blocs *between* parties. The partisan model enables political representation that balances constituent expectations and the pragmatic realities of modern government, like forming stable majorities in the lower house.

Political Parties

Political representation

In Australia's democracy, political parties play a paramount role in political representation. Political parties act as channels, combining individual political preferences into collective platforms that appeal to broad segments of society.

Major parties

In the Australian context, there are two major political parties: the Australian Labor Party and the Liberal Party of Australia (in **coalition** with the National Party). Each embodies distinct ideologies. The ALP traditionally aligns with worker and union interests, advocating for social justice and equitable wealth distribution - it is a party of the left. Its political rival, the right-leaning Liberal-National Coalition, tends to represent business and rural interests, championing free market policies and individual freedoms. These two parties together represented approximately two-thirds of eligible Australian voters at the 2022 general election. *See Background information: Political representation through major parties.*

Background information: Political representation through major parties

Around two-thirds of electors vote for either the Australian Labor Party (ALP) or the Liberal Party of Australia (LPA) in coalition with a minor party, the Nationals. These parties represent ideologies that echo the political preferences of most of the **electorate**.

Figure 10.4 — Chris Watson, first leader of the then Federal Labour Party 1901–1907, and Prime Minister in 1904.

The Australian Labor Party (ALP)

- **Origins and Evolution**: Founded in the 1890s by trade unions, the ALP is Australia's oldest political party. It initially represented its constituents (working and labouring people) by adopting two ideologies - **democratic socialism** and labourism. The party introduced strict party discipline, where members support agreed-upon policies and vote as a unified bloc in parliament.
- **Historical Impact**: The ALP has influenced Australian politics through its strong organisation and parliamentary discipline, offering significant participation opportunities for its supporters.
- Ideological Shifts:
  - **Early Years**: It advocated for government intervention to redistribute wealth and regulate the economy to eliminate business exploitation of workers, as seen during the Chifley Government's attempts to nationalise banks (1945–1949).
  - **Whitlam Era (1972-1975)**: The party transformed Australian society and economy by establishing free healthcare (Medibank—now Medicare) and abolishing university fees. These measures aimed to make health and education services accessible to people regardless of economic background.

Figure 10.5 — Gough Whitlam, Prime Minister 1972–1975.

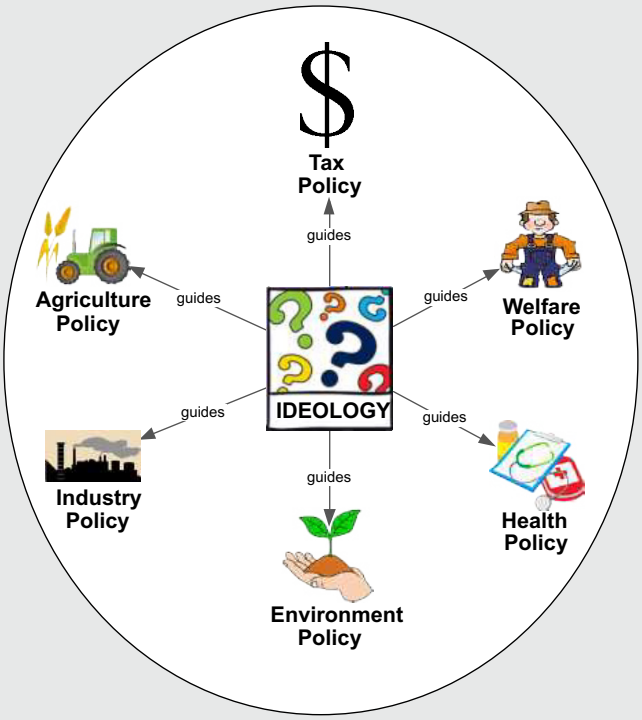


Figure 10.6 — An ideology provides philosophical guidance for a political party's policies. All the policies will share a logical set of principles. They will be mutually supportive and coherent.

- **Modern Times**: The party shifted towards **social democracy**, focusing on government roles in reducing inequality while supporting individual wealth creation. The National Disability Insurance Scheme (NDIS) introduced by the Gillard Government and the Housing Australia Future Fund (HAFF) created by the Albanese government illustrate contemporary ALP policies.

The Liberal Party of Australia (LPA)

- **Foundation and Purpose**: The Liberal Party was founded by Sir Robert Menzies in 1944. It consolidated several non-Labor parties and adopted the ALP's approach to organisation and discipline—although party discipline is less strictly enforced. The Liberal Party offered political representation for ideologies opposed to the ALP's core beliefs by adopting a social liberal **ideology** based on individual enterprise and minimal government intervention. However, it has always described itself as a 'broad church' - which means it represents a wide range of non-Labor political philosophies, including conservatism and **economic liberalism.**

Figure 10.8 — In 2020 the Liberal Party attempted to introduce Stage 3 tax cuts to reduce the rate to top earning tax payers.

- Core Principles and Internal Dynamics:
  - **Social Liberalism**: Early Liberal policies under Menzies supported social welfare measures for those in genuine need while promoting individual responsibility and economic freedom.
  - **Shift towards Economic Liberalism and Conservatism**: More recent Liberal policies have focused on economic **liberalism**, such as deregulating the economy and reducing government spending on social services, illustrated by the Howard Government's WorkChoices industrial relations laws and the Abbott Government's attempt to reduce government benefits in its 2014 budget.
  - **Internal Conflicts**: The party's broad ideological spectrum, from social liberals to conservatives, often leads to internal tensions. These have been evident in the party's leadership challenges and differing policy views that characterised its last term in office (2013-2022).

Figure 10.7 — Robert Menzies, Liberal Prime Minister from 1949 to 1966.

Minor parties

Smaller parties, like the Australian Greens, are crucial in expanding political representation to include specific issues such as environmental conservation, climate change action, renewable energy and housing justice. They push these agendas into electoral processes, like campaigns and political advertising, that the major parties would otherwise dominate. Their presence ensures that many more viewpoints

and policies are represented by offering voters a broad spectrum of political options. For example, following the COVID-19 pandemic, many Australians faced a housing crisis and felt underrepresented by the major parties. Sensing the need, the Greens prepared for the 2025 election by broadening their platform to position themselves as the party representing renters. The Greens have thus added the contemporary plight of renters to their traditionally strong stance on the environment. By doing so, they have injected these issues into the public debate and influenced legislation on climate change and housing, shaping the electoral issues that will be at play in the 2025 election. The Greens' example shows how minor parties can represent a significant fraction of the electorate who feel unrepresented by the two major parties. At the 2022 election, that underrepresented segment was close to one-third of the electorate - a historic high. They are seeking political representation, and minor parties are answering the call. See *Background information*: *Political representation through minor parties.*

Background information: Political representation through minor parties

In addition to the ALP and Liberal Party, Australia has many minor political parties - of which only a few ever win seats in parliament. These parties often arise from emerging social needs and worldviews - like the growth of environmental issues since the 1980s and the impact of immigration - and focus on specific issues like the environment or immigration.

The Nationals

- **Background**: Originally the Country Party in the 1920s, the Nationals focus on rural and regional Australians. They began as an agrarian social democratic party combined with economic liberalism - a strategy mix originating from their desire for government intervention to support farmers while preferring market-based policies for the rest of the economy. The Nationals consistently win seats in regional electorates - enough to make them the only minor party with a long history of political representation in the House of Representatives. They have always been the natural 'coalition' ally of the Liberal Party, which also prefers market-based policies. However, its agrarian social democracy sometimes causes ideological tension with the Liberals. When the Coalition forms a government, the Nationals are automatically included in the **Ministry**, which makes them the only minor party to hold portfolios in the executive branch.
- **Current Role**: As a critical member of the Coalition with the Liberal Party, the Nationals are vital in forming any non-Labor government, often holding key **cabinet** positions. In 2024, they strongly represented rural communities' opposition to power transmission lines built through farming areas to connect the growing number of solar and wind farms to the electricity grid.

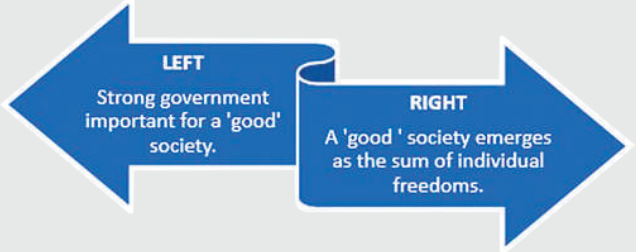


Figure 10.9 — The political spectrum

Australian Greens

- **Emergence**: Born through the amalgamation of State-based parties representing the environmental and anti-war movements of the 1960s and Cold War era, the Greens attract young, educated, and urban middle-class voters concerned about ecological sustainability.
- **Influence**: They have substantially impacted parliament and legislation due to the proportional representation **electoral system**, which allows them to achieve political representation in the Senate for their support in inner urban areas. They have held a seat in the House of Representatives for an inner Melbourne electorate since 2002. In 2022, they increased their House of Representatives representation by 400% by winning three additional seats in inner Brisbane. They often participate as the dominant party in the Senate **balance of power**.

Pauline Hanson's One Nation

- **Overview**: Pauline Hanson's One Nation (PHON) emerged as a significant force offering nationalist populism, appealing to voters disillusioned with rapid social and economic changes and immigration.
- **Characteristics**: Their core approach, populism, focuses on the political representation of grievances rather than a coherent ideology, leading to unpredictable electoral participation and parliamentary behaviour—often driven by whatever issues currently generate grievances in the

electorate. PHON has won consistent Senate representation in recent elections.

The Jacqui Lambie Network

- Jacqui Lambie was elected as a senator for Tasmania, representing Clive Palmer's Palmer United Party. She quickly fell out with Mr Palmer, left his party and sat as an independent senator. Her distinctive and forthright style earned her respect for the political representation of Australian Defence Force veterans and her state's interests. She has been a senator since 2014 (with a short absence due to Section 44 disqualification).
- In 2022, the Jacqui Lambie Network (JLN) party succeeded in electing a second Tasmanian senator, who left JLN in 2024 to sit as an independent. The resignation of JLN's second senator illustrates the precarious nature of political representation based on parties whose fortunes depend on a charismatic leader - *see Revived Parties below*.

Notable Minor Parties in Recent History

Centre Alliance:

- Formerly the Nick Xenophon Team, the party is based in South Australia and represents a populist/social liberal ideology. It has had one MHR and one Senator in recent times.

Revived Parties:

- Clive Palmer's United Australia Party, previously the Palmer United Party, illustrates the fluctuating fortunes of populist parties that often revolve around charismatic leaders. In 2022, the party spent $120m and won only one Senate seat.

Australian Conservatives

- **Formation**: Founded by Senator Cory Bernardi after he resigned from the Liberal Party, this party seeks to represent conservatives dissatisfied with the political representation of deeply social conservative ideas.
- **Merger**: The Australian Conservatives lost parliamentary representation when Mr Bernardi lost his seat. The party has since merged with the religiously conservative Family First - another deeply conservative party that once had, but has since lost, parliamentary representation.

Liberal Democrats

- **Philosophy**: A **minor party** offering political representation for those holding libertarian principles, the Liberal Democrats promote minimal government intervention and maximum individual freedom, positioning themselves to the right of the Liberal Party. They have had parliamentary representation in the past but have had no electoral success since 2016.

Note: there are many more minor parties than those listed above. The great majority of them cannot effectively participate in electoral processes because they lack resources and the broad appeal needed to win many votes. As a result, most minor parties never attain parliamentary representation for their supporters' political views.

Participation in Electoral Processes – Electoral Systems

Electoral systems

The preferential voting system, used in the House of Representatives elections, is a fundamental part of Australia's election processes. It enables a high-resolution snapshot of voter preferences on election day. The system allows smaller parties and independent candidates to influence the electoral outcomes through preferencing strategies. Reducing vote wastage ensures that votes contribute to the election process more comprehensively, allowing for a more accurate representation of the electorate's will. As political representation fragments and more voters choose minor parties and independents, the two major parties increasingly rely on minor party preferences to win enough electorates to form a government. In this way, minor parties strategically use the electoral system to influence the major parties' policies, broadening their platforms and making them more representative.

Meanwhile, the Senate's proportional representation voting system amplifies the role of political parties by ensuring accurate representation of minor parties. By allocating seats proportionately to the statewide vote, smaller parties can achieve parliamentary representation, ensuring that a more comprehensive array of interests is represented in the national legislature. The 2022 election demonstrated this effect when several minor parties, including the Greens, the Jacqui Lambie Network (JLN), Pauline Hanson's One Nation (PHON), and independents, held the balance of power in the Senate. The balance of power enabled them to force the governing Labor Party into negotiation and compromise on climate, housing, migration and other legislation. In

short, the Labor Party Government had to take seriously the views represented by the Greens, JLN, PHON and others to pass government bills.

Australia's multi-party system, underpinned by one of the world's best electoral compromises and an independent Australian Electoral Commission that manages a rigorous electoral process, facilitates political representation where a broad spectrum of interests is represented fairly.

> *'political parties can be described as 'organisations designed to maximise effective participation in electoral processes.'*

Background information: Parties and electoral participation

There are several reasons why the two major political parties can be described as 'organisations designed to maximise effective participation in electoral processes.' These reasons explain why they are far more effective than individuals and other political organisations—like pressure groups—at exploiting electoral processes to achieve political representation in parliament.

Representation: Political parties in Australia represent a broad spectrum of public opinion, making them more effective in the electoral process. They provide a platform for various interests and viewpoints, helping to aggregate these into a coherent policy agenda. Voters are attracted to coherent platforms that align with their political preferences. It is usually more appealing than voting for specific issues or causes.

Figure 10.10 — David Littleproud leading the Nationals towards "the sensible centre".

- **Organisation and Resources:** Political parties have the organisational structure and resources needed to mobilise voters - which is an advantage even in a system with compulsory voting. They can conduct large-scale nationwide campaigns, manage complex electoral logistics, and have the members and volunteers needed to reach out to the electorate.
- **Preference Deals:** Most Australian elections for lower houses use a preferential voting system. Under this system, voters are required to mark a preference for every candidate on the ballot paper. Parties influence voter decisions on which candidates to preference through their how-to-vote cards. Complex negotiations between parties enable them to shape voters' preferences, which can significantly affect election outcomes.
- **Voter Databases:** The Labor and Liberal parties have built sophisticated voter databases, named 'Campaign Central' and 'Feedback' respectively. These databases store information about every Australian voter and assign a 'persuadability score' based on polling and robocall results. Data analysts use this information and demographic details such as income, age, and gender from the Census to create statistical models. These models help party strategists determine which voters are worth targeting. This level of sophistication enables 'narrowcasting' via individual voters' social media feeds to influence how they vote.
- **Influence over Electoral Processes:** The Turnbull Liberal Party Government reformed the Senate electoral system in 2016 in ways that disadvantaged minor parties. No other political organisation or individual can 'make the rules' that govern electoral processes in this way.

Election campaigns

Electoral campaigns are part of Australia's electoral processes. Political parties run campaigns that use slogans to simplify complex issues, traditional media broadcast advertising, targeted digital messaging, and other means to shape and harness the electorate's will and translate it into parliamentary representation. Examples of successful campaigns include the ALP's "It's Time" campaign, which saw the Whitlam Government sweep into office in 1972, and its "Kevin 07" campaign, which won the 2007 election. These examples show how

slogans simplify complex issues to maximise the impact of political communication during elections. The Liberal Party's "Axe the Tax" and "Jobs and Growth" campaigns in the 2013 and 2016 elections also illustrate how parties use slogans to connect with and mobilise the electorate around their parties' proposals. Meanwhile, political parties are adapting new technologies by combining traditional broadcast media advertising with highly targeted political messaging (called narrowcasting) using social media and their vast databases containing the politically significant details of most electors.

> *Political parties run campaigns that use slogans to simplify complex issues, traditional media broadcast advertising, targeted digital messaging, and other means to shape and harness the electorate's will and translate it into parliamentary representation.*

Political Representation - Pressure Groups

Pressure groups operate alongside political parties to shape the political landscape in the interests of those they represent. In doing so, they ensure that various interests and causes achieve political representation within the parliament and government. Pressure groups, through a variety of strategies, exert considerable influence over policy and legislation, reflecting the concerns and priorities of their constituencies. Among the most influential in this arena are the Pharmacy Guild of Australia, the Minerals Council of Australia, and the Australian Council of Trade Unions (ACTU), each advocating for distinct sectors with different strategies.

Pressure groups do not participate in electoral processes to represent their causes or interests in parliament like political parties do. Parties aim to achieve political representation directly in parliament. On the other hand, pressure groups participate in electoral processes only if doing so advances the political representation of their cause or interest. If they choose to participate, they often do so indirectly by supporting favoured political parties or candidates through donations, policy advice, logistical support and other means like broadcast and narrowcast media advertising.

The Pharmacy Guild of Australia

The Pharmacy Guild represents community pharmacies and is renowned for its effective lobbying efforts, particularly in negotiating favourable conditions within the Pharmaceutical Benefits Scheme (PBS), which subsidises expensive medicines and increases public access to drug treatments. It also lobbies to influence **regulations** governing where pharmacies can be located, thus minimising competition. For example, unlike common overseas practice, Australian supermarkets are banned from operating pharmacies under the five-yearly Community Pharmacy Agreement, of which the Pharmacy Guild is an influential participant.

The Pharmacy Guild forges bipartisan relationships with both major political parties, ensuring that community pharmacies' interests remain protected whatever the election outcome. An example of their influence was evident in the lead-up to the 2019 federal election when the Guild successfully lobbied for commitments from major parties to support the continuation and funding of the PBS. In 2023, it lobbied unsuccessfully to prevent changes that allowed patients to receive two-month prescriptions for common medicines - effectively doubling the duration of their prescriptions and halving the frequency of their visits to a community pharmacist, where they might spend money on other items.

> *Pressure groups operate alongside political parties to shape the political landscape in the interests of those they represent. In doing so, they ensure that various interests and causes achieve political representation*

The Australian Council of Trade Unions

The Australian Council of Trade Unions (ACTU) is the 'peak body' representing trade unions, which represent workers in various industries and sectors of the Australian economy. Unions pay fees to affiliate with the ACTU, providing it with significant resources to lobby **ministers** and take **direct action**. The ACTU leverages its extensive resources and networks within the labour movement to influence industrial laws and workplace regulations.

One of ACTU's primary strategies is mobilising grassroots support through national campaigns, such as the "Change the Rules" campaign.

The campaign aimed to reduce inequality in workplace relations laws. It focused on reforming the *Fair Work Act 2009*, which advocates for fair labour laws and better working conditions. The campaign fostered public participation by organising rallies, engaging with the media, and coordinating with political parties sympathetic to its cause—especially the ALP.

The ACTU has been at the forefront of discussions with the Albanese Government concerning its promised workplace reforms targeting the status and rights of casual employees. Central to these proposed changes is establishing a clear pathway to transition casual workers into permanent roles, potentially impacting over 850,000 people (sometimes called the 'precariat' because of their precarious employment conditions). The ACTU-supported reform aims to redefine the criteria for casual employment and **abrogate** a **High Court** decision that allows workers to remain categorised as casual despite working in conditions like permanent staff. The ACTU's lobbying to close legal gaps and advocate for the rights of casual workers shows how pressure groups can represent people with no other voice.

> *"Pressure groups do not participate in electoral processes to represent their causes or interests in Parliament like political parties do."*

Parallel with reforms targeting casual employment, the ACTU recognised a need to address the circumstances of so-called digital gig workers, like Uber drivers and Deliveroo riders. These workers are often classified as independent contractors, which excludes them from traditional employee benefits like sick leave and superannuation contributions. The Albanese Government, prodded by the ACTU, may extend reforms to include digital gig workers.

The Australian Conservation Foundation

The Australian Conservation Foundation (ACF) represents environmental causes and influences public policy regarding ecological preservation and climate action. The ACF employs a blend of advocacy, public campaigns, and legal action to champion the protection of Australia's natural heritage.

It has an extensive network of volunteers and experts it can draw on to address critical environmental issues. It runs specific-issue campaigns crafted to engage the public and government policymakers on action on climate change, biodiversity loss, and sustainable water management.

The ACF played a central role in a 2021 campaign to safeguard the Great Australian Bight from oil exploration drilling. Their involvement illustrates the variety of methods groups like the ACF use to advance their causes. They promoted awareness by raising the alarm about the dangers of deep-sea oil drilling in the Bight launching campaigns to educate policymakers and the public about the area's ecological significance. They used the **courts** to make legal challenges to contest drilling permits, pushing for compliance with environmental laws. They collaborated with other environmental groups, local communities, and Indigenous groups to form a united front called the Great Australian Bight Alliance. They sponsored 'paddle-out protests' by volunteers in kayaks along Australia's shores. They stood in solidarity with surfers, activists, and local communities, visually demonstrating their opposition to the drilling plans. They ran media campaigns and organised press events, gaining national and international attention. They participated in public forums and inquiries and presented scientific research.

The Environmental Defenders Office

The Environmental Defenders Office (EDO) is a unique environmental advocacy group that specialises in using the courts to represent environmental causes. It is a network of lawyers who volunteer to take environmental legal cases.

The EDO has represented people and groups taking significant environmental cases. Anjali Shama was 14 years old when she and other children took legal action in 2021, claiming the Minister for the Environment owed children a duty of care when evaluating mining companies' applications to mine coal because of the impact of the fossil fuel's emissions on their future. The EDO aided Anjali Shama's argument in the Federal Court and won. The High Court later reversed the Shama **precedent** on appeal.

The EDO also represents other groups, such as Indigenous communities and conservation organisations, enabling them to use the courts to fight against environmentally damaging projects and policies.

The EDO is also heavily involved in **law** reform efforts, working to strengthen environmental laws. By writing detailed submissions to parliamentary inquiries and engaging in public debates, the EDO tries to influence environmental laws.

The Minerals Council of Australia

The Minerals Council of Australia (MCA) represents the mining and resources sector. In addition to policy submissions to the government and direct lobbying of ministers and public servants, it uses pre-election advertising campaigns to represent its members' interests.

Their 2010 campaign against the proposed Resource Super Profit Tax (RSPT) was a significant example of their influence through electoral participation. The MCA was pivotal in using an extensive media campaign to turn public opinion against the RSPT. During the campaign, several mining companies announced that mining projects had been deferred or abandoned, putting the industry's displeasure at the centre stage of the election. Kevin Rudd was deposed by his party before the election and replaced as **Prime Minister** by his deputy, Julia Gillard. The RSPT contributed to the public dissatisfaction that led to his removal. Ms Gillard committed to reviewing the RSTP during the campaign. The newly elected Gillard Government abandoned the RSPT in favour of the weaker Minerals Resource Rent Tax (MRRT), which the MCA helped develop.

The MCA's campaign illustrates how pressure groups can participate in electoral processes by timing an advertising campaign to take advantage of the three-year electoral cycle. In this example, the campaign significantly undermined Prime Minister Kevin Rudd, contributing to his replacement by his Deputy Prime Minister Julia Gillard. The Labor Party's re-election bid was a close-run thing when the election resulted in a **hung Parliament** and a **minority** Gillard Labor Government. Such is the **power** of a well-resourced and influential pressure group to participate in election processes.

Climate 200

Climate 200 emerged in the lead-up to the 2022 general election as a pressure group for whom participating in electoral processes was its primary strategy for representing the cause of climate change.

Wealthy businessman Simon Holmes à Court founded Climate 200 to get climate-focused independent candidates elected to parliament. The candidates it supports are not members of Climate 200. Instead, Climate 200 offered financial support to any independent candidate whose platform aligned with the pressure group's philosophy.

Climate 200 quickly became a rallying point, offering political representation to a diverse

Figure 10.11 — Simon Holmes à Court Climate 200 offered financial support to any independent candidate whose platform aligned with the pressure groups' philosophy in the 2022 Federal election.

group of over 200,000 supporters, from scientists to concerned citizens, united by the climate cause.

Its strategy dovetailed with another movement of 'community independents', who were candidates applying Cathy McGowan's proven "Voices" model for electing independent MPs—*See Background information: Cathy McGowan in the following section on "Individuals".*

> *"Political parties, pressure groups and individuals need to work at the commonwealth and state levels to achieve their political aims."*

The 'community independent' movement wanted to transform political representation by electing individuals through direct participation in electoral processes. The media dubbed these community independent candidates the 'Teals'. The Teals shared policies advocating aggressive emissions reduction, renewable energy expansion, and a just transition for workers in fossil fuel industries. Thus, the Teals' policies aligned with Climate 200's philosophy, earning them its financial support.

Climate 200 exerted influence as the election approached through strategies to bolster the Teals' election campaigns. Financial contributions funded advertisements and social media campaigns. The Teals' grassroots "Voices" strategy saw thousands of individual concerned citizens and experts directly promote Climate 200's agenda in the community.

Climate 200's endorsement of Teal candidates lifted their credibility and visibility. The pressure group's vetting process ensured that only independent candidates with genuine commitments to its climate agenda were

selected for support. Climate 200 organised climate-centred debates and forums, where candidates publicly committed to Climate 200's climate goals.

The election rewarded Climate 200's participation in electoral processes. Six Teals were newly elected to the House of Representatives, joining two others who were re-elected. All eight Teals ejected Liberal MPs from formerly safe seats, transforming the political representation of approximately 900,000 citizens in eight electorates. The Australian Capital Territory elected another Teal to the Senate.

> *"The quest for political representation is deeply ingrained in the fabric of Australia's democracy."*

The Climate 200 / Teal "Voices" partnership displays the potential rewards of participating in electoral processes for pressure groups, and individuals.

What about federalism?

Note that Australia is a **federation**, which means representative democracy operates at two levels. Each level requires political representation and participation in electoral systems to achieve representative democracy through the political and legal system. Therefore, political parties, pressure groups and individuals need to work at the **commonwealth** and state levels to achieve their political aims. See *Background information: Political Parties and Pressure Groups: Political Representation and Electoral Participation in Australia's Federal System*

Background information: Political Parties and Pressure Groups: Political Representation and Electoral Participation in Australia's Federal System

Political Parties

The structures of the ALP and the Liberal Party mirror Australia's federal system, featuring organised branches at local, state and commonwealth levels. This hierarchical organisation enables the parties to effectively represent issues specific to different government levels, reflecting local constituents' concerns through their state branches while representing their views on national affairs through their federal branches. For example, the ALP's National Platform expresses national policies while it's state branches represent adaptations to local contexts. Similarly, the Liberal Party's Federal Council coordinates national policy stances, with its state divisions tailoring these to local needs and priorities.

These structures are federalist, ensuring that policy and political representation are responsive to localised concerns and overarching national challenges. Naturally, the parties focus their efforts on the fields of powers relevant at each level. For example, on issues like health and education, which are **residual powers** and thus primarily state responsibilities, party policies represent each state's specific needs and contexts. On matters of national significance like defence and immigration, which are commonwealth powers exclusive by nature, the parties adopt stances that transcend state boundaries. In fields of **concurrent power**, like taxation, the parties adjust their politics to the types of taxation applicable at each level – for example, income and company tax at the commonwealth level and stamp duties and payroll taxes at the state level.

Political parties engage as much with state electoral processes as they do at the federal level. However, some parties are state-based and do not participate in federal elections. The Daylight Saving Party was a Western Australian example before its deregistration in 2023.

Pressure Groups

Pressure groups concentrate their efforts on specific issues or interests, focusing on the relevant levels of government based on the constitutional division of powers. For example, a pressure group advocating for changes in road rules would focus on state governments because they exercise the relevant powers.

To be effective, pressure groups must navigate Australia's federal structure, directing their influence efforts towards the relevant government level. For example, environmental groups typically engage with federal government agencies on national environmental policy and legislation issues, such as climate change actions and biodiversity protection - because the commonwealth dominates these fields of power. Meanwhile, industry-specific groups might focus more on state governments when advocating for policy and legislative changes that directly impact their sectors, given states' significant powers over resources and land use.

For example, mining dominates the Western Australian economy. Therefore, mining-related pressure groups like the Minerals Council of Australia and the Chamber of Minerals and Energy of Western Australia are active in the state. Meanwhile, gambling is a big industry in Victoria and New South Wales, so the gambling lobby, dominated by the Australian Hotels Association and ClubsNSW focuses on these States to represent the interests of its members.

Pressure groups participate in the electoral processes at the levels of government most relevant to their lobbying and influence efforts. They do not participate in elections at anything like the level of political parties. Still, they will support favoured parties and candidates if doing so advances their efforts to influence policy and legislation.

Political representation - Individuals

The quest for political representation is deeply ingrained in the fabric of Australia's democracy, tracing its roots back to the Eureka Rebellion on the Victorian goldfields - *See Background information: Eureka Rebellion.*

Individuals exercise their political rights and freedoms in many ways, from voting and running for public office, leveraging implied constitutional rights such as freedom of political communication, and joining collective entities like political parties, pressure groups and community associations that have political objectives. These activities highlight citizens' democratic participation in their government.

Background information: Eureka Rebellion

The Eureka Rebellion is a key event in Australian political history. It took place between 1851 and 1854 during the Victorian gold rush. Gold miners led the uprising, including some veterans of Europe's 1848 Revolutions. Like their American cousins before them, they expressed discontent with the government's oppressive taxation policies. Their main grievance was the exorbitant fees for mining licences and the colonial government's arbitrary enforcement of mining regulations. A notable concern was the lack of political representation for miners and goldfield communities concerning the taxes and regulations, echoing the battle cry, "no taxation without representation" which heralded the American War of Independence.

In response to the lack of political representation, the miners began organising peaceful demonstrations and civil disobedience across the Victorian goldfields in 1851. In Ballarat, miners assembled for mass meetings and, in an act of political communication, burned their licences in protest. After the murder of James Scobie in October 1854, who was killed in controversial circumstances outside a local hotel, things turned violent. An inquest acquitted any suspects of criminal liability for Scobie's death and ignited further unrest among the miners.

Growing tensions between the colonial government and the miners led to the Battle of the Eureka Stockade in Ballarat on December 3, 1854. In a brave stand against overwhelming colonial forces, rebellious miners built a makeshift fortification of wooden palisades known as the Eureka Stockade. Armed conflict broke out, resulting in at least 27 fatalities. The majority of the dead were miners.

The Eureka Rebellion has significantly influenced Australian politics. It is celebrated as a foundational event in the development of Australian democracy, famously surmised by former Labor Party leader and High Court **judge** Doc Evatt's declaration that "Australian democracy was born at Eureka." The Eureka Rebellion's ideal was fair political representation.

In the aftermath, the call for political change gained momentum. Significant reforms were introduced, eventually leading to the British Parliament passing the Victorian Constitution **Act** in 1856. This legislation established a **bicameral** parliament comprising an elected Legislative Assembly and an appointed Legislative Council, making Victoria the first Australian colony with a fully elected lower house.

Exercising Political Rights and Freedoms

Individuals can exercise their political rights and freedoms in different ways to achieve political representation.

Voting: Since 1924, compulsory voting has been at the heart of Australian democracy. It is a characteristic feature of Australia's electoral processes that ensures high individual participation. Compulsory voting has kept voter turnout rates above 90%. Coupled with an inclusive **franchise**, compulsory voting maximises the political representation of the Australian community. Compulsory voting illustrates the high value Australia places on participation in democracy—voting is every citizen's duty, not choice.

Running for Public Office: Australia's political system also empowers individuals to stand for election, offering a path for individuals to political representation as a Member of Parliament. An example is the emergence of 'Teal community independents' in the 2022 federal election. These candidates, running on platforms focused on climate action, integrity in politics, and gender equality, successfully contested six traditional Liberal party seats, demonstrating the potential of individuals to reshape political representation.

Freedom of Political Communication: Though not explicitly outlined in the Australian Constitution, the High Court has acknowledged an implied right to political communication. This right facilitates political debate and enables individuals to criticise the government, argue policy changes, and mobilise support for various causes without fear of censorship.

Freedoms of speech and assembly: These freedoms are protected in **common law**. The courts adopt styles of **statutory interpretation** that maximise these freedoms. A 2021 example of Australians assembling for political communication was the protests outside Parliament House following Brittany Higgins' allegations of sexual assault. Thousands of women rallied in the *March4Justice* demanding more decisive action from the government on women's safety. Prime Minister Scott Morrison said in parliament, "it is good and right, Mr Speaker, that so many are able to gather here in this way, whether in our capital or elsewhere, and to do so peacefully to express their concerns and their very genuine and real frustrations. This is a vibrant liberal democracy, Mr Speaker. Not far from here, such marches, even now, are being met with bullets, but not here in this country, Mr Speaker." Although his comments were seen as controversial by some, they expressed a true feature of Australian democracy.

Cooperating for Political Purposes

Political Parties and Pressure Groups: Individuals can join associations like parties and pressure groups to amplify their political representation. Political parties, from the major ones like the ALP and the Liberal Party to minor parties such as the Greens, offer forums for individuals to contribute to policy development and campaign strategies. Pressure groups provide many choices, allowing individuals to seek representation of almost any specific cause or interest. The Australian Conservation Foundation and the ACTU are examples of individuals collectively influencing public policy and legislation.

Marches and Protests: Assembling for political purposes, such as marches and protests, is an act of democratic participation. Marriage Equality Rallies in 2017 saw Australians across the country take to the streets in support of same-sex marriage. The legalisation of same-sex marriage in Australia highlights how such public demonstrations can lead to significant change.

Participation in electoral processes – Voting and volunteering

Participation in electoral processes extends beyond voting, encompassing a range of activities through which individuals can influence electoral outcomes.

Voting: The foundation of electoral engagement is the act of voting itself. As noted above, compulsory voting ensures broad participation, making elections a singular moment when eligible citizens express their political preferences and decide the composition of the parliament and who forms the government. The preferential voting system further allows voters to order candidates by preference, ensuring their vote contributes meaningfully to the election outcome by continuing to count even if they vote for an eliminated candidate.

Volunteering: Many Australians contribute to electoral processes by volunteering for political parties or independent candidates. While traditional political party membership is in decline, the Teal 'community independent' movement has inspired very high levels of individual participation through the "Voices" model, pioneered in 2013 by Cathy McGowan in Indi, Victoria. Volunteers supporting the Teals engaged in various activities, from 'kitchen table conversations' to doorknocking, phone calls, and handing out how-to-vote cards at polling stations. The Teal community independents movement encouraged grassroots participation from individuals seeking a higher standard of political representation than that offered by traditional 'party politics'. The community **independence** movement - beginning in 2013 and rising to national prominence in 2022 - may inspire further individual participation since the Teals' success has fostered interest and proven that individuals can make a difference. See *Background information: Cathy McGowan*

Background information: Cathy McGowan

Since federation and especially since World War Two, political representation in parliament and participation in electoral processes have been dominated by the two major parties in

Australia's 'two-party' system. Electoral reforms in the late 1940s allowed minor parties to participate meaningfully in electoral processes and achieve a measure of political presentation for underrepresented political perspectives in the **Senate**. However, despite some notable **independent MP**s, the systematic election of individual candidates to parliament through strategic participation in electoral processes had been absent from Australian democracy - until 2013.

Cathy McGowan's "Voices" strategy is a significant addition to—and possible departure from—conventional party-centric political representation. Its outstanding feature is community-driven individual participation in electoral processes.

Origins of the "Voices" Movement

The "Voices" movement grew out of community frustration with poor political representation in the rural Victorian electorate of Indi.

Cathy McGowan, a community advocate and independent candidate, organised her Indi community by launching the "Voices for Indi" campaign in 2012. She aimed to unseat the incumbent Liberal Party member, Sophie Mirabella, in what was considered a safe Liberal seat. Her grassroots movement was based on the principles of openness and participation and driven by peer-to-peer collaboration and shared values. 'Kitchen table conversations' became well-known as one of the Voices of Indi's most effective strategies. It involved Voices of Indi members hosting gatherings in their homes, inviting their friends and neighbours and discussing the issues that concerned them and how to do something about them. In this way, grassroots political communication organised a large segment of the Indi electorate behind McGowans' candidacy. Perhaps the most radical idea was the Voices movement's emphasis on trust in the community's capacity to represent itself as an alternative to traditional party representation.

Figure 10.12 — Cathy McGowan, unseated Sophie Mirabella from her safe Liberal seat with her "Voices for Indi" campaign in 2012.

Impact

McGowan's "Voices" movement foreshadowed a significant shift in political representation when she won Indi by 439 votes in 2013. The movement demonstrated the viability of community-organised individual participation in electoral processes by galvanising local people to rally behind an independent candidate. McGowan's success in the 2013 federal election sent a message: independent candidates, grounded in community advocacy and free of party constraints, could effectively represent and prioritise local interests in the national parliament.

> *"The mechanisms enabling political representation – that is, voting, political rights and freedoms, electoral processes, etc. – are what make a political and legal system a democracy."*

The Voices approach was vindicated in 2016 when McGowan defeated Mirabella again despite the Liberal Party committing significant resources to get their candidate re-elected. When Cathy McGowan retired in 2019, Voices of Indi selected a new candidate, Dr Helen Haines, to replace her. Haines won Indi in the 2019 election, becoming the first independent in Australian history to succeed a retiring independent. Haines was re-elected in 2022 - meaning Voices of Indi has achieved the community's political representation for four consecutive terms by an independent chosen by the people of Indi through community participation in electoral processes.

Expansion

The success of McGowan's Voices model extended beyond Indi, inspiring other Voices groups across Australia. Zali Steggall became the first community independent elected outside Indi when "Voices for Warringah" adopted McGowan's model to unseat former Prime Minister Tony Abbott in 2019.

Since then, over fifty community groups in various electorates have adopted the "Voices of" or "Voices for" name, endorsing independent candidates who embody their desire for community-focused political representation. The 2022 general election saw many Voices-endorsed candidates run in the election. Two sitting community independents - Haines and Steggall - were reelected, and six new community independents were elected for the first time.

The 47th Parliament has the highest proportion of independent MPs of any parliament in history - with eight community independents - branded the 'Teals' by the media – now a significant force on the **crossbench**.

The Voices strategy challenges the conventional practices of electoral participation and party political representation in Australia. It advocates for direct community participation in electoral processes and the election of delegate/trustee rather than partisan representatives. The strategy reflects the growing dissatisfaction with party-based political representation and a yearning for strong link between elected parliamentarians and their constituents.

The Voices movement has benefited from - and probably accelerated - the decline of **major party** electoral support. If the trend continues, the major parties may find it increasingly difficult to form **majority governments**. A future in which community independents are relied on by minority governments for confidence and supply could be a time when political representation in parliament is radically transformed. It may see future parliaments able to effectively hold governments to account through **Question Time** and other scrutiny procedures.

Such is the potential of one individual's determination to improve the political representation of her community through direct community participation in electoral processes.

Electoral Campaigning: In addition to volunteering, individuals also engage in electoral campaigning through digital platforms and social media. The use of social media for political campaigning has grown exponentially, with individuals sharing content, participating in online discussions, and even coordinating virtual rallies. Digital engagement has become essential for reaching voters, particularly younger people, and mobilising support for causes and candidates. Change.org is an example of an online advocacy organisation that allows citizens to create and sign digital petitions.

Participation in Pre-Election Activities: Engagement with electoral processes also occurs in the lead-up to elections. Australians participate in pre-polling discussions, attend candidate forums, and engage with party policy platforms to inform their voting decisions. The 'Democracy Sausage' phenomenon, where community groups and schools run sausage sizzle fundraisers at polling stations, is an internationally recognised feature of Australia's blend of participation and community spirit on election day.

A Comparative Analysis of Political Parties, Pressure Groups, and Individuals in Australia: Political Representation and Participation in Electoral Processes

Political Representation

In Australia's democracy, political representation consists of citizens' interests, needs, and aspirations being voiced within the legislative and executive branches of government. The mechanisms enabling political representation – that is, voting, political rights and freedoms, electoral processes, etc. – are what make a political and legal system a democracy. They hold parliamentarians and executive officials responsible to the governed and make them responsive to citizens' interests. Political parties, pressure groups, and individuals each play distinctive roles in this process.

Political Parties serve as the principal vehicles for political representation, aggregating individual preferences into coherent policy platforms. Major parties like the ALP and the Liberal Party, alongside minor parties such as the Greens, represent a broad spectrum of political and other interests. They are structured and organised political associations dedicated to using electoral processes to represent citizens in parliaments across state and national levels.

Pressure Groups operate parallel to and often independently from the formal party system, aiming to influence public policy and legislation without seeking election. Groups like the Pharmacy Guild of Australia and the Australian Conservation Foundation are structured and organised political associations that focus on specific causes or interests, using their influence to achieve political representation. They may participate in electoral processes, but their main strategies are non-electoral, for example, direct lobbying, direct action, and public campaigns. Pressure groups enhance the participatory aspect of democracy by offering myriad choices

Figure 10.13 — Extinction Rebellion is a pressure group that uses direct tactics to deal with the climate emergency.

for politically motivated citizens to pursue particular causes or interests.

Individuals assert their political rights and freedoms through voting, running for public office, and employing implied constitutional rights like freedom of political communication. Historical instances, such as the Eureka Rebellion, and contemporary movements, including the emergence of 'Teal community independents,' highlight the individuals' capability to achieve meaningful political representation. Some individuals can be extraordinarily successful at achieving political representation for issues like climate and integrity. Cathy McGowan, through her "Voices" movement, is an example.

Participation in Electoral Processes

Political Parties almost singularly focus on one strategy for achieving political representation—that is, direct participation in electoral processes through campaigns, policy formulation, and candidate selection. Their involvement is critical in shaping electoral outcomes, as evidenced by strategic campaign initiatives and the use of modern technologies to reach and mobilise the electorate. The strategic use of the preferential voting system in the House of Representatives and proportional representation in the Senate highlights how parties use the electoral process to win seats in parliament.

Pressure Groups' participation in electoral processes, though not aiming for direct representation in parliament, can significantly influence electoral outcomes. The strategic timing of campaigns, such as the Minerals Council of Australia's efforts against the Resource Super Profit Tax, illustrates how these groups can sway public opinion and policy outcomes and impact political parties' leadership and policy. Climate 200's support for 'Teal independents' in the 2022 general election demonstrates pressure groups' capacity to marshal resources and public support behind candidates that align with their political objectives.

Individuals engage in the electoral process through various avenues beyond compulsory voting. They volunteer for political campaigns, engage in digital advocacy, and participate in pre-election activities. The 'community independent' movement, inspired by figures like Cathy McGowan and her "Voice" model of individual community members' participation in electoral processes, highlights the transformative potential of individual participation, which is currently challenging the dominant 'party' model of political representation.

Political parties, pressure groups, and individuals' efforts to seek political representation often, though not only, through participation in electoral processes demonstrates the vitality of the Australian political and legal system. Each of these entities contributes to a political system that is diverse and inclusive. Political parties offer broad policy platforms and structured engagement across government levels in Commonwealth and State Parliaments. At the same time, pressure groups and individuals provide representation through lobbying and direct action that ensure a wide range of interests and concerns are heard. Table 10.1 summarises the ways political parties, pressure groups and individuals achieve political representation and participate in electoral processes.

Entity	Political Representation	Participation in Electoral Processes	Examples
Political Parties	Aggregate individual preferences into coherent policy platforms, representing a broad spectrum of interests across state and national levels.	Direct participation through campaigns, policy formulation, candidate selection, and strategic use of voting systems to win seats in parliament.	ALP, Liberal Party, and the Greens, using strategic campaign initiatives and modern technology to engage the electorate.
Pressure Groups	Influence public policy and legislative agendas without seeking election, targeting specific causes or interests to achieve representation.	Influence electoral outcomes through campaigns, policy advice, and support for candidates that align with their objectives, without aiming for direct representation.	Minerals Council of Australia's campaign against the RSPT and Climate 200's support for Teal independents.
Individuals	Assert political rights and freedoms through voting, running for public office, and employing rights like freedom of political communication.	Engage in electoral processes through voting, volunteering for campaigns, digital advocacy, and grassroots community participation in pre-election activities.	The Eureka Rebellion, Cathy McGowan's Voices movement, and the community independent movement challenge the dominant party model of representation.

Table 10.1 — A summary of the ways political parties, pressure groups and individuals achieve political representation and participate in electoral processes.

Summary

Political Representation

- The Australian political and legal system is a representative democracy because SECTIONS 7 and 24 of the Constitution require both houses of the **Commonwealth Parliament** to be "directly chosen by the people".
- Political representation is essential to democratic theory and practice in representative democracies.
- Political representation involves participation in the electoral processes to elect officials who represent people's interests within the legislative and executive branches.
- Political representation is essential for holding parliament and the government accountable for implementing **majority rule**.
- Political representation emphasises pluralism through broad electoral participation and diversity in viewpoints, enhancing government legitimacy and responsiveness.

Participation in Electoral Processes

- Participation in electoral processes is essential to the principle of a fair election, which is an operating principle of democracy.
- Participation in electoral processes is essential for reflecting the people's will through voting and other participatory actions like campaigning and standing in elections.
- High participation rates signal a healthy democracy; low participation and apathy weaken it. Australia's compulsory voting system ensures high levels of individual participation in electoral processes and is the foundation for the legitimacy of parliament and the government.

Roles of Political Parties and Pressure Groups

- Political parties and pressure groups are key political representation and participation agents.
- Parties consolidate a range of similar individual preferences into coherent and broad policy platforms, nominate and support candidates, and, if elected, enact these policies through legislation or executive decisions.
- Pressure groups focus on narrow interests or causes to influence public policy and political debate without directly contesting elections. During elections, they may support parties and candidates aligned with their interests or causes. They may also make donations to political parties, contribute expert advice to parties' policy development, and provide volunteers to assist with election logistics.

Individual Political Representation

- Australian individuals have a long history of political representation, which was and continues to be foundational to Australia's representative democracy. The Eureka Rebellion and the "Voices" movement are examples.
- Individuals exercise political rights through voting, running for office, and employing constitutional freedoms like political communication.
- Individuals may join political parties or pressure groups to enhance their political representation.
- Individuals participate in democratic activities like marches and protests, as seen with the Marriage Equality Rallies in 2017.

continued overleaf

- Individuals participate in electoral process through voting. However, they can also volunteer for political parties or independents, engage in campaigns, and try to exert influence through digital platforms - examples of participation beyond merely voting.
- Cathy McGowan's "Voices" model demonstrates new modes of grassroots individual participation in electoral processes at the community level that challenge traditional political representation via parties in contemporary Australia.

Exam practice questions

Short Answer

1a. Outline what is meant by the term 'political representation.'

1b. Explain the importance of representative democracy in Australia's political system.

1c. Discuss **one** strength and **one** weakness of the operating principle of participation in Australia's electoral process.

2a. Outline what is meant by the term 'political party.'

2b. Explain the difference between the role of political parties and pressure groups in providing for **political participation**.

2c. Discuss **two** ways that major and minor political parties uphold political representation.

3a. Outline what is meant by the term 'pressure group.'

3b. Explain **one** strategy used by a pressure group to achieve political representation.

3c. Discuss **two** reasons why political parties are more effective than pressure groups in achieving political representation in parliament.

4a. Outline what is meant by the term 'federalism.'

4b. Explain **one** way that individuals can exercise their political freedoms in Australia's political system.

4c. Discuss **two** ways that individuals can participate in the electoral process.

Source Analysis

The source is adapted from: Shields, T (2022), Voter turnout in the 2022 federal election hit a new low, threatening our democratic tradition, The Australian Institute, 22 November, 2022, from https://australiainstitute.org.au/post/voter-turnout-in-the-2022-federal-election-hit-a-new-low-threatening-our-democratic-tradition/

This year's election had the lowest turnout for a century. For the first time since compulsory voting was introduced for the 1925 federal election, turnout fell below 90%.

For most of the last 100 years, voter turnout, which measures the number of people who lodge a vote as a percentage of all enrolled to vote, was around 95%. Since the 2007 federal election, however, it has declined steeply.

Australia is rare in requiring citizens to enrol and vote. Without compulsory voting, voter turnout in most nations is low – averaging just 69% across OECD countries. When voting is optional, those with lower education and lower income are less likely to vote – making government less representative of and attentive to those groups, and more influenced by elite power.

While other policies such as improving education could increase voter turnout by a few per cent, nothing works as well as a well-enforced compulsory voting regime. Compulsory voting brings us closer to the ideal of 'Government of the people, by the people, for the people'. The $20 penalty for not voting has not changed since 1984. As wages rise, its deterrent value falls – it would be $78 today if it had risen in line with wages. Australians should be grateful for our compulsory voting system and the genuinely mass turnout that it encourages – but the recent fall in voter turnout shows it has been taken for granted and needs to be made a priority before the next federal election.

continued overleaf

5a. Outline what is meant by 'compulsory voting.'

5b. With reference to the source, discuss in your own words **two** issues that arose from the 2022 election.

5c. With reference to a recent state or federal election in Australia, discuss **two** ways in which political participation was upheld.

5d. Evaluate the significance of **one** contemporary issue relating to representation in the Commonwealth Parliament.

Essay questions

6. Analyse how, and to what extent, political parties and pressure groups can participate in the electoral processes in Australia.

7. Evaluate the extent to which individuals, political parties and pressure groups uphold political representation in Australia.

Investigation

8a. Students are assigned a section in the chapter on political representation or participation in the electoral process, highlighting the roles of individuals, pressure groups, and political parties to compile notes in the table below.

8b. Then, divide the class into groups and let them choose their focus (individuals, pressure groups, or political parties).

8c. Each group should research and compile examples of how their assigned entity upholds and undermines political representation or participation in the electoral process.

- Students need to use contemporary examples where they can.

8d. Have each group present their findings to the class.

- Encourage discussion and questions from other students.

Entity	Upholding Political Representation	Undermining Political Representation	Participating in Electoral Process (Upheld)	Participating in Electoral Process (Undermined)
Individuals				

Entity	Upholding Political Representation	Undermining Political Representation	Participating in Electoral Process (Upheld)	Participating in Electoral Process (Undermined)
Pressure Groups				
Political Parties				

Sources

Figure 10.1 Source: Francesco Hayez, Aristotle, 1811, Public Domain, https://en.wikipedia.org/wiki/Aristotle#/media/File:Francesco_Hayez_001.jpg
Figure 10.2 Source: Kate Chaney, 2022, https://www.youtube.com/watch?v=2LJPUn-e0KU CC BY 3.0, https://commons.wikimedia.org/w/index.php?curid=119228403
Figure 10.10 Source: Matt Golding, 'Abbott's cover band…', 8 best responses to Abbott's war on renewables, 2015, https://yes2renewables.org/2015/07/15/10-best-responses-to-abbotts-war-on-renewables
Figure 10.3 Source: https://en.wikipedia.org/wiki/History_of_the_Australian_Labor_Party
Figure 10.4 Source: National Archives of Australia, Personalities—Gough Whitlam, Leader of the Opposition, https://commons.wikimedia.org/wiki/File:Gough_Whitlam_1962.jpg
Figure 10.5 Source: Stephen King, 2018
Figure 10.7 Source: Arthur Dickinson, Portrait of R. G. Menzies, Prime Minister of Australia, National Library of Australia, 1950s, Public Domain, https://en.wikipedia.org/wiki/Robert_Menzies#/media/File:Portrait_Menzies_1950s.jpg
Figure 10.8 Source: Matt Golding, 2020, https://www.smh.com.au/national/nsw/top-end-tax-cuts-encourage-exasperation-not-aspiration-20201221-p56p67.html
Figure 10.9 Source: Nicol Davis, 2018
Figure 10.10 Source: Matt Golding, 2022, <https://twitter.com/GoldingCartoons/status/1531537981848203265>
Figure 10.11 Source: AAP Image/Morgan Hancock) Simon Holmes a Court
Figure 10.12 Source: cathy@cathymcgowan.com
Figure 10.13 Source: Andrew Mercer (www.baldwhiteguy.co.nz) - Own work, CC BY-SA 4.0, https://commons.wikimedia.org/w/index.php?curid=92110720

All sources last accessed 3/8/24

Evaluating legal systems—Inquisitorial and adversarial trial

Syllabus points:

- **Key processes of at least one non-common law system**
- **Strengths and weaknesses of the processes and procedures of at least one non-common law system**
- **Strengths and weaknesses of Western Australia's adversarial civil and criminal law processes**
- **Essential to the understanding of representation and justice are the principles of natural justice.**

A **trial** is a procedure for the discovery of truth. The two most common systems adopted in the Western world - the **adversarial** and the inquisitorial - are founded on contrasting approaches about how to find the truth:

– the adversarial system is based on the premise that the truth is revealed through a contest between parties presenting evidence before a *passive* adjudicator; whereas,

– the inquisitorial system is based on the premise that the truth is discovered through a rigorous investigation resulting in the discovery of evidence by an *active* inquirer.

Common law countries such as Australia share a colonial legal inheritance from Britain that includes the adversarial trial. European countries such as France share a legal inheritance from ancient Rome, which was then further developed through the Napoleonic Code, that includes the inquisitorial trial.

Civil law countries

Civil law—An overview

The inquisitorial trial is used in many **civil law** countries. Civil law itself is derived from ancient Roman legal codes; however, it has undergone reforms and changes over the centuries. The diverging structures and processes of civil law and English **common law** can be attributed to differing social and political histories.

After the fall of Rome, some emerging states sought to distance their legal principles from the shadows of Roman influence during the medieval period, before returning to them in the modern age. This was evident in medieval France, where civil law was initially perceived as the '**law** of the conqueror'.

After the Enlightenment and the French Revolution,[1] French civil law was modernised and re-codified by Napoléon Bonaparte. His conquests helped spread his revived version of civil law throughout Europe. It was known as *Le code civil*. Napoleon regarded this code as his greatest achievement, saying, "my code civil will not be forgotten, it will live forever".[2] It is sometimes referred to as the *Napoleonic Code*.[3]

> *Codification is the process by which laws and rules are systematically collected and recorded into written codes.*

France and other European great powers like Spain, Portugal and the Netherlands went on to build empires in the New World. They took civil law with them and, as a result, many former European colonies in South America and Asia use civil law and the inquisitorial trial today. Indonesia, Australia's closest Asian neighbour—the world's third most populous country and its largest Islamic country—also uses the inquisitorial trial system introduced by the Portuguese and Dutch several centuries ago.

Figure 11.1 — Enlightenment writers and philosophers such as Voltaire were influential in the development of the French legal system.

Civil law—Codification

Complete codification of the law is a dominant feature of civil law. Although **precedent** has a minor role, the development of a formal body of law by the **courts** (as in English common law) is not a feature of civil law. There is no **doctrine of precedent**, no principle of ***stare decisis,*** and no binding and persuasive precedents.

Codification is the process by which laws and rules are systematically collected and recorded into written codes. In France, laws have been

1 Two great events based on new ways of seeing the world.

2 Napoléon at Saint-Helena, as cited in Friedrich, C J, 'The ideological and philosophical background', *The code Napoléon and the common law tradition*, 1956, NYU Press, New York, p 7.

3 Napoléon's code also abolished privileges based on birth, allowed freedom of religion and created a modern public service based on merit.

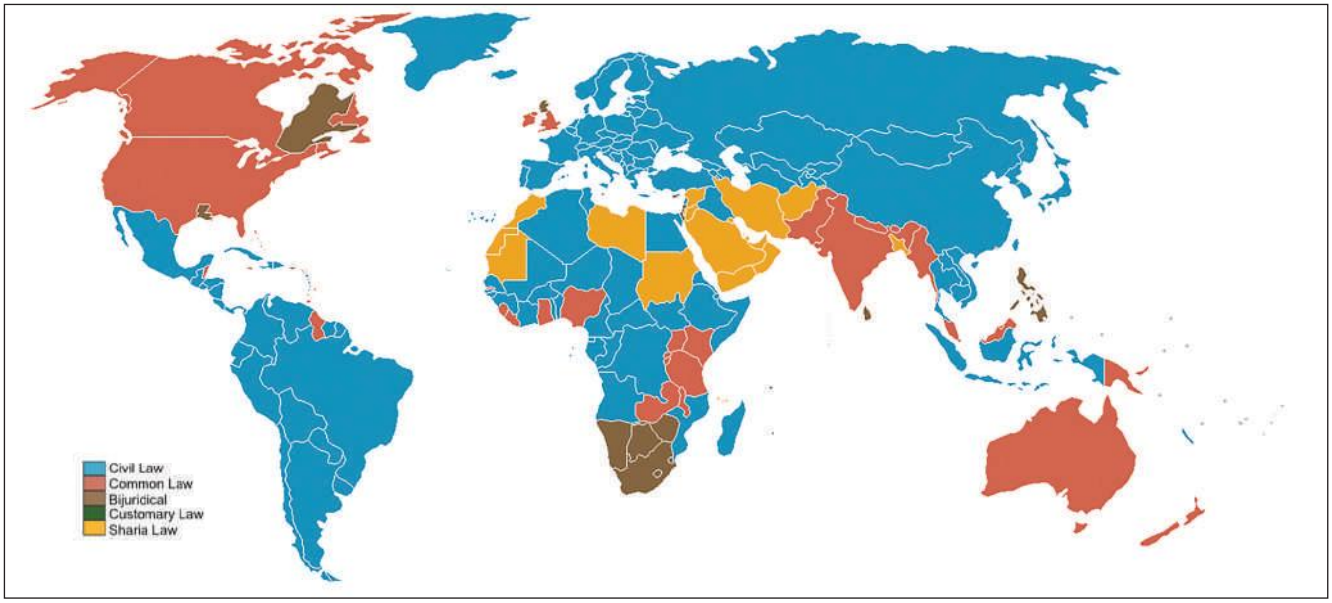


Figure 11.2 — A world map identifying the use of different legal systems across the world.

codified into a number of bodies of text including *les grandes lois* (which outline overarching legal and **human rights** protections), *les codes* (such as *le Code civil* of 1804), and *les textes réglementaires* (which are introduced by the executive branch of **government**).[4]

In contrast, Australian common law is found in ***ratio decidendi***—the reasoning of judges. Rather than being codified in statutes, Australian common law is found in Law Reports, which are the published judgments of particular cases (or case law). Case law is complicated and located in many sources. Its complexity encourages reliance on expensive legal expertise.

A key advantage of the codification of law is transparency—it is easy for lawyers and **citizens** to know the law because there is a single source published in written codes accessible to everyone. A positive outcome is less reliance on expert legal knowledge, reducing the role of lawyers in providing advice to parties. Costs are reduced as a result.

In Australia there is statute and common law—two bodies of complementary law. In France there are only statutory codes—one body of law. This is an important difference for the way the inquisitorial trial system works. Inquisitorial trials are heavily dependent on written codes. There is also much less emphasis on the spoken word in inquisitorial trials. Evidence is mostly written and presented in a dossier; there is less emphasis on the spoken testimony of **witnesses**.

The French inquisitorial trial

The French trial system, like the Australia trial system, deals with both civil (*droit civil)* and criminal (*droit pénal)* matters. The French trial system, like the Australian trial, has a hierarchy of courts to respond to offences that are both minor (summary) as well as serious (indictable) in nature. These shared features provide a beneficial framework by which to compare the French Inquisitorial and Australian Adversarial systems.

However, the French trial system also includes complexities that are not necessarily mirrored in Australia (such as a specialised Administrative Legal System and an inter-jurisdictional European Court of Justice). For ease of discussion, the analysis and evaluation within this chapter will focus primarily on the French criminal system (*droit pénal)* with reference to four key courts:

- Le tribunal de police
- Le tribunal correctionnel
- La cour criminelle
- La cour d'assises

All four courts are considered 'courts of first instance', with each having a separate channel of **appeals**.

4 Les sources du droit. (n.d.). Ministère de la justice. Retrieved March 16, 2024, from https://www.justice.gouv.fr/justice-france/fondements-principes/sources-du-droit

Parts of the French inquisitorial system

It is worth noting that when considering the nomenclature of roles in the French Inquisitorial system, direct translations are not always comparable. When providing translations below, students should consider using the original French roles and titles rather than the translation into English to preserve the accuracy of their analysis. Table 11.1 contains a summary of these roles and titles.

	Australia (Summary)	French (Summary)
Court	WA Magistrate Court	Le tribunal de police
Criminal Jurisdiction	Some criminal offences are known as 'simple offences' and will be dealt with in the Magistrates Court. More serious criminal offences, known as 'indictable offences', commence in the Magistrates Court. While some of these offences (known as 'either way' offences) may be dealt with in the Magistrates Court, the most serious offences must be sent on to be heard in the District or Supreme Courts.[5]	Crimes of the 1st - 5th order (maximum penalty of a fine not exceeding 3,000 euros).[6]

	Australia (Indictable - Intermediate)	French (Indictable - Intermediate)
Court	WA District Court	Le tribunal correctionnel
Criminal Jurisdiction	Offences such as robbery, assault with intent to commit robbery, criminal damage, serious assaults, sex assaults, serious fraud and commercial theft, burglary and drug offences.[7]	Crimes punishable with less than 15 years imprisonment.[8]

	Australia (Indictable - Serious)	French (Indictable - Serious)
Court	WA Supreme Court	La cour d'assises or La cour criminelle
Criminal Jurisdiction	Crimes punishable with 20 years of imprisonment	La cour criminelle: Crimes punishable with 15-20 years of imprisonment La cour d'assises: Crimes punishable with over 20 years of imprisonment.[9]

Summary of Key Roles

French Role	English Translation	Approximate Australian Equivalent
Parquet	Public Prosecution	Office of the Director of Public Prosecutions
Procureur de la République	Public Prosecutor	Public Prosecutor
Le prévenu / le person accusé	The Accused	The Accused / Defendant
President d'Audience	Hearing Officer	Magistrate
Juge(s)	Trial Judge(s)	Trial Judge
Juge Président	Presiding Judge of a panel of judges (in serious cases)	Trial Judge (Chair) [10]
Juge Assesseurs	Assisting Judge(s) (in serious cases)	Trial Judge
Juge Instructeur	Investigating Judge	No equivalent in Australia
Les Jures	The Jury	Jury

Table 11.1 — Table of Key Roles in the French Inquisitorial System (including Translation) and Approximate Australian Equivalent

5 *About the Court.* (2018, January 10). Magistrates Court of Western Australia. Retrieved March 16, 2024, from https://www.magistratescourt.wa.gov.au/A/about_the_court.aspx

6 *Déroulement de la procédure devant le tribunal de police.* (n.d.). Service-Public.fr. Retrieved March 16, 2024, from https://www.service-public.fr/particuliers/vosdroits/F1457?lang=fr

7 *About the District Court.* (2020, November 12). District Court of Western Australia. Retrieved March 16, 2024, from https://www.districtcourt.wa.gov.au/A/about_the_court.aspx

8 *Déroulement d'une affaire devant le tribunal correctionnel.* (n.d.). Service-Public.fr. Retrieved March 16, 2024, from https://www.service-public.fr/particuliers/vosdroits/F1485

9 *Procès devant la cour d'assises ou la cour criminelle.* (n.d.). Service-Public.fr. Retrieved March 16, 2024, from https://www.service-public.fr/particuliers/vosdroits/F1487

10 There is no equivalent terminology in Australia for the Juge Président. The phrase 'Trial Judge (Chair)' has been provided to illustrate that the Juge Président takes a role in chairing and facilitating trial procedures in the French system when there is a panel of 3 more judges in serious cases in the Cours D'Assises.

Pathways into different roles/professions

In Australia, the **judiciary** is drawn from practising lawyers, and lawyers may work for the **prosecution** or defence throughout their career. This is contrasted with different career pathways in the French system: judges and lawyers have separate training pathways. Those trained as judges are employed by the state; either as the judiciary, or *parquet* - the equivalent of prosecutors in Australia. Contrastingly, those lawyers who train as defence counsel have limited capacity to switch into a prosecutorial role without undergoing retraining.

> *The parquet is responsible for initiating an investigation in serious offences; however, they must then 'seize', or refer a matter to, a Juge Instructeur, who formally commences the information judiciare (judicial inquiry).*

Parquet / Procurer — Prosecution / Prosecutor

The *parquet* (the Public Ministry) represents the **Executive** branch of Government trained to conduct preliminary investigations into matters and refer those matters to a *Juge Instructeur* if required. In summary matters, the *parquet* can refer matters directly to *le tribunal de police* without the need for a *Juge Instructeur.* It is similar in function to the Department of Public Prosecution in the Western Australian criminal system. The *parquet* is one of the parties to the case.[11] An individual prosecutor is referred to as the *Procureur de la République.*

Roles of the parquet

The *parquet* fulfils the role of prosecutors for minor offences. This means that minor criminal offences, similar to **summary offence**s in Australia, can be investigated and referred to *le tribunal de police* directly by a *procureur* .

The process is different for serious criminal offences. The *parquet* is responsible for initiating an investigation in serious offences; however, they must then 'seize', or refer a matter to, a *Juge Instructeur,* who formally commences the *information judiciare* (judicial inquiry). Critically, a *Juge Instructeur* is not part of the *parquet*; they are part of the formal judiciary.

11 Bullier, A. J. (2001, May 24). *How the French understand the inquisitorial system.* AustLII. http://classic.austlii.edu.au/au/journals/AlAdminLawF/2001/10.pdf

Figure 11.3 — The Cour d'Assises in Paris hears the most serious offences. This building was modified to accommodate lengthy trials for terrorism offences that occurred in 2015 and 2016

Once a *Juge Instructeur* takes action to discover the truth (acting on the advice of the *parquet*), the 'machinery of trial' is engaged by law and cannot be stopped. Actions of the *Juge Instructeur* can be appealed by the *parquet,* but the trial itself is now independent of the parties, and in the hands of the judiciary. Even an admission of guilt by the defendant will not end the trial as it would in an adversarial trial. Nor can the *parquet* abandon the trial.

> *This is a key distinction between the inquisitorial and adversarial systems; a juge instructeur exercises a significant amount of autonomy and discretion in this process that is not afforded to the pre-trial process in the adversarial system (which is constrained by strict rules of evidence and procedures).*

Le prévenu or le person accusé —The accused

The accused may seek legal counsel from a legal representative *(un avocat).* However, in minor offences, **legal representation** for the defence may not be necessary.

Role of the defence

When the case is with the *parquet* the defence role is limited.

Once a case has been referred to the *Juge Instructeur* the defence has more **power**. It can request investigation, interviews, and

confrontations. A confrontation is a meeting of the accused and the victim for a discussion. Note, the defence can request only the judge to investigate—it cannot do its own investigation and, thus, is reliant upon the **independence** and competence of the judge in gathering the evidence supporting its case.

A major difference from the adversarial trial is in the **pleading**. There is no plea of 'not guilty'. A defendant can plead guilty (*comparution sur reconnaissance préalable de culpabilité* translates as 'appearance on prior recognition of guilt'), but pleading guilty is limited in the following ways:[12]

- defendants under 18 years of age cannot plead guilty;
- defendants accused of certain crimes (such as breaching press laws, manslaughter and political misdemeanours) cannot plead guilty;
- a guilty plea can only be made with the agreement of the prosecution (the *parquet*);
- the *juge instructeur* does not have to accept a guilty plea;
- a rejected guilty plea is not recorded in the dossier and, thus, cannot be used as evidence in the trial; and
- a successful guilty plea does not necessarily end the trial—the investigation may continue until the *juge instructeur* is satisfied sufficient evidence has been gathered and is presented in the dossier.

Juge instructeur — Investigating Judge

The *Juge Instructeur* is critical to the inquisitorial trial.

The *parquet* may refer a matter to the *Juge Instructeur* who may initiate a judicial inquiry, but once that occurs the *Juge Instructeur* is in full control of the pre-trial investigation phase. This is a key distinction between the inquisitorial and adversarial systems; a *juge instructeur* exercises a significant amount of autonomy and discretion in this process that is not afforded to the pre-trial process in the adversarial system (which is constrained by strict **rules of evidence** and procedures).

Juge Instructeurs play a fundamental role in weighing the value of evidence and directing the investigation.

Given that *Juge Instructeurs* are 'seized' for serious matters, they feature heavily in pre-trial procedures for the *cours criminelle and cours d'assises.* A *Juge Instructeur* may also be seized by the *parquet* for less serious matters that are ultimately referred to the *tribunal correctionnel (intermediary court).*

A *juge instructeur* is a member of the separate judiciary. Students should note the **separation of powers** within a serious criminal inquisitorial trial. The *parquet* is part of the executive branch and prosecutes, whereas the *Juge Instructeur* is part of the judicial branch and investigates matters and has judicial autonomy and power that the police/prosecution cannot otherwise exercise (warrants, remand et cetera). By comparison, there is less **accountability** than in Australia, where the police/prosecution must seek judicial approval for comparable actions. Students may also note the investigative role in serious cases is assigned to the judiciary, which directs the police, not the police alone as is the case in the adversarial system.

Role of the juge instructeur

The judge is instructed by the *parquet* to discover the truth. Once instructed a *Juge Instructeur* has a wide range of resources and powers at his or her disposal to discover the truth through investigation. The *Juge Instructeur* can:

- direct the police to investigate and gather evidence;
- interview witnesses and take their statements in written form;
- order a 'confrontation' (a meeting) between the accused and the victim;

Figure 11.4 — In Australia, investigation of criminal matters is conducted by police, who must seek judicial approval for some actions, including search warrants.

12 Fair Trials International, Criminal proceedings and defence rights in France, London, 2013, pp 23–24, <https://www.fairtrials.org/wp-content/uploads/France-advice-note.pdf>.

Figure 11.5 — A *juge instructeur* has the power to direct the police to investigate and gather evidence.

- interrogate the defendant *in camera*[13] and not under oath, but with the defendant's legal representative present;
- decide if the defendant has a case to answer;
- issue warrants to facilitate the collection of evidence;
- order expert reports (from medical and psychiatric experts for instance);
- select evidence for inclusion in the dossier;[14] and
- widen the scope of the inquiry as long as it is related to the *parquet's* instructions.

Note: In Australia some functions are carried out by the police. Some functions may be requested by the police but require judicial authority to carry out that is, bail hearings/ issuing warrants.

All of the above resources and powers are used at the discretion of an active *Juge Instructeur.* The *parquet* may appeal the judge's actions, but it cannot stop the process. By comparison, in the adversarial system judges do not instruct the police or the Department of Public Prosecutions (DPP)[15] to gather evidence; they only make judgments about the admissible evidence gathered by the police or DPP, once it is presented at trial.

Juge — Trial Judge

It is important to note that the French Inquisitorial System has two types of judges - the *Juge Instructeur* explained above as well as a 'Trial Judge' who is actually responsible for overseeing trial proceedings in the courtroom.

Role of the juge

Whilst the *Juge Instructeur* operates in a uniquely inquisitorial manner, a Trial Judge in France performs similar judicial functions to Judges in Australia. In hearings of minor criminal offences (that is, *le tribunal de police*), the Trial Judge is referred to as *le President d'audience* which loosely translates to 'Hearing Officer' or Magistrate. In more serious cases, the Trial Judge is simply referred to as *le Juge*.

In cases with multiple judges, one judge will take on the role of *le président (Lead Judge)* with two or more judges acting as *assesseurs (Assisting Judges).*

The roles of *Juge Instructeurs* (investigating judge) and *Juges (*trial judge) are not interchangeable - both roles require rigorous training programs that focus on different skills and procedures.

> *It is important to note that the French Inquisitorial System has two types of judges - the Juge Instructeur as well as a 'Trial Judge' who is actually responsible for overseeing trial proceedings in the courtroom.*

The overarching role of the 'Trial Judge' consists of facilitating court processes; however, they may also pose questions to the parties in the case (the defendant, victims, or witnesses). Interestingly, they may also grant authority to the Assisting Judges or the Jury to direct questions to the parties as well. This represents a key distinction between the role of the Judge in the Adversarial and Inquisitorial systems.

Juries can assist Trial Judges

Very serious **criminal trials** are heard in the *Cours d'Assises* and may include a panel of six jurors. The jury is a random selection of citizens who sit with three *juges* (one of whom is *le president*) and assist in determining guilt. Jurors have equal rank with judges in assessing evidence, but only judges can decide on trial procedure. Jurors and judges have equal power in sentencing, with voting on a verdict being secret.

13 In camera is Latin for 'in a chamber' and means out of sight or in private.

14 The dossier is the file of written evidence collected by, or on the instructions of, the juge instructeur. It contains all the evidence to be used at trial.

15 The Western Australian Department of Public Prosecutions is the branch of the executive that prosecutes indictable offences in the state's criminal trial system.

Key Concepts and Themes in the Inquisitorial System

Evidence — 'Proof by any means'

The English word 'evidence' cannot be directly translated into French. The best French translation of the English word 'evidence' is *prevue* or 'proof'. The phrase, 'evidence of proof by any means' is better thought of as 'the most obvious conclusion suggested'. Rather than the adversarial system's admission of only high quality evidence, the inquisitorial approach admits any relevant evidence.

Evidence is gathered by the *parquet* in the first instance and then, if a *Juge Instructeur* is 'seized' and takes over the case, it is gathered by the *Juge Instructeur,* with the assistance of the police. All evidence gathered is collected into a **dossier**.

> *"The dominant 'rule of evidence' in the inquisitorial system is relevance."*

All the evidence in the dossier is selected, assessed and weighted by the *Juge Instructeur (for serious offences)* or the *Parquet (for minor offences)*. The dominant '**rule of evidence**' in the inquisitorial system is relevance. There is no hearsay, opinion or other rules of evidence to exclude poor quality evidence. The openness of evidence places a burden on the *Juge Instructeur* to weigh evidence according to its quality. The investigation conducted by the *Juge Instructeur* is referred to as the *information judiciaire* (judicial inquiry).

Witnesses

Most evidence is written and contained within the dossier. However, oral testimony from witnesses can also be used as evidence, especially in the *cours d'assises*. Witness testimony is in the form of 'telling their story', rather than 'answers to questions' as occurs in the examination-in-chief and cross-examinations of the adversarial trial. Witnesses tell their story uninterrupted by questions from the parties or the Trial Judge. Witness evidence is not subject to rigorous testing through cross-examination by the parties; however, as noted above, the Trial Judge, Assisting Judges, or Jury may pose further questions to witnesses after the conclusion of their testimony.

Burden of proof

There is no formal 'burden of proof' in the inquisitorial trial. The overriding aim of a trial in the French system is to find the truth, with this responsibility being borne by the Trial Judge(s). This contrasts to the processes in Australia, where it is up to lawyers (Prosecution/Defence) to present their cases.

Standard of proof

The **standard of proof** in inquisitorial trials is an *intime conviction*, translated as 'inner belief and intimate conviction'. Different from the adversarial system; however, worth noting that it is closer to '**balance of probabilities**' rather than 'beyond a reasonable doubt'.

The *Trial Judge(s)* must be convinced to the level of a firm and strong personal belief, or an inner conviction which provides a profound sense of certainty. An *intime conviction* must be based on evidence contained in the dossier and presented in Court as weighed by the Trial Judge(s), or the Trial Judge(s) and jury in very serious Assize Court criminal cases.

The comparatively lower threshold of proof means that guilty verdicts are somewhat easier to obtain in the inquisitorial trial than the adversarial trial.

Figure 11.6 — The evidence gathered by the parquet, police and/or gendarmerie is collected in a dossier, which is handed up to the juge instructeur

Due Process and Legal Rights

Rights of the accused

The accused has certain rights, such as a right to assistance by a lawyer, a right to silence, a presumption of innocence and a right to know the allegations against them.

The right to silence is not as robust as it is in the adversarial system and, in certain cases, remaining silent can actually damage a defendant's case. In the adversarial trial, the silence of the defendant cannot be interpreted as an admission of guilt or a reluctance to incriminate themselves.

Until 2001 *juge instructeurs* had the power to detain a defendant. However, reforms were introduced, and that particular power was removed and given to the newly created position of a judge of freedoms and detentions—*juge des libertés et de la detention*. The removal of this power from the *juge instructeur* has improved the rights of the accused to retain their liberty prior to conviction.

Trial procedure

An adversarial trial is highly structured and upholds **procedural fairness**, with the judge acting as the 'referee' of strict procedure. The claim that a judge did not uphold 'proper procedure' is one of the greatest causes of appeals in the adversarial system.

In contrast, the inquisitorial trial has more relaxed procedural rules. The *juge instructeur* in charge of a judicial inquiry has much more flexibility to decide how the pre-trial investigation proceeds. Similarly, the *juge* (Trial Judge) is less beholden to strict procedures than an adversarial judge.

While the following Table 11.2 outlines the general process, students are reminded that this is flexible. The *juge instructeur* is actively in charge of the pre-trial procedure and it may vary because of the judge's active involvement.

Inquisitorial Trial	
***Parquet* investigates and collects evidence**	The *parquet* (standing judiciary/prosecution) collects evidence to establish if a crime has been committed. At this stage the parquet is in control of the case. Minor criminal offences (equivalent to summary offences in Australia) can be referred directly to *le tribunal de police* by the Parquet.
Parquet seizes *juge instructeur* and provides a dossier of evidence	If the *parquet* is convinced that a serious offence has been committed and has gathered enough evidence to pursue a prosecution, the case is handed to a *juge instructeur*. This process is referred to as 'seizing' the judge.
***Juge instructeur* takes charge of the case**	The juge instructeur: • summarises the charges against the defendant; • questions the defendant in the presence of a legal representative (the defendant does not answer under oath). The defendant has a right to silence, but silence may be used against the defendant; • directs police and/or gendarmerie to investigate and collect further evidence; • may order a 'confrontation' (meeting) between hostile witnesses (for example, between the defendant and the victim); and, • asks witnesses to 'tell their story'—there is no series of examining and cross-examining questions. The oral testimony from witnesses is transcribed into writing and included in the dossier. Once the case is under the control of a *juge instructeur* the *parquet* takes on the role of 'prosecution'. The parquet can amend the charge and make requests of the *juge instructeur* but cannot control the case or abandon the prosecution. Similarly, the judicial inquiry cannot be stopped by a guilty plea by the defendant.
Usual sequence of trial proceedings	• Victim's lawyer addresses the court; • *Parquet* addresses the court; • Defendant's lawyer addresses the court; • Defendant(s) invited to add anything they wish after their lawyer has spoken; • Trial Judge asks the parties if they have further questions; • Trial Judge(s) may pose questions to the defendant, victim, or witnesses during the trial; and • Trial Judge asks *parquet* for a recommendation for sanction if the defendant is found guilty. Unlike the adversarial system, civil and criminal matters related to the same event (for example, car crash or terrorist attack) are dealt with in a combined investigation and trial process. This means that all victims (civil complainants) have a right to be a part of the trial process, but the usual trial procedures may be changed by the judges to suit the needs of all parties.
Standard of proof and Verdict	The *juge* (Trial Judge) must be convinced to the standard of intime conviction (strong inner belief, a firm conviction) that guilt is 'obvious' according to the evidence. In serious cases, they may be supported by additional Assisting Judge(s) and a Jury.

Table 11.2 — The inquisitorial trial for serious criminal offences—the process from initial investigation to verdict.

Comparative summary of inquisitorial and adversarial systems

Table 11.3 summarises and compares the inquisitorial and adversarial systems of trial.

	Inquisitorial	Adversarial
Prevalence	• Derived from Roman law and practice • Inherited by most countries in continental Europe • Introduced by European countries into their colonies (for example, France)	• Developed over centuries in Britain • Introduced into British colonies • UK, US, Canada, NZ, India and Australia are examples
Role of Juge Instructeur	• Inquires after the truth and controls judicial investigation • Compiles evidence dossier • Calls and examines witnesses • Determines pre-trial procedure • Is active and impartial	• No comparable equivalent in Australia
Role of Trial Judge	• Applies law—almost exclusively from statutory sources • Weighs the value of evidence based on its reliability • Is the finder of facts and determines the remedy/sanction (with other judges and, in very serious cases, a jury)	• Ensures a fair trial by upholding strict procedures • Upholds rules of evidence • Does not ask questions, except to clarify points • Is passive and impartial • Applies law from statutory and common law sources • Is the finder of facts (if no jury) and determines the remedy/sanction
Role of Prosecution	• Respond to directions of the court • Make suggestions to the *juge instructeur* as part of the pre-trial judicial investigation • Parquet acts as prosecution	• Control the case • Conduct their case unassisted by the court • Locate and present evidence • Question witnesses • Make legal argument and submissions
Role of Defence Counsel	• Not critical • Assist the juge instructeur • Provides legal counsel to the defence	• Critical to trial procedure • Leads the examination, cross-examination and re-examination of witnesses
Evidence	• Collected by parquet and juge instructeur • 'Proof by any means' results in relevance being the only rule of evidence • Parties may not object to evidence or test evidence in cross-examination • Mostly written evidence • Witnesses 'tell their story' uninterrupted by questions • Follow up questions by Trial Judge(s) or Jury to defendant, victim(s) or witnesses permitted in Court • Character of the defendant allowed as evidence	• Collected by the parties • Strict rules of evidence ensure quality of evidence (such as hearsay, opinion and relevance) • Judge can only make a ruling on admissibility of evidence if it is challenged by either party • High reliance on oral evidence, but importance of written evidence is growing • Witnesses answer questions asked by both parties • Character of the defendant is not allowed as evidence
Burden of proof	• No burden of proof on the prosecution • Instead, Trial Judge and Jury bears the 'burden to find the truth'	• Prosecuting party bears the burden of proof • Defendant has no burden of proof
Standard of proof	• *Intime conviction*—the inner belief and conviction of the Judge • Lower standard of proof	• **Beyond reasonable doubt** • Very high in criminal cases
Separation of powers	• Limited oversight in some instances when the *Juge Instructeur* is conducting investigations, as there is no need for additional judicial oversight to issue warrants.	• Entirely separate judicial and executive roles in all cases • Stronger oversight of the investigative process, as police require warrants approved by judicial officers
Rights of the accused	• Presumption of innocence (improved since 2001) • Limited right to remain silent	• Presumption of innocence • Robust right to remain silent

Table 11.3 — Comparing key parts of the two legal systems

Evaluating the inquisitorial trial

Like any system, the **inquisitorial system of trial** has strengths and weaknesses. In evaluating the inquisitorial system, it is helpful to compare its key principles with those of the adversarial system.

The inquisitorial system's main strengths are that it:

- brings forth all evidence;
- witnesses hold less bias;
- reduces costs for the parties; and
- is more likely to convict a guilty offender.

Its main weaknesses are:

- disproportionate power held by an active judge;
- lower quality of evidence (including the inclusion of the defendant's character);
- that parties have less control;
- an overreliance on one person's skill (*juge instructeur / juge*);
- a weaker separation of judicial and executive power; and
- a weaker protection of the rights of the accused.

Strengths

Bringing forth evidence

The relaxed rules of evidence and the inability of the parties to hide (or withhold) evidence against their own case means more evidence comes before the court. The parties cannot strategically select evidence beneficial to their case. More evidence is a positive because it helps find the truth.

A skilled and trained judge is required to weigh up the value of each piece of evidence. In this way, quality evidence is weighted more heavily and less reliable evidence is discounted. All evidence contributes to the judge's (and jury's) reasoning when forming his or her *intime conviction*, but only to the extent of its quality.

Figure 11.7 — Palais de Justice, Paris. The inquisitorial trial system features lower costs for the parties and higher conviction rates for serious criminal offences.

Witnesses hold less bias

All witnesses are called and questioned by an impartial judge trying to find truth, not by partisans trying to win the contest. The result is that parties cannot filter or coach witnesses to suit their side by presenting only favourable testimony. As above, parties cannot behave strategically by calling sympathetic witnesses.

Lower cost for the parties

The major part of trial costs is borne by the State, not the parties. This makes the inquisitorial system more expensive for the French taxpayer, but cheaper and, therefore, more accessible for the parties.

The cost advantage is also because of lower reliance on legal expertise. The cost of legal advice (which is essential in the adversarial system) is much lower because legal advice is less important. As the parties do not run the case, they do not need legal expertise to the same extent as parties in an adversarial trial. The judge provides the expertise and is paid by the taxpayer.

> *A risk associated with this is that any bias held by the Juge Instructeur can be amplified, due to limited checks and balances.*

Access to justice is part of the **rule of law**. With lower costs, it allows people to initiate and protect their rights through the legal system if they need to—costs are less of a barrier to participation. Through lower costs, the inquisitorial trial provides increased access to justice, satisfying this important element of the rule of law.

More likely to convict a guilty offender

One of the major criticisms of the adversarial trial is the difficulty in achieving convictions for serious criminal offences. Strict rules of evidence and procedure, the high standard of proof and the robust rights of the accused make it difficult to prove a criminal case by imposing high burdens on the prosecution. It is argued that some guilty defendants are not convicted when they should be in Australian trials. Nevertheless, the merit in the adversarial system is that it is less likely an innocent accused will be wrongfully convicted.

The inquisitorial trial has higher conviction rates for serious criminal offences due to its more relaxed rules and procedures, lower standard of proof and weaker rights for the accused. This has the advantage of achieving stronger punishment, deterrence, rehabilitation and community protection outcomes. The price, however, is a higher likelihood of wrongful convictions.

Weaknesses

Disproportionate power held by an active judge

Unlike the Adversarial system, the French system has highly active *Juge Instructeur* who lead the direction of judicial investigations in serious cases. This places a significant amount of power in the hands of the *Juge Instructeur.* A risk associated with this is that any bias held by the *Juge Instructeur* can be amplified, due to limited **checks and balances**.

Similarly, a Trial Judge(s) can also exercise significant autonomy with trial procedures which highlights their active role in the French system. However, in serious cases in the *Cours d'assises,* the power of the Trial Judges can be constrained by the jury of six citizens who have equal power to the judge(s) to determine the verdict and sentencing.

Lower quality of evidence

The inquisitorial trial's 'proof by any means' can result in low quality, potentially unreliable evidence being allowed to influence the judge. Hearsay evidence, circumstantial evidence and opinion evidence are all permissible, and all potentially unreliable.

Evidence is not subject to rigorous testing by the parties, for example, there is no cross-examination process. Weak evidence may be included in the dossier by an inexperienced *Juge Instructeur,* or weighed disproportionately by less experienced *juges* in forming their *intime conviction.*

Figure 11.8 — The *Cours d'assises* features a large 'bench' for the trial judges and jury, as seen in the *Salle Voltaire* (Voltaire Room) in the *Palais de Justice* in Paris.

The admission of low quality evidence is counter-balanced by the greater quantity of evidence and the fact that it is gathered at the direction of the judge rather than biased parties.

The *juge* is not required to explain how they weighted the available evidence, only to reach an *intime conviction* within the limits of their own conscience - there is no *ratio decidendi* or ***obiter dicta***. Appeals can be hampered by the lack of clarity about how a guilty verdict was reached.

Parties have less control

The parties have little influence over the trial, and only the *Juge Instructeur* can dismiss the pre-trial judicial inquiry.

A guilty plea in an adversarial trial is 'evidence so strong' (*par excellence*) it ends the trial immediately, whereas in the French system, it is not weighed as heavily. In fact, an inquisitorial judge may choose to give no weight to a confession at all, or give great weight to a confession that was later retracted (withdrawn) by the defendant.

A French defendant has little control over pre-trial or trial proceedings. At best, they may request the *Juge Instructeur* to investigate.

The character of the defendant is included

The previous criminal history of the defendant is admissible and can be used by the *Juge Instructeur* to reach an *intime conviction*. Despite the character of a person having little bearing on whether or not they actually committed the specific offence for which they are on trial, it is allowed to help the judge decide the case.

In the adversarial system, the previous history of the defendant is inadmissible unless it shows a **propensity** of the accused, that is, a tendency for them to behave in a particular way related to the offence for which they are on trial. Even then, it is often used only in post-trial sentencing and not the trial itself where it may prejudice the jury by causing them to prejudge the case.

Over reliance on one person's skill (Juge Instructeur / Juge)

As stated above, the *Juge Instructeur* and the *juge* are critical elements of the inquisitorial trial. Quite simply, justice depends almost entirely on the competence and impartiality of the judges.

The degree of active control makes the competence of an inquisitorial trial judge more

important than an adversarial trial judge in delivering justice. An adversarial judge's power is checked by the parties' control of the trial, the strict rules and procedures, and greater transparency in how the verdict is determined. This difference is highlighted by the fact that some appeals in the adversarial system are successful due to errors made by a magistrate or judge during a trial. An incompetent inquisitorial judge can have a far more devastating effect on natural justice than an adversarial trial judge.

Weaker separation of judicial and executive power

As discussed above, the *Juge Instructeur's* power to issue search warrants and direct police to conduct investigations represents a lack of oversight that exists to a greater extent in Australia, due to a greater separation of powers in Australia.

Weaker protection of the rights of the accused

The accused is presumed innocent and has a right to silence, but both of these are weaker in the inquisitorial trial than in the adversarial trial.

Figure 11.9 — Emperor Napoleon Bonaparte of France. He said: "my code civil will not be forgotten, it will live forever." (See Footnote 2, page 257)

The right to silence in France varies depending on whether the case has been referred to a *juge instructeur:*

- **Before** a case is referred to a *Juge Instructeur*, the accused has the right to remain silent and cannot be interrogated by the *parquet* in the way an ordinary witness can; and
- **After** a case is referred to a *Juge Instructeur*, the accused can be forced to make a statement and give evidence, but not under oath. This rule ensures they cannot be guilty of lying under oath (perjury). However, their evidence may be used against them in the trial if the judge decides it should be.

The right to silence in the French legal system is significantly weaker than that enjoyed by an Australian defendant in an adversarial trial.

The presumption of innocence is a right that prevents punishment before conviction. Before 2001 a *Juge Instructeur* could place a defendant under 'provisional detention' (similar to remand) or 'judicial supervision' (where they were free, but subject to conditions imposed by the judge) prior to their trial. However, the French government reformed this system because of the lack of separation between the *Juge Instructeur's* investigative and judicial functions. The reformed system created a new judicial position—a Judge of Freedoms and Detentions (*juge des libertés et de la detention)*, and **vested** the power to detain an accused person before and during their trial with this judge, who is a judge separate from the investigation.

It is fair to say that before 2001, the potentially lengthy pre-trial detention, which could prejudice the presumption of innocence, meant that the French inquisitorial system did not adequately presume the innocence of an accused. However, the 2001 reform addressed this shortfall and the system is now better at protecting this important legal right.

Thinking for yourself—Evaluating the inquisitorial system

The inquisitorial system has many strengths and weakness—as does the adversarial system. Students are encouraged to think deeply about the French trial system described above and evaluate it in terms of how well it:

- Promotes impartial adjudication
- Enables both sides to be heard
- Makes decisions based on evidence
- Ensures transparency and openness

Impartial Adjudication	Hearing Both Sides
• The French Inquisitorial System upholds the principle of separation of powers in theory, through a distinct separation between the roles of the Parquet and the *Juges*. • The *Juge Instructeur* holds a disproportionate amount of power in the pre-trial phase, and these risks amplify any potential bias or impartiality on the case. • The lack of judicial oversight of the *Juge Instructeur* during the Judicial Inquiry process removes a key check and balance to ensure impartiality.	• Defendants have a right to legal representation in France, enabling them to have a voice in legal proceedings. • However, given the emphasis on inquiry and investigation, there is limited opportunity for the defence or parquet in the French system to conduct their own lines of inquiry and present evidence in court. • Evidence is considered by the *Juge* and is not presented nor contested by the parties.
Evidence Based Decisions	**Transparency and Openness**
• The Inquisitorial system is able to gather a wider scope of evidence during the Judicial Inquiry due to relatively more flexible rules of evidence that operate within the French system. • However, this grants *Juges* disproportionate power in weighing the relevance and usefulness of evidence which is subject to more inconsistency than a set of well-defined rules, such as the rules of evidence used in the Adversarial system. • Furthermore, rather than relying on a transparent burden of proof such as 'beyond reasonable doubt', the Inquisitorial system bases convictions on an inner belief or *intime conviction*. This is a highly ambiguous threshold and can vary based on the character, values, and attitudes of the presiding judge.	• Although French courts remain open to the public, media, and other interested parties - the extent to which scrutiny and accountability of the judiciary exists can vary. • Given the looser standard of proof required in the French Inquisitorial system, and the overemphasis on the 'inner thinking' of the *Juge* - transparency can be harder to achieve. • This is compounded by the informal and less predictable nature of trial processes as each trial is less beholden to strict rules of procedure.

Table 11.4 — A summary of the key elements of Natural Justice as applied in the French Inquisitorial System.

Thinking for yourself – Evaluating the adversarial trial

Students are strongly encouraged to refresh their understanding of the adversarial trial and its rules and procedures covered in Unit 1. Knowledge of the adversarial trial is a prerequisite for learning about its strengths and weaknesses.

Like the inquisitorial trial, the adversarial system also has strengths and weaknesses.

Its main strengths are:

- an impartial judge (and jury);
- high quality evidence;
- the parties retaining control of the trial;
- procedural fairness; and
- strong protections for the rights of the accused.

Its main weaknesses are:

- an overreliance on legal expertise;
- the high cost to parties;
- the potential for strategic manipulation by the parties;
- winning may be more important than truth;
- juries may be prejudiced by media, and jury decisions are unaccountable; and
- the potential for lengthy delays.

Strengths

An impartial judge (and jury)

The passive judge does not investigate; nor do they question the witness. They do not introduce evidence, compile an evidence dossier or direct the trial. Instead, an adversarial judge is a neutral referee of the trial. The judge oversees the contest between the competing parties, ensuring they adhere to strict processes designed to ensure procedural fairness (natural justice) and make decisions on the rules of evidence and procedure.

Further, a judge must explain the reasons for their decisions (*ratio decidendi*), making judicial thinking transparent and subject to appeal by either of the parties.

Juries are commonly used in trials for indictable offences in Western Australia, although an accused may request a trial by judge alone. The Western Australian jury selection process was reformed in 2011 to ensure a more representative selection of peers of the defendant on criminal juries. This serves to better uphold the ancient

principle of being 'tried by one's peers'.[16] The jury is a body of citizens who are 'peers' of the accused. It is they, not the judge, who decide if the accused is guilty or not guilty on the basis of evidence.

Juries are independent of the parties and the judge. They are neither part of the executive (as is the DPP) nor the judiciary (as is the judge). They are citizens, like the accused. As such, the assumption—made first in 1215, but emerging over the centuries that followed the signing of *Magna Carta*—is that fellow citizens will judge the accused justly.

High quality evidence

The rules of evidence in the adversarial trial are designed to ensure that low quality evidence never enters into the decision making process of a judge or jury.

The inquisitorial judge uses their expertise to weight evidence according to its quality. The adversarial judge rules on the admissibility of evidence—it is either 'in' or 'out'—according to strict exclusionary rules. Evidence is not weighed by an adversarial judge. Furthermore, the way the judge enforces the rules of evidence is transparent and can be contested by the parties through argument.

Incorrect evidence procedure can be grounds for appeal.

■ Figure 11.10 – Strong protections for the rights of the accused are embedded in the adversarial system.

16 Trial by one's peers was first codified as 'the lawful judgment of his peers' in the *Magna Carta* signed by King John in 1215. In the same year, Pope Innocent III banned priests from participating in trials, beginning the process of abolishing 'trial by ordeal'.

Parties retain control of the trial

The prosecution (or **plaintiff**) and defence run the case. They find and present evidence, call and question witnesses, test evidence through cross-examination, object to evidence that may contravene the rules of evidence, argue the meaning and **interpretation** of law, and open and close the case.

Either party can end the case without the consent of the judge—the prosecution by abandoning the trial and the defence by pleading guilty. The same power to end the trial exists in a civil case with the plaintiff and defendant, or they may reach an agreement to resolve the dispute out of court.

Procedural fairness

One of the key features of the adversarial trial is its strict adherence to procedure. There is a correct way to conduct the trial, and the judge's role is to ensure a trial happens according to these strict rules.

The procedures ensure both sides get to present their case in an equitable manner and that high quality evidence is entered and tested. The neutrality of the judge and jury is part of the procedure, as is the public nature of the trial. In short, natural justice is assured by procedure, not the personal beliefs and values of the judge.

Judges cannot change procedure—it is rigidly inflexible. Improper procedure can be grounds for appeal.

Strong protections for the rights of the accused

The right to silence is a common law right embedded in the adversarial trial for hundreds of years. An accused person does not have to answer questions or incriminate themselves. Exercising the right to remain silent by not answering questions cannot be interpreted by the judge or jury as an admission of guilt by the defendant.

The presumption of innocence is also strongly protected by the adversarial trial. Accused persons are charged and prosecuted by the executive, but cannot be detained except by authority of the judiciary. Thus, a strong separation of powers protects the accused from overzealous use of executive power. The onus of proof is on the prosecution to prove guilt to the highest standard—beyond reasonable

doubt. Failure to prove guilt results in immediate acquittal. The defendant does not have to prove anything.

Habeas corpus[17] is an ancient legal right enabling a person to appear before court, hear the charges against them and challenge their detention. It prevents the executive from detaining a person prior to their conviction by a court except by court-approved remand.

Weaknesses

Overreliance on legal expertise

Legal advice is essential in the adversarial trial. Strict procedures, rules of evidence and laws are all quite technical. Only an expert trained in law and trial procedure can ensure a party can navigate the complexities of a court trial.

In theory, the passive judge cannot assist a party, even an unrepresented party. Therefore, success in a trial depends as much on the quality of legal representation as it does on where truth lies.

High cost to parties

It is not enough to have truth on your side—you need a good lawyer, too. Like all things in high demand, but limited supply, good lawyers are costly. The obvious consequence of overreliance on costly legal expertise is injustice due to lack of resources.

An impoverished accused may not get the quality of advice needed to defend themselves against an effective prosecution run by the State. Legal aid provided by the government to poorer defendants goes some way to addressing this critical weakness, but is often underfunded and overworked. Furthermore, legal aid is only available for criminal trials. In **civil trials** the parties must pay for their representation. Unit 1 outlined case management reform to civil trial procedures aimed at resolving civil disputes before they end up in court. Case management also seeks to prevent parties using wealth to exhaust (by outspending) their opponent and, thus, win their case through superior resources.

Access to justice is a right. It should not be dependent on wealth. Justice should not be rationed according to a party's capacity to pay. But access and representation are rationed by price in the adversarial system, and that is a serious flaw.

17 Latin for 'bring the body' before a court, a right developed by courts in times when suspects were held in detention at the pleasure of the King before being found guilty by a court. Detention by the executive can be challenged and is only lawful if approved by an independent court.

Figure 11.11 — A disadvantage of the adversarial system is the high cost of legal advice and trial fees.

Potential for strategic manipulation by the parties

Party control of the trial, reliance on legal experts, and strict rules and procedure mean clever lawyers can sometimes manipulate a case to their client's advantage. Better knowledge of the rules can mean that they can be played to one's advantage.

Parties call their own witnesses. Parties are extremely unlikely to call witnesses hostile to their case even if those witnesses help reveal truth. This also applies with other forms of evidence. Parties will seek to use rules and procedures to obscure evidence harmful to their case.

Witnesses cannot 'tell their story' as in the inquisitorial trial; they can only answer questions. Lawyers can construct questions to get the answers they want, within limits. They can use hostile questioning in cross-examination to unsettle a witness for the other party. Hostile cross-examination is particularly damaging to some types of witness. Domestic violence and serious assault trials, for example, often result in the victim having to retell their assault over and over again, and have their credibility questioned by barristers skilled at creating the slightest doubt through clever questioning. Many victims fear the trial process and do not press charges against their attacker as a result.

Legal representatives ask all the questions. They can sometimes use objections to interrupt and distract a witness, disrupting the flow and clarity of evidence. Juries can be confused by legal jargon and lengthy testimony.

The passive judge can only ensure questions conform to the rules; they cannot influence the questions themselves.

Winning is more important than truth

In any contest the aim is to win. An adversarial trial assumes a contest will reveal the truth by producing the best evidence and argument—and that may well be true. But contest also produces a desire to win.

Each party's desire to win will almost certainly outweigh their desire to have the 'whole' truth emerge, especially if the truth is not on their side. The truth can only favour one side; the other side will do everything in its power to prevent its discovery.

The court and the parties have different goals. Courts hope the truth will emerge. Parties strive to win.

Juries may be prejudiced by media, and jury decisions are unaccountable

A growing issue is 'contamination' of the jury. Jurors are supposed to make their judgments using only quality evidence presented in the trial. Low quality evidence may have been ruled out because it does not meet the standards of the rules of evidence. The judge will 'charge the jury' by instructing them about what evidence can be used to determine a verdict and what evidence they must disregard; that is, evidence which was heard in court, but then ruled inadmissible.

In the modern era, jurors have smartphones and other technology, and can easily access news about the trial, search the Internet, and communicate with friends and family outside the court. Jurors are not supposed to do this, but it is hard to regulate such communication in today's hyper-connected and information-rich world. If the trial is high profile, there will be media coverage and speculation that jurors should not see or hear. It is increasingly difficult to quarantine a jury from these sources of low quality outside influence that may prejudice their judgement in the jury room.[18] If the judge learns that jurors have sought outside information, they may declare a mistrial, causing the trial to be aborted. Aborting a trial is expensive and time consuming and denies justice to the accused and the victim.

Additionally, juries only produce a verdict; they never explain how their verdicts were reached. There is no *ratio decidendi* written by the jury. It is very difficult to successfully appeal on the grounds that a jury made a mistake if it cannot be seen how they made their decision.

Time and delays

In theory, adversarial trials are conducted in one continuous hearing. In practice, complex cases, detailed evidence, numerous witnesses, lengthy testimony and adjournments (breaks in a trial ordered by the judge) add to the time it takes to reach a conclusion. Trials in complex and technical cases can last weeks, months or even years. The most extreme Western Australian example is *Westpac Banking Corporation v The Bell Group Ltd* (in liq) (No 3) [2012] WASCA 157, which lasted 14 years (1990–2013). The decision of the Court of Appeal was subsequently appealed to the **High Court of Australia**, however, the case was settled between the parties prior to the High Court hearing.

Proceeding to trial can be frustratingly slow. Pre-trial processes can be lengthy in both civil and criminal cases. Even when a case is committed for trial, the heavy workload of the courts often means a backlog of older cases creates lengthy delays.

The 2010 civil trial case management reform in Western Australia was partially aimed at reducing the time taken to finalise cases. Criminal trials do not have an equivalent process for reducing delay.

Justice delayed is justice denied.

18 'Prejudice' literally means to 'pre-judge', to makes up one's mind before all evidence is presented.

Summary

- There are two primary systems of trial in the contemporary Western world. The inquisitorial system in civil law countries with a Continental European heritage, and the adversarial system used in common law countries with a British heritage. Both were spread by colonial expansion to most countries of the world.
- Systems of trial are founded on competing approaches about the best way to find the truth.
  - The inquisitorial trial is based on *inquiry* and *investigation* by judges.
  - The adversarial trial is based on *competition* and *contest* between parties.
- The inquisitorial trial developed in civil law countries with legal systems derived from Roman law. Civil law evolved differently in the various kingdoms and countries that emerged in post-Roman Europe, including France. French Emperor, Napoléon Bonaparte, refined civil law and the inquisitorial method of trial, and spread both through much of Europe during his conquests. Civil law is based entirely on written statutory codes. There is no doctrine of precedent or judge made law as exists in 'common law'.
- The French trial system is one example of the inquisitorial system. It has the following key elements:
  - a 'standing judiciary', called the *parquet*. The *parquet* is part of the executive and investigates and prosecutes criminal offences in minor cases. In serious criminal cases its investigation and adjudication roles are taken over by a *Juge Instructeur*, and this judge assumes the singular role of prosecution (equivalent to the DPP in Australia);
  - a separate judiciary, composed of different types of judges. A *Juge Instructeur* is an active investigating judge who takes control of a serious trial once seized by the *parquet*. A *Juge Instructeur* has wide powers to investigate, interrogate defendants, call witnesses and regulate trial procedure. They can command police, gendarmes and both parties to produce evidence, which they compile into a dossier. At the end of their judicial inquiry, they may refer a matter to a court which is then presided on by a Trial Judge (or in more serious cases, a panel of Trial Judges supported by a jury). Guilt is determined by whether an *intime conviction* can be established based on their judgment of the evidence presented before the court.
  - a Judge of Freedoms and Detentions—*juge des libertés et de la detention*—is another type of judge and was introduced in 2001 to improve the rights of the accused to retain their liberty prior to conviction. The Judge of Freedoms and Detentions has the power to detain an accused person before and during their trial, but is not involved in the investigation;
  - passive parties. The roles of the prosecution (*parquet*) and defence (defendant) are to assist the *Juge Instructeur*. They do not act on their own initiative, gather evidence or question witnesses. Neither party has any significant control over the trial and is unable to end the trial of their own volition;
  - 'proof by any means' determines the rules of evidence, with relevance being the only rule. A wide variety of evidence, including low quality evidence, can be admitted and recorded in the evidence dossier. Judges are trained to weigh evidence based on its quality;
  - reliance on written evidence. Witnesses 'tell their story' in statements entered into the dossier. They do not answer questions except those posed by the *Juge Instructeur* or *juge.*
  - a judge's *intime conviction* (inner belief and intimate conviction) is the standard of proof; and

continued overleaf

  - very serious offences may be heard in Assize Courts where a jury of six citizens has the same power to decide guilt as the judges.
- The strengths of the inquisitorial trial are:
  - bringing forth evidence;
  - less biased witnesses;
  - lower cost for the parties; and
  - increased likelihood of convicting a guilty offender.
- The weaknesses of the inquisitorial trial are:
  - a less impartial judge;
  - lower quality of evidence;
  - parties surrendering control;
  - inclusion of the character of the defendant;
  - an overreliance on one person's skill;
  - weaker separation of judicial and executive power; and
  - weaker protection of the rights of the accused.
- The strengths of the adversarial trial are:
  - an impartial judge (and jury);
  - high quality evidence;
  - parties retaining control of the trial;
  - procedural fairness; and
  - strong protections for the rights of the accused.
- The weaknesses of the adversarial trial are:
  - overreliance on legal expertise;
  - high cost to parties;
  - potential for strategic manipulation by the parties;
  - winning may be more important than truth;
  - juries may be prejudiced by media, and jury decisions are unaccountable; and
  - lengthy delays.

Exam practice questions

Short answer

1a. Outline the role of the 'standing judiciary' in a minor criminal case in an inquisitorial legal system.

1b. Explain **one** difference between the role of the 'parquet' and the 'Juge Instructeur' in the inquisitorial trial system.

1c. Discuss **two** features of an inquisitorial trial system.

2a. Outline what is meant by the term 'codification' in an inquisitorial legal system.

2b. Explain the difference between how the truth is discovered in both the adversarial and inquisitorial legal systems.

2c. With reference to examples, discuss **two** ways in which the 'rules of evidence' are applied in both the inquisitorial and adversarial trial systems.

3a. Outline what is meant by 'the presumption of innocence'.

3b. Explain the role of the *juge des liberte et de la detention* in the French trial system.

3c. Discuss **two** ways the principle of natural justice can be upheld or undermined in the French inquisitorial system.

4a. What is meant by the term 'non-common' law system?

4b. Explain the relationship between the judge and the jury in the adversarial trial system.

4c. Discuss **one** argument for and **one** argument against the assertion that 'the rights of the accused are more robust in the inquisitorial system as compared to the adversarial system'.

Source analysis

5. Source 1 is a translated and adapted excerpt of an article written by Julie Brafman and published in French Magazine L'Express 24 June 2011, Loïc Sécher acquitté, autopsie d'une erreur judiciaire, from https://www.lexpress.fr

Loïc Sécher acquitted, autopsy of wrongful conviction conducted

Loïc Sécher was declared not guilty of charges from a 2003 sexual assault allegation against a young girl by the Cour d'Assises in Paris. He spent more than 7 years behind bars despite being found innocent.

An incomplete investigation by the police

The initial investigation was conducted under the supervision of Detective Olivier Rouault, who is currently 42 years old. During the first day of the review trial, he was in his official uniform with his police cap in front of him. Lawyer, François-Louis Coste, accused him of "shooting like an arrow", referencing the criticism of the initial investigation being narrow minded and too pre-determined. He was further critical of Detective Roualt for not meaningfully assessing the credibility of testimonies presented by the children, because doing so would invalidate key evidence that supported his line of thinking on the case. Head bowed; Detective Rouault concedes: "It was undoubtedly a mistake on my part."

Deceptive Appearances

The man in the dock, Loïc Sécher, has the typical profile of a culprit. He has all the faults; depressed, unemployed, single, addicted to alcohol. It is argued by his legal team that their client was never given the presumption of innocence he deserved and was unfairly judged before the commencement of the trial.

continued overleaf

Experts who failed

In this 'he said, she said' dilemma, the experts played a significant role in the condemnation of Loïc Sécher. However, the various expert reports presented seemed highly inaccurate and even erroneous. The psychiatrist Marcel Zins-Ritter, who had examined the victim when she was quite young in December 2000 and in October 2004, noted that "there exists no elements of deception" nor "any tendency of untrue storytelling" in the victim's testimony. However, according to Mr Sécher's attorney, the expert psychiatrist presented too much certainty in his assessment and did not sufficiently question the reliability of the testimony. This, argued the attorney, was another key failing in the initial wrongful conviction trial.

5a. In terms of the legal system, outline what is meant by the term 'acquitted'.

5b. With reference to Source 1, in your own words, discuss **two** reasons why Loïc Sécher was wrongfully convicted in 2003.

5c. With reference to examples, discuss **two** weaknesses of the inquisitorial system of trial.

5d. Evaluate **two** ways that the inquisitorial system could mitigate weaknesses of the adversarial system of trial.

Essay response

6. 'The primacy of the judge is the key difference between the inquisitorial and adversarial legal systems'. Analyse the role of the judge in each trial system and the extent to which this explains the difference between the two systems.

7. For one non-common law (inquisitorial) system you have studied, evaluate whether the key pre-trial and trial processes lead to justice being achieved.

8. 'The separation of powers is challenged within the inquisitorial legal system'. Evaluate this claim.

Investigation and discussion

9. Investigate the diffusion of the inquisitorial legal system around the globe and create a mind map to explain its prevalence.

10. Lord Thomas, the Lord Chief Justice of England and Wales, has suggested that "a judge-led, inquisitorial system of justice may be a better way of conducting family and civil cases where litigants are unrepresented".[19] Consider this suggestion and:

    9a conduct a class discussion on its relevance to countries with legal systems based on common law; and

    9b. reflect upon how implementing Lord Thomas' comments would change the Australian legal system.

11. Investigate the 'rules of evidence' of both the adversarial and inquisitorial legal systems and create a graphic organiser showing the strengths and weaknesses in each system.

12. South Africa employs a hybrid legal system, interweaving elements of both civil and common law systems. Investigate Oscar Pistorius' 2014 murder trial and create a three circle Venn diagram showing the similarities and differences between Australia's common law system, South Africa's hybrid system and an inquisitorial system from a jurisdiction of your choice.

19 Bowcott, Owen, 'Inquisitorial system may be better for family and civil cases, says top judge', *The Guardian*, 2014, <https://www.theguardian.com/law/2014/mar/04/inquisitorial-system-family-civil-cases-judge-lord-thomas>.

Sources

Figure 11.1 Source: Nicolas de Largillière, François-Marie Arouet (Voltaire), (1694–1778), c. 1724, Public Domain, <https://en.wikipedia.org/wiki/Voltaire#/media/File:Nicolas_de_Largilli%C3%A8re,_Fran%C3%A7ois-Marie_Arouet_dit_Voltaire_adjusted.png>
Figure 11.2 Source: *File:LegalSystemsOfTheWorldMap.png.* (2022, December). Wikimedia Commons. Retrieved March 16, 2024, from https://commons.wikimedia.org/wiki/File:LegalSystemsOfTheWorldMap.png
Figure 11.3 Source: Cour d'Assises, Paris, 2023, Ben de Vries
Figure 11.4 Source: Western Australian Police Skoda wagon, 2024, Ben de Vries
Figure 11.5 Source: Police Nationale vehicle, 2023, Ben de Vries
Figure 11.6 Source: Police Nationale vehicle outside the Palais de Justice in Paris, 2023, Ben de Vries
Figure 11.7 Source: Palais de Justice, Paris, 2023, Ben de Vries
Figure 11.8 Source: Tiraden. Palais de justice de Paris - salle Voltaire (Cour d'Assises).jpg. 2018, Creative Commons CC BY 2.0, <https://en.m.wikipedia.org/wiki/File:Palais_de_justice_de_Paris_-_salle_Voltaire_(cour_d%27assises).jpg>
Figure 11.9 Source: https://en.wikipedia.org/wiki/Napoleon
Figure 11.10 Source: Supreme Court of Western Australia (David Malcolm Justice Centre), 2024, Ben de Vries
Figure 11.11 Source: Supreme Court of Western Australia (1903 Building), 2024, Ben de Vries
Table 11.1 Source: Ben de Vries and Anish Badgeri (2024)
Table 11.2 Source: Ben de Vries and Anish Badgeri (2024)
Table 11.3 Source: Ben de Vries and Anish Badgeri (2024)
Table 11.4 Source: Anish Badgeri, 2024

All sources last accessed 3/8/24.

Glossary

abrogate To cancel, overrule or repeal. Statute law can abrogate common law due to its democratic authority. This is a mechanism that allows the parliament to hold the courts to account.

absolute majority The required majority to win in a preferential voting system; a majority of 50%+1 of all formal/valid votes.

absolute monarchy A form of government in which the head of state is an inherited position with powers that are unlimited by any constitution or constitutional conventions.

accountability The requirement that public officials are directly and indirectly responsible for their actions, performance and conduct. This is an essential feature of responsible parliamentary government and applies to both elected and appointed public officials.

Act (of parliament) A statute that has been passed by both houses of parliament and given royal assent by the Crown.

adjudicate To hear a dispute and resolve it according to law or precedent. The decision of the courts has the force of law and binds the parties to the decision.

adversarial system A trial system based on the assumption that truth is best discovered through a contest between opposing parties in a dispute. This prompts the production of high-quality evidence and arguments before an impartial adjudicator. It is used in many countries first colonised by Britain, including Australia and the United States.

altruistic groups Cause groups, such as the Australian Conservation Foundation (ACF) and Greenpeace.

amendment The alteration or modification of a bill during the consideration in detail stage of the legislative process.

appeal An application to a higher court to review the decision of a lower court on the grounds of an error of fact/an error of law. This is an internal accountability mechanism within the judiciary. A Circuit court is a court of appeal from a district Court and there is 13 jurisdictions in the US.

appellate jurisdiction The jurisdiction of a court to hear and determine appeals from inferior courts and decision makers.

appropriations The authorisation of government expenditure through an Act of Parliament. These statutes are known as 'appropriation bills' and allow the executive to draw from the consolidated revenue fund for the ordinary annual services of the government. Also known as 'money bills' or 'supply bills', they can only be initiated and amended in the House of Representatives.

arbitration A form of alternative dispute resolution in which parties present arguments and evidence to an independent third party (the arbitrator) who makes a determination. The parties appoint an arbitrator and determine the issues that need to be resolved. This is commonly used to resolve industrial disputes between employers and employees before the Fair Work Commission.

assistant minister A junior minister appointed to assist Ministers in the performance of their duties, particularly the administration of large portfolios.

autocracy A form of government in which political and legal power is unlimited by any constitution or constitutional conventions. The operating principles of a liberal democracy are not applied. Autocracies are characterised by a concentration of power in the executive arm, a lack of checks and balances and rule by law (as opposed to rule of law).

backbencher A member of parliament who is not in Cabinet or the ministry (the executive). This includes both the government frontbench and the Shadow Ministry.

balance of power The situation in which a political party or an individual may use their position in a House of Parliament to decide the fate of a bill or a motion. This is commonly held by minor parties and independents in the Senate, referred to collectively as the Senate crossbench.

balance of probabilities The standard of proof required in a civil dispute. A fact is considered true on the balance of probabilities if its existence or occurrence is more probable than not.

beyond reasonable doubt The standard of proof required in a criminal dispute. A charge cannot be proved if the court is not satisfied beyond reasonable doubt that the accused committed the offence charged. Beyond reasonable doubt is a higher standard of proof than the balance of probabilities.

bicameral A legislature composed of two houses or chambers, an upper house (of review) and a lower house (of the people).

bicameralism (strong) A legislature with two houses of equivalent power. Australia and the US have strong bicameralism.

bicameralism (weak) A legislature with two houses of unequal power, the upper house being the weaker of the two. Britain has weak bicameralism.

bill A proposed law. Bills become Acts of Parliament through the legislative process, with the Governor-General providing Royal Assent.

by-election An election held in one lower house electorate for the purpose of replacing a Member of the House of Representatives who has vacated the seat between general elections.

Cabinet An executive body comprised of the Prime Minister and senior Ministers which operates according to convention. It is the central executive organ responsible for formulating government policy.

Cabinet secrecy A Westminster convention of collective ministerial responsibility that requires the deliberations and discussions of Cabinet to be confidential. It allows for robust and frank discussion within Cabinet by its members. It also allows Cabinet to reach a single position and present itself as a united government (Cabinet solidarity).

Cabinet solidarity A Westminster convention of collective ministerial responsibility that requires the Cabinet to present itself as a united government. All ministers are bound by the convention to publicly support the Cabinet's position on all issues. If a minister cannot publicly support Cabinet he or she is required, by convention, to resign.

caucus - Australia The party room of the Australian Labor Party (ALP). It consists of all Labor Members of the House of Representatives and Senators. The caucus is a critical forum for political strategy and debate, and determines the party leadership. Caucus is bound to support ALP policy, which is largely determined by a triennial National Conference.

caucus - United States In the US, Party caucuses are private meetings run by state political parties to vote on potential candidates for an upcoming election.

cause groups Pressure groups focused on a particular 'cause' that they believe is a general community good. Also known as altruistic or promotional groups.

checks and balances A system by which the powers of one arm or branch of government limits the powers of the other arms of government. Essential to the doctrine of the separation of powers.

Chief Justice The head and most senior judge in a court hierarchy. Chief Justices have an accountability role, ensuring that the courts and judges within their court hierarchy are exercising judicial power appropriately. Their power over other judges is very limited because of judicial independence, which applies not only to a judicial system, but also to the individual judges within it. Susan Kiefel AC is the Chief Justice in the High Court of Australia, and Peter Quinlan SC is the Chief Justice of the Supreme Court of Western Australia.

citizens The inhabitants of a sovereign nation state (and a state within a federation) who possess political rights and freedoms, participate in their own government and enjoy protection of these rights by law. Citizens also enjoy legal rights protecting them from the arbitrary use of power.

civil law Law concerning 'wrongs' committed against private parties.

civil trial A trial in which a private party is the plaintiff and the defendant is accused of a civil wrong. The burden of proof rests with the plaintiff. The defendant is presumed innocent and is protected by legal rights.

coalition Where two or more political parties form an alliance. At federal level, the Liberal Party and the Nationals form a coalition to form government.

collective ministerial responsibility A Westminster convention of responsible parliamentary government by which an entire executive government may be held to account by the House of Representatives. This is a part of parliament's 'responsibility function'.

committee A cross-party panel of parliamentarians appointed to undertake particular tasks. Standing committees are established for the life of a parliament. Select committees are formed for a particular purpose and then disbanded after reporting to parliament. Committees may be formed in either house of parliament (i.e. House committees and Senate committees) or by members of both houses (i.e. joint committees). Committees are essential to the legislative and responsibility functions of the Parliament, particularly since Ministers cannot sit on them.

common law Law made by judges when deciding cases which give rise to the need for new precedents.

common law system A legal system in which judges establish precedents that serve as guides in future cases with similar factual circumstances and legal principles. In resolving disputes, judges are bound to apply precedents from superior courts, as to provide consistency in the application of law. Common law systems use an adversarial trial system.

Commonwealth The sovereign central government within the Australian federation. It is created by CHAPTERS ONE, TWO and THREE of the Constitution, which establish its three separate branches. It came into being at Federation on 1 January 1901. Its exclusive and concurrent powers are specified and enumerated in the Constitution.

Commonwealth Parliament The body in which the legislative power of the Commonwealth is vested. It consists of the King, the Senate and the House of Representatives. The Commonwealth Parliament makes and amends laws, represents the people of Australia, holds the executive to account and plays a central role in the formation of government. It is the sovereign body that lies at the heart of Australian representative democracy.

compulsory voting The legal requirement for eligible Australian citizens to vote in elections. They are required to attend a polling place on, or before, election day, or to return ballot papers via postal vote. This is outlined in s245 of the Commonwealth Electoral Act 1918.

concurrent power Legislative powers granted by the Constitution to the Commonwealth and State parliaments. They are shared powers. SECTION 109 invalidates State laws that conflict with Commonwealth laws, to the extent of the inconsistency.

conscience vote A parliamentary vote guided by members' independent judgement, without the constraints of party discipline.

constituency The electorate or electoral district in which voters are located. For example, Hasluck is a federal constituency in Western Australia.

constitutional law Constitutional law is distinct from ordinary laws made in parliament and courts. It is superior to both. The superiority of constitutional law necessitates unique processes for creating and amending it. In Australia amending this type of law this is done via direct democracy, that is, a referendum.

constitutional monarchy A form of government in which the head of state is an inherited position with powers limited by a written constitution or by unwritten constitutional conventions.

constitutionalism The idea that government power should be limited by a body of laws, so that its exercise is controlled. The opposite of absolutism.

conventions Westminster conventions of responsible parliamentary government. For example, the Prime Minister must be a member of the House of Representatives. See also: 'Westminster conventions'. In the case of the US. Political parties hold national conventions to select presidential and vice presidential nominees.

court The main institution of the judicial branch of government, which aims to resolve disputes according to law. In common law countries, courts can create precedent and are organised in a court hierarchy.

court hierarchy A judicial system in which courts are ranked according to their level of authority. Each has jurisdiction granted by legislation or, in the case of the High Court of Australia, the Constitution. Minor civil, criminal and administrative matters are heard by inferior courts. More serious and complex matters are heard by intermediate and superior courts, which also have appellate jurisdiction. A court hierarchy is essential to the efficient operation of the judiciary, the accountability of the courts through appeals and the application of the doctrine of precedent.

criminal law Law concerning 'wrongs' committed against the community, which are punishable by the State.

criminal trial A trial in which the defendant is accused of committing a wrong punishable by the State. The burden of proof rests with the prosecution (the State) while the defendant is presumed innocent until proven guilty beyond a reasonable doubt.

crossbench Members of Parliament that are not members of a major political party. The crossbench sit in the 'U' shaped benches opposite the Speaker of the House or the President of the Senate. In the Senate, crossbenchers can wield significant political power as they often hold the 'balance of power'. In the House of Representatives, crossbenchers wield less political power, unless a minority government is formed.

crossing the floor The action taken by a Member of Parliament to vote with other political parties. During a division, they will cross to the other side of the chamber to formally record their vote. This is a rare occurrence due to strong party discipline in the Commonwealth Parliament.

Crown, The The term used to describe the Australian constitutional monarchy. It is often used in reference to the executive government under the Crown, who is represented in Australia by the Governor-General.

defendant The person against whom civil or criminal proceedings are brought. They are presumed innocent and are protected by a number of legal rights.

delegate (representation) A form of representation in which an elected representative reflects their constituents' views and values in parliament, maintaining close links with them through frequent communication and consultation.

delegated legislation Laws made by an executive body (e.g., a government department) using law-making powers granted to them by an Act of Parliament. These are also known as ordinances, regulations, or instruments. The Commonwealth Parliament closely monitors delegated legislation, particularly through the Senate Regulations and Ordinances Committee. The Senate may pay disallowance motions, annulling delegated legislation in part or in full.

deliberate To decide through careful consideration using well-defined processes. Ideally, the way the Commonwealth Parliament should debate and legislate.

deliberative vote A vote used to resolve a deadlocked vote in the negative. The President of the Senate possesses a deliberative vote. In the event that the Senate is deadlocked the President always votes against the motion. The Senate is a house of review. The deliberative vote is a cautionary vote designed to ensure a motion is reconsidered by the Senate before passing. This is in contrast with the 'casting' vote which is employed in the lower chamber when the votes are tied. The Speaker has the casting vote.

democracy A system of government based on popular sovereignty (i.e., the will of the majority).

democratic socialism A progressive political ideology on the left of the political spectrum. Under democratic socialism, government should use the power of the State to nationalise key parts of the economy and provide for basic economic equality and outcomes for all citizens. Socialism is achieved through democratic processes and not violent revolution. The early Australian Labor Party (prior to the Whitlam years) is an example of a democratic socialist party.

direct action The use of strikes, protests, and other forms of public political participation to achieve political change.

direct democracy A system of government in which citizens govern themselves through personal participation in law-making. Referenda and plebiscites are modern mechanisms of direct democracy.

division A formal vote in either house of parliament. Members move to one side of the chamber or the other to vote for or against a motion. This is counted and formally recorded in the Hansard.

division of power The allocation of legislative powers to federal and state governments within a federation. Some are exclusive to the federal government, some are shared by federal and state governments, while the states retain powers they enjoyed prior to federation.

doctrine of precedent The principle that courts must acknowledge the reasoning of judges in previous cases with similar factual circumstances. Operating within a court hierarchy, judges are bound to follow previous decisions made in superior courts – binding precedents. They may also consider judgements made in courts of equal or lesser authority – persuasive precedents. Also known as the principle of 'stare decisis' ('the decision stands').

Dorothy Dixer A question asked by a government backbencher to a government minister. They are 'friendly' questions giving a minister the opportunity to speak about a matter favourable to the government. The Opposition are more likely to ask genuine questions enquiring into the activities of government. Dorothy Dixers undermine the responsibility function of parliament.

double dissolution The simultaneous dissolution of the House of Representatives and the Senate by order of the Governor-General. This procedure is outlined in SECTION 57 of the Constitution and is designed to resolve legislative deadlocks in a bicameral parliament. It can be triggered when the Senate twice rejects, or fails to pass, a bill passed by the House of Representatives, with a three-month interval. A double dissolution necessitates new elections for each House. If this fails to resolve the legislative deadlock, the Governor-General may convene a joint sitting of the House and Senate in which Members will deliberate, and vote upon, the proposed law.

double majority The requirement for a successful referendum to change the Constitution. It is made up of a democratic majority (a majority of Australian voters) and a federal majority (a majority of voters in a majority of states).

economic liberalism An economic/political ideology on the right of the political spectrum. It strongly advocates the view that the market is the best means of achieving economic growth and wealth, and that the life outcomes people enjoy are the result of their own talent and effort. It does not support a strong role for government in the provision of the basic economic needs for disadvantaged citizens, relying instead on family obligations and charity to meet these needs. The 'dries' of the Liberal Party, such as John Howard, are examples of economic liberals.

ejusdem generis A Latin maxim meaning 'of the same kind'. In statutory interpretation, where general terms follow particular terms, the general words should be interpreted as being 'of the same kind' as those listed previously. For example, in a list of 'beer, wine, spirits, and other liquids', the general term ('other liquids') would include alcoholic liquids, but not soft drinks.

elections A process enabling citizens to choose representatives to sit in a legislature and act as their delegates or trustees in law-making. This is an essential procedure of representative democracy.

electoral system The mechanisms through which votes are cast, counted and translated into parliamentary representation and/or leadership. They may be based on single-member electorates or multi-member electorates. Electoral systems are classified as either majoritarian, proportional, or a compromise of both.

electorate A geographical area in which citizens vote to elect a parliamentary

representative. Electorates can be small (e.g., Wentworth in the House of Representatives) or large (e.g., Western Australia in the Senate). They may also vary in their representative purpose. Electorates are also known as 'divisions' or 'seats' in Parliament.

entitlement The right to a particular privilege or benefit, as granted by law.

equality of political rights Political rights are those that enable citizens to participate, directly or indirectly, in the establishment and administration of government. They include the right to vote, the right to run for political office and the freedom of assembly. In a liberal democracy, all citizens are equally entitled to political rights, which are protected by laws.

exclusive powers Legislative powers granted solely to the Commonwealth Parliament by the Constitution. For example, SECTION 52 grants the 'exclusive power to make laws for the peace, order and good government of the Commonwealth with respect to…'.

executive The arm of government responsible for the execution and administration of laws. It is composed of three parts – a 'constitutional executive' (i.e., the Monarch, Governor-General and Federal Executive Council); a 'political executive' (i.e., the Prime Minister and Cabinet); and an 'administrative executive' (i.e., the Australian Public Service). Recent Australian executives include the Albanese, Morrison, Turnbull and Abbott governments. Each State and Territory of the Australian federation has its own executive.

exhaustive preferential voting A preferential voting system in which an elector must number all of the candidates on their ballot paper - 'exhausting' the preferences. Exhaustive preferential voting is used in Commonwealth and Western Australian elections.

ex post facto Latin for 'after the fact'. For instance, courts resolve disputes after they have occurred. A retrospective laws is 'ex post facto' as it changes the legal consequences of actions that were committed prior to its creation.

express powers Powers granted by the express wording of the Constitution. For instance, the Governor-General may exercise a number of express powers (e.g., SECTION 64 – appointing a Minister of State).

expressio unius est exclusio alterius A Latin maxim meaning 'the express mention of one excludes the other'. A maxim of statutory interpretation that, in the absence of general terms, requires the exclusion of matters not specified. This prevents courts from adding other objects or meanings (see ejusdem generis).

fair elections Elections that maximise political participation and safeguard the political freedoms that facilitate it. Fair elections are administered by an independent authority, which issues ballots, counts votes and declares a winner, providing a high degree of accountability for elected officials.

family law Sets out the rights, duties, powers aand liabilities of spouses and children, provides for enforcement of those rights and liabilities as well as the dissolution of marriage. Underpinning policy strands include: a philosophy of no fault divorce; promoting the best interests of the child; preserving the institution of marriage; promoting reconciliation; and protecting the notion of family.

federalism A system of government in which law-making power is divided between one central and two or more regional governments, each sovereign within their own sphere. There are different types of federalism, which reflect the power distribution between different levels of government. Coercive federalism is where the federal government exercises greater power than the States. Cooperative federalism is where Federal and State governments consult one another and collaborate in the development of policy. Coordinate federalism is where Federal and State governments operate in separate and independent spheres.

Federation The process of uniting previously independent colonies or states under one national government. In Australia, six colonies federated to form one 'indissoluble federal Commonwealth'. The political entity resulting from this process (the Commonwealth of Australia) is also referred to as a federation.

Federation Chamber A special committee of the House of Representatives, established as an alternative venue for debate. It operates parallel to the House, allowing multiple matters to be debated simultaneously. This enhances the efficiency of the House and enables it to focus on more contentious motions or legislation. All Members of the House of Representatives are members of the Federation Chamber and may participate in its meetings. It can resolve motions and facilitate the legislative process (e.g., amendments, debate) for business referred to it the House. However, any decision must be later confirmed by the House of Representatives.

first past the post electoral system A majoritarian electoral system based on single-member electorates in which electors select one candidate of their choice. The winner is the candidate with a simple majority of votes. It was used in Australia for electing both the House of Representatives and the Senate prior to 1919.

floodgating A tactic employed by the government to stifle debate by submitting a large number of bills for consideration before the end of a parliamentary sitting. Standing orders can be manipulated by the government of the day to allow for minimal debate – e.g. using guillotine procedures to establish a time limit.

formal vote A ballot paper that has been completed correctly according to electoral law.

franchise The right to vote. In Australia, the franchise extends to citizens over the age of 18 years. However, it is not a universal adult franchise, as some populations are not permitted to vote (e.g. prisoners serving a sentence of more than three years).

gag A motion that 'the question be now put' in a house of parliament. If agreed to, this curtails debate by requiring the Presiding Officer to resolve a question without amendment or debate.

gerrymander The drawing of electoral boundaries to disadvantage a political opponent. This does not occur in Australia, as electoral boundaries are redrawn by the Australian Electoral Commission (AEC) according to the Commonwealth Electoral Act 1918 (Cth). This is still a prominent feature in elections for the United States House of Representatives.

golden rule A rule of statutory interpretation that requires courts to interpret words according to their natural and ordinary meaning unless this would result in an absurd or ambiguous outcome.

government In the broad sense, the political and legal system of a nation state. In the narrow sense, the executive branch within a political and legal system.

Governor-General The representative of the monarch in Australia, as established by SECTION 2 of the Constitution. The Governor-General exercises legislative and executive powers granted by the express wording of the Constitution. However, these powers are bound by unwritten conventions.

guillotine A motion passed in a house of parliament to impose a time limit on debate of a piece of legislation that has been declared 'urgent' by the government. This is a tactic used to stifle debate and rush legislation through the parliament.

Hansard The written record of debates in parliament, including committee hearings. The official record of the business of parliament. To ascertain the purpose of a statute, courts may refer to Hansard, especially the second reading speech for the relevant bill.

High Court of Australia The highest court in Australia. SECTION 71 of the Constitution vests the judicial power of the Commonwealth in the High Court and other federal courts the parliament may create. It has original jurisdiction over the interpretation of the Constitution and has been the major agent of constitutional change since Federation. It has appellate jurisdiction over all matters from all Australian lower courts. It is similar to the Supreme Court in the United States.

House of Representatives (Australia) The lower house of the Australian Commonwealth Parliament. SECTION 24 of the Constitution states the House of Representatives must be "directly chosen by the people". It is the people's house (representative role) and the house of government (responsibility role). As of 2024, there are 150 seats in the House of Representatives.

House of Representatives (United States) In the United States, the House of Representatives is the lower house of Congress. The number of voting representatives in the House is fixed by law at no more than 435, proportionally representing the population of the 50 states. Each representative is elected to a two-year term serving the people of a specific congressional district.

how to vote card An exemplar illustrating the preferred voting selection for both houses of parliament as determined by a political party. These are handed out by volunteers on behalf of a political party at polling places on election day. They act as a guide for voters on how to cast their votes. They can be strategically used to influence the outcome of an election in specific electorates.

human rights The freedoms and entitlements derived from the status of being human. These rights are inalienable – they cannot be legitimately limited or reduced by the actions of government.

hung parliament A parliament in which no party controls an absolute majority of seats in the House of Representatives. By convention, the previous government has the opportunity to form government. If unsuccessful, other parties and independents may try to form a minority government. In the 45th Parliament, the Morrison government briefly lost its majority in the House of Representatives, resulting in a hung parliament. However, two independents – Kerryn Phelps and Julia Banks – agreed to support the government on matters of confidence and supply.

hybrid pressure groups Pressure groups combining the features of 'cause' and 'sectional' pressure groups, for example, the Returned and Services League (RSL).

ideologies A coherent set of beliefs about how society and the economy ought to be organised. Politics is often a contest between different ideological viewpoints, such that political parties are formed by people with similar ideologies.

ideology A coherent set of beliefs about how society and the economy ought to be organised. Politics is often a contest between different ideological viewpoints, such that political parties are formed by people with similar ideologies.

independence The quality of being free from interference or influence by others. This is an essential feature of the judicial arm of government as required by the rule of law. Independence is a critical requirement for accountability. For example, the Auditor General is independent of the executive into which he/she conducts reviews and reports on to parliament. A lack of independence may lead to a loss of public confidence in investigative or accountability bodies.

independent MP A member of parliament who is not a member of a political party. A delegate or trustee, but not a partisan representative.

indictable offence A serious criminal offence that is generally adjudicated in an intermediate or superior court, and where the defendant is afforded a trial by jury.

individual ministerial responsibility A Westminster convention of responsibility parliamentary government which requires Ministers to be accountable to the House of Representatives for their decisions, probity and propriety. This is fundamental to the parliament's responsibility function.

individual A person acting independently, in their own interests or in the public interest.

informal vote A ballot paper that has not been completed correctly. The vote has been cast in a way that does not adhere to electoral law. In an exhaustive preferential voting system, if all candidate boxes are not numbered, if there is repetition of the same numbers or if only one candidate has been marked, this is an informal vote.

in futuro Latin, meaning 'for the future'. Statutes are made as rules to guide future actions or events. They serve as law from their date of proclamation. In contrast to common law which is ex post facto.

inquisitorial system of trial A system of trial based on the assumption that the truth is best discovered through inquiry by an expert impartial adjudicator. It developed in Europe from Roman civil law over many centuries and is practised in many countries that were former European colonies of countries like France. It includes Indonesia and many South American countries.

interpretation The determination of the meaning of words in a judgement, instrument or statute. Laws are derived from texts, which may be interpreted in different ways. Disputes over the meaning of words in statute or constitutional law are resolved by courts with original jurisdiction over the matter. These interpretations become part of the common law and change the meaning of a provision until a new interpretation is made or the provision is amended. Constitutional interpretations made by the High Court cannot be reviewed or changed by the Parliament without a referendum.

joint committee A parliamentary committee comprised of Members of the House of Representatives and Senators, such as the Parliamentary Joint Committee on Human Rights.

joint sitting A combined sitting of all Members of the House of Representatives and Senate, convened by the Governor-General under SECTION 57 of the Constitution, to resolve a legislative deadlock following a double-dissolution. The members present vote on the proposed bill, as last proposed by the House of Representatives. If affirmed by an absolute majority of the combined members, the bill is taken to have passed both houses. There has only been one joint sitting since Federation, which occurred in 1974 under the Whitlam government.

judicial discretion The freedom of a judge to decide an appropriate outcome for a particular case within the bounds of the law. It is important for adjudication and the exercise of judicial power. It is a component of judicial independence and, therefore, the rule of law. However, it can be limited by parliament, as in mandatory sentencing laws. These limits can be seen as controversial intrusions on judicial independence.

judicial independence A democratic principal that requires judicial power to be exercised independently of legislative or executive influence. This also extends to the influence of other institutions, such as the media.

judicial power The power to adjudicate. To make decisions that have the force of law. To make legally binding decisions. The power exercised by the courts.

judiciary The arm of government responsible for the interpretation of laws and their application to disputes heard in courts. An appointed, not elected, arm of government. The independence of the judiciary is critical to the rule of law. The Australian judiciary is organised into federal and state court hierarchies.

judge A person vested with the authority to adjudicate legal disputes and determine legal remedies. Judges are protected against undue influence from the executive and legislature by the Constitution, which guarantees their independence. As per SECTION 72, federal judges can only be removed by the Governor-General in Council on an address from both houses of parliament. In some jurisdictions in the United States judges are elected.

jury A panel of citizens randomly selected to determine the facts in a legal dispute. They hear evidence and arguments presented by parties, take direction from a judge and determine the verdict. A jury typically consists of twelve people in a criminal trial and four people in a civil trial.

law Rules of conduct that are enforceable by the courts. In Australia, they may be drawn from the Commonwealth Constitution, Commonwealth and State legislation, common law and subordinate legislation (e.g., regulations, by-laws).

Leader of the Opposition The leader of the largest non-governing party in the House of Representatives. They act as an alternative Prime Minister, presenting alternative policies, scrutinising government actions and leading the Opposition caucus/party room.

legal representation The provision of legal services by a qualified professional to a party in a dispute.

legislature The arm of government responsible for the creation, amendment and repeal of statutes through the legislative process. Legislatures may be unicameral (one house) or bicameral (two houses). In Australia, the Commonwealth Parliament is a bicameral legislature composed of the House of Representatives, the Senate and the Crown.

legislative process The procedures through which a proposed law must pass in order to become an Act of Parliament and come into force.

liberalism A political philosophy based on the primacy of the individual, which emphasises individual rights against the State and broader community. Democracy is the only form of government compatible with liberalism, as it is based on the sovereignty of individual citizens to govern themselves.

liberal democracy A system of government which is based on both popular sovereignty (i.e., the will of the majority) and the protection of individual rights.

literal rule A rule of statutory interpretation requiring courts to interpret a statute based on the 'plain and ordinary meaning' of the language used within it.

lobbying The act of communicating with a decision maker within the political system in an attempt to influence policy and law-making. Decision makers who are lobbied include ministers, parliamentarians and public servants. The Register of Lobbyists and Lobbying Code of Conduct ensure that the influence of lobbyists is transparent. Lobbying is a common strategy employed by sectional pressure groups that have access to political networks.

major party A political party that is capable of winning a majority of seats in the House of Representatives. A party that is capable of forming government - e.g., the Australian Labor Party (ALP) and Liberal Party of Australia. The characteristics of major parties include: a distinct political philosophy, a comprehensive policy platform, a broad support base, and the capacity to contest most parliamentary seats.

majoritarian electoral system An electoral system that amplifies the number of seats the election winner receives relative to the number of votes they won. The percentage of total seats won is greater than the percentage of total votes won by the election winner. First-past-the-post and preferential voting are examples of a majoritarian electoral system.

majority government A government in which one party or coalition controls more than 76 seats in the House of Representatives. In turn, it is able to 'govern in its own right'. In 2022, the Australian Labor Party formed a slim majority government under Prime Minister Anthony Albanese, winning 77 out of a possible 151 seats.

majority rule The principle that executive power is derived from popular authority. The party or coalition that wins a majority of votes in an election, or seats in an legislature, forms government and expresses the will of the majority in law and decision-making processes.

majority verdict The finding of a jury that is not unanimous, but still accepted as a verdict in that jurisdiction. States may only allow majority verdicts for some offences. For example, in South Australia, s57 of the Juries Act 1972 (SA) specifies that, for offences other than murder, a verdict in which 10 or 11 jurors concur is valid.

malapportionment This is where the number of voters in an electorate are inconsistent with the number of voters in other electorates, outside an acceptable margin of difference. Malapportionment is a deliberate feature of the Commonwealth Constitution, which provides for 'equal representation' of the States under SECTION 7.

marginal seat A seat in the Australian electoral system in which the winning party has received less than 56 per cent of the vote. Marginal seats are often targeted during election campaigns due to their potential to 'swing' to alternative parties/candidates.

maxims A legal principle or rule that is often expressed in Latin. Several legal maxims apply to the process of statutory interpretation - e.g., ejusdem generis.

mediation A form of alternative dispute resolution in which a neutral third party (a mediator) assists two disputing parties with finding common ground and settling a dispute. Mediation is commonly used in family law disputes and is mandatory in the pre-trial phase of Western Australian civil trials.

micro party A political party that is unlikely to win multiple seats in parliament and tends to campaign on a narrow range of issues. Micro parties are unlikely to achieve parliamentary representation in successive elections, but may hold the balance of power in the Senate.

Examples include: the United Australia Party (UAP) and Centre Alliance.

minister A member of the executive tasked with the administration of one or more government departments. Ministers are appointed by the Governor-General under SECTION 64 of the Commonwealth Constitution. However, by convention, they are appointed on the advice of the Prime Minister.

ministry The collective of Ministers and Assistant Ministers tasked with the administration of one or more government departments. The ministry is divided into an inner ministry (i.e., Cabinet) and an outer ministry consisting of junior ministers and assistant ministers.

minor party A political party capable of winning seats in parliament, but not capable of forming government in its own right. Minor parties may seek to form a coalition with other parties to form government (for example, Nationals) or seek the balance of power in the Senate (for example, Greens). Minor parties can usually achieve representation in the Senate due to its system of proportional representation.

minority government A government formed by a party or coalition that does not control an absolute majority of seats in the House of Representatives. In turn, it must rely on the support of minor parties and/or independents in matters of confidence and supply (i.e., appropriations). In 2018, the minority government under PM Scott Morrison lost its majority in the House, relying on the support of Kerryn Phelps and Julia Banks.

mirror representation An ideal form of representation in which the composition of the parliament accurately reflects the diversity of the electorate in terms of age, gender, ethnicity, religion, and other social and economic characteristics. This part of the parliament's 'representative function' is exhibited most strongly in the Senate.

mischief rule A rule of statutory interpretation that requires the ambiguous wording of a statute to be interpreted in light of the 'mischief' or problem that the statute sought to address. In determining this, courts may refer to extrinsic materials, including the statute's second reading speech as documented in Hansard.

mixed-member proportional system Blends majoritarian and proportional elements to elect a unicameral parliament. It combines first-past-the-post (majoritarian) with a party list system (proportional).

motion of no confidence A motion by which the House of Representatives withdraws its support from the government. A successful motion of no confidence would, by the convention of collective ministerial responsibility, require a minister or government to resign. In turn, they are almost always defeated on party lines. However, they provide the Opposition with an opportunity to scrutinise the government and debate its actions.

multi-member electorate An electorate represented by more than one parliamentary representative. The system of proportional voting used in the Senate requires multi-member electorates.

nation state A political unit represented by a central government that has supreme authority over a territory and its population (i.e., sovereignty). Under customary international law, a nation state must have the following attributes: a defined territory, a permanent population, a central government, and the capacity to enter into relations with other nation states. Australia is an example of a nation state.

nationalise To transfer the ownership of private assets (e.g., businesses, land) to the government.

natural justice A principle of justice incorporating the rule against bias and the right to a fair hearing. Fair processes for determining the truth in a dispute, also known as 'due process'. Courts and tribunals have a duty to act fairly.

nemo iudex in causa sua Latin for 'no one is to be a judge in their own cause'. It is the principle of impartiality. Judges and juries must be impartial. A principle of natural justice. Also referred to as the duty to act fairly, and with due process.

noscitur a sociis A Latin maxim meaning = 'by the company it keeps'. A maxim of statutory interpretation whereby the meaning of a word or phrase is determined in the context of the words accompanying it.

obiter dictum Latin for 'sayings by the way'. The judicial remarks that do not form part of the reasoning in a decision which may be persuasive (non-binding) in future similar cases.

ombudsman A public official appointed to hear complaints about the public service. Ombudsmen can make recommendations to resolve a dispute, but cannot impose a resolution.

opposition The largest non-governing party or coalition in the House of Representatives. In the Westminster system, the opposition is the alternative government. Its role is to hold the government to account and present alternative policies.

optional preferential voting A preferential voting system in which electors must number a minimum number of candidates in order of preference. In Senate elections, electors must number at least six boxes above the line (for parties or groups), or number at least twelve boxes below the line (for individual candidates).

ordinances A rule established through delegated legislation.

original jurisdiction The jurisdiction of a court to hear and determine proceedings brought before it 'in the first instance.' The original jurisdiction of the High Court is specified in SECTION 75 of the Commonwealth Constitution, though parliament can make laws conferring original jurisdiction on it under matters specified in SECTION 76.

parliament The typical name given to the legislature in Westminster style political systems. Australia has a Commonwealth Parliament, six state parliaments and two territory parliaments.

parliamentary privilege An enhanced form of 'freedom of speech' enjoyed by all members of parliament when they are on the floor of their chamber and when their chamber is in session. It protects members of parliament from criminal or civil liability for statements they make in parliament. Essential for the representative, legislative and responsibility roles of the parliament. This privilege is also extended to their work in committees. Members may be held to account for their misuse of parliamentary privilege by the privileges committee of the house in which they sit.

parliamentary sovereignty or supremacy The supreme law-making authority of the legislature. This enables the legislature to amend or repeal previous legislation and abrogate common law. However, all Australian legislatures are bound by a written constitution, and the High Court can set aside the legislation if it is unsupported by legislative power.

partisan (representation) A model of representation in which parliamentarians act in accordance with the policies of their political party, voting as a bloc (a group of political parties or independents with common interests who have formed an alliance) throughout the legislative process. This is the dominant form of representation in the Commonwealth Parliament and plays a key role in its 'representative function'.

party room A group consisting of the members of a political party within a legislature. This represents a critical forum for political strategy and debate, as it determines the party leadership. The Liberal Party of Australia and The Nationals have separate party rooms, alongside a Coalition Party Room that meets when they form government. The party room for the Australian Labor Party is known as the Caucus, and is bound by a pledge to support ALP policy, which is largely determined by the party's National Conference held every three years.

plaintiff The party that initiates a civil dispute and seeks relief against another through judicial proceedings.

plebiscite An expression of the will of eligible electors through a direct vote on a matter on public interest. Plebiscites are initiated via the passage of legislation, though the results are not binding on the parliament. The same-sex marriage postal survey held in 2017 was NOT a plebiscite.

political freedom The protection of political rights (e.g., freedom of speech, freedom of assembly) so that citizens can engage in political action without fear of reprisal or litigation.

political participation The active involvement of citizens in a political system, which may include: voting, involvement in political parties, pressure group activities and protesting.

political party A group of people with a shared political ideology that seek to achieve representation in parliament and influence law/decision-making. They can be classified as major, minor or micro parties.

political representation The reflection of citizens' views and values in law and decision-making processes. This is primarily facilitated by elected Members of Parliament, who act in the best interests of a constituency.

political spectrum A way of representing political ideologies in relation to one another. Political parties on the left of the spectrum are progressive. Parties on the right are conservative. Centrist parties combine elements of both and tend to be more pragmatic. From the extreme left to the extreme right, typical political ideologies include: communism, socialism, democratic socialism, social democracy, social liberalism, economic liberalism, social conservatism and fascism. Australian political parties tend to be more pragmatic, with the extremes of the political spectrum poorly represented across State and Commonwealth legislatures.

politics A contest for the exercise of power. At the national level it is the contest for the ability to make and carry out law.

popular sovereignty The right to govern rests with the people and is delegated to the government via the electoral process. Democracy is based on the idea of popular sovereignty.

portfolio An area of government activity for which a minister is responsible. For example, the Minister for Health oversees the Department of Health and all public servants and executive agencies related to health. Under the convention of individual ministerial responsibility (IMR), ministers must accept responsibility for their portfolio, including instances of maladministration or inefficiency.

power The ability to bring about intended outcomes. Power may be exercised through formal channels such as law-making and

governing or by less formal means such as lobbying and persuasion by individuals, pressure groups and political parties.

preamble An introductory statement to a document. In statute law this may include a statement outlining the purpose of the law. In the Constitution, it outlines the sources of authority and makes reference to whom this document applies, namely the "people of New South Wales, Victoria, South Australia, Queensland, and Tasmania, humbly relying on the blessing of Almighty God..."

precedent A judge made decision that stands as an example or guide for future decisions in cases of similar factual circumstances. There are binding precedents that apply to all courts lower in the hierarchy than where the precedent was set. There are persuasive precedents that a court may refer to when making a decision. These can be from courts outside of this court hierarchy or even internationally.

President (of the Senate) The Presiding Officer of the Senate. They are responsible for maintaining the functioning of the chamber according to the Standing Orders.

pressure groups Associations formed by people with common interests, who seek to influence law and decision-making processes. They can be classified as 'cause' groups or 'sectional' groups. They take action in a variety of ways, but usually do not seek election to parliament. GetUp! Australia is an example of a pressure group.

Prime Minister The head of the federal executive (i.e., the government). The leader of the party or coalition that obtains a majority of seats in the House of Representatives. This position is governed by convention, as there is no mention of the Prime Minister in the Commonwealth Constitution.

private member A member of parliament who is not a member of the Cabinet or Ministry (the executive). The opposition frontbench (Shadow Ministry) are private members.

procedural fairness Another term for 'natural justice' and 'due process'.

processes and procedures The rules by which an institution of government operates. For example, the Standing Orders contain the processes and procedures of the parliament. Question time and the statutory process are examples of parliamentary processes and procedures.

proclamation The publication of the consent of the Governor-General for the commencement of legislation in the Government Gazette. This is the final stage in the legislative process, after which a bill becomes an Act of Parliament.

progressive The 'left' of the political spectrum. The Australian Labor Party and the Greens are progressive political parties. Progressive parties believe in the power of government to improve society. They advocate a larger role for government.

promotional groups Cause groups

proportional representation/voting A multi-member electoral system in which parties and candidates gain seats in proportion to the number of votes cast for them. To win, a candidate must achieve a 'quota' of votes. Candidates with votes in excess of one quota have their surplus votes distributed at a reduced transfer value. Votes are redistributed at their transfer value, in order of electors' preferences. This system has been used to elect the Commonwealth Senate since 1949, with variations of it used to elect State upper houses.

prosecution The party that commences criminal proceedings on behalf of the State.

public law Laws governing key areas of social conduct, which aim to ensure the security of society and enforce fundamental social norms/values. Examples include: criminal law, industrial law and constitutional law.

public service Appointed officials that provide administrative services to the executive. They are required to develop policy, advise Ministers and implement government policies or directives. The public service is organised under government departments, agencies and statutory authorities. It is accountable to one or more Ministers and, by extension, the parliament and the people through the Westminster 'chain of accountability.' Public servants can exercise considerable power, particularly when acting as delegates of a Minister (e.g., the Minister for Immigration).

question time A procedure in the Commonwealth Parliament by which Ministers must answer questions without notice put to them by private members. Question time occurs on each parliamentary sitting day and lasts for roughly one hour. Questions may relate to the Minister's portfolio, their conduct or other matters relating to their ministerial role.

quota The number of votes required to win a seat in an electoral system with proportional voting. Quotas are calculated by dividing the number of formal ballots by the number of seats contested in a State/Territory, plus one. One is then added to the total. In a half-Senate election, a quota represents approximately 14.3 per cent of formal ballots. However, in a double dissolution election, the quota decreases to approximately 7.7 per cent of formal ballots.

ratio decidendi Latin for 'reason for deciding'. The critical reasoning that led to a judicial decision, which is binding on lower courts.

referendum A formal vote held to change the wording of the Commonwealth Constitution. The procedure for this is contained in SECTION 128 and requires Parliament to approve a bill proposing the change. The question must then be put to voters at least two, and no more than six, months after the passage of the enabling bill. A successful proposal must obtain a double majority, made up of a majority of Australian voters and a majority of voters in a majority of States.

regulations Delegated legislation.

representative A member of parliament elected to represent the views and values of an electoral district (House of Representatives) or a State (Senate). There are 151 representatives in the lower house and 76 in the upper house—a total of 227 members of parliament.

representative democracy / government A form of government in which the people are sovereign, but are represented in government by elected members of a legislature (parliament).These representatives may be delegates, trustees or partisans.

republic A system of government in which the Head of State is, directly or indirectly, chosen by the people. This individual is commonly known as a president. Examples include: the United States, France and India.

reserve powers The codified powers of the Governor-General that may be exercised without, or in spite of, ministerial advice during emergencies. In 1975, Sir John Kerr exercised a reserve power under SECTION 64 of the Constitution to dismiss Prime Minister Gough Whitlam.

residual powers All government powers not specified or enumerated in the Constitution. They are exercised by the states.

responsible government A system of government in which the executive is drawn from, and accountable to, the legislature. According to SECTION 64 of the Constitution, Ministers of State must sit in Parliament as a Senator or Member of the House of Representatives.

royal assent The formal agreement of the monarch, or their representative, to a bill passed by the Commonwealth Parliament, or a State Parliament. At the Commonwealth level, the Governor-General provides royal assent under SECTION 58 of the Constitution. By convention, it is always given; it is never refused.

rule of law The principle that all individuals and government are equally subject to, and equal before, the law. It is supported by a number of other principles, including: constitutionalism, the separation of powers, constitutionalism, respect for rights and freedoms, democratic law-making and the coherence of law.

rule by law The prejudiced execution of law such that a government can impose its will on a population. In autocratic systems of government, rule by law allows those in positions of power to wield the law as a weapon to suppress opposition and dissent.

rules of evidence Rules governing the type of evidence admissible in a trial. The adversarial trial has strict rules of evidence. For example, hearsay, character, opinion and circumstantial evidence are not admissible because of their lower quality and reliability. Inquisitorial systems have more relaxed rules of evidence.

secret ballot The legal requirement for an elector's vote to be recorded privately, such that they may choose an option or candidate free from intimidation. In Australia, this is achieved through the provision of private voting booths and the disqualification of identifiable ballot papers as informal votes.

sectional groups Pressure groups focused on benefits for a particular sector of society or the economy. For example, the Australian Medical Association (AMA).

Senate The upper house of the Commonwealth Parliament. The Constitution, at SECTION 7, states the upper house must be 'directly chosen by the people'. It is the 'states' house' (federal and representative role) and a 'house of review' (responsibility role). There are currently 76 Senators. In the United States the Senate is the Upper House of Congress and the Austrlian Senate is modelled on that house.

separation of powers The allocation of law-making powers to separate and independent arms of government - the legislature, executive and judiciary. This prevents a concentration of powers and establishes a system of checks and balances to prevent/counteract improper exercises of power.

shadow ministry The senior members of the Opposition in the Commonwealth Parliament, who occupy the frontbench. They are allocated a portfolio similar to that of government Ministers, such that Shadow Ministers can scrutinise their performance.

simple majority The highest number of votes cast for any one candidate. This is the requirement to win in a first-past-the-post electoral system. Otherwise known as a 'plurality of votes'.

single member electorate An electorate represented by one representative. Single member electorates are used to vote in members to the House of Representatives.

single transferable vote An electoral system with proportional representation used to elect the Commonwealth Senate since 1949. See proportional voting.

social conservatism A political ideology on the right of the political spectrum. It is often aligned with the economic views of economic liberalism, with the exception of government

economic support for traditional institutions such as the family. Religion and nationalism can be influential in social conservatism. It does not strongly support legislative protections for human rights, which is often viewed as a part of a progressive agenda. For example, Tony Abbott is a social conservative.

social democracy A progressive political ideology on the centre left of the political spectrum. Government should use the power of the State to provide for basic economic equality and opportunity for all citizens. Markets are the best means of achieving economic efficiency, but market failures leave some groups vulnerable to inequality. It also tends to be socially progressive and supports strong protection for rights. The modern ALP is an example of a social democratic party. The Hawke, Keating, Rudd and Gillard Governments were social democratic governments.

social liberalism A political ideology on the centre right of the political spectrum. It supports the view that the market is the best means of achieving economic growth and wealth, but that the government should use the power of the State to provide for the basic economic needs of those citizens who cannot participate in the market (the disabled, elderly, etc). It is differentiated from social conservatism by its progressive social values, such as support for marriage equality and stronger protection of human rights. The 'wets' of the Liberal Party are examples of social liberals. Malcolm Fraser and Malcolm Turnbull are thought of as social liberals.

socialism A political ideology on the left of the political spectrum. It believes that government should use the power of the State to nationalise key parts of the economy, provide for basic economic equality and outcomes for all citizens. It distrusts the market as the best means of achieving fair economic outcomes, preferring to trust in government allocation of economic resources and a reduction of private capital. The ALP was a democratic socialist party from its formation in the 1890s to the late 1960s.

sovereignty The unlimited authority of a nation state or a state within a federation to govern itself. Sovereignty requires a geographical territory, a population and a political and legal system to govern the people and territory. In democracies, sovereignty is vested in the people. In autocracies, sovereignty may be vested in a monarch, a party, a dictator, a religious elite, a military elite, or other person or elite group.

Speaker (of the House of Representatives) The Presiding Officer of the House of Representatives. They are responsible for maintaining the functioning of the chamber according to the Standing Orders.

special leave to appeal This is the process by which an appellant applies to have their appeal heard by the High Court. Appeals to the High Court are not automatically granted. Under the Judiciary Act 1903, they will only be granted if the case presents a question of law that is of public importance, resolves a difference of opinion between courts or requires an appeal in the interests of justice (e.g., miscarriage of justice).

standard of proof The extent to which a disputed fact must be proven in order to be legally established. There is a lower standard of proof in civil disputes (i.e., on the balance of probabilities) compared to criminal disputes (i.e., beyond a reasonable doubt).

Standing Orders The rules by which each house of parliament operates. SECTION 50 of the Constitution gives power to each house to make its own rules. Standing Orders are enforced by the presiding officer of each house —the Speaker of the House of Representatives and the President of the Senate. They may be suspended by a motion of the chamber. In the House, the executive dominates and may amend or suspend Standing Orders.

stare decisis Latin for 'to stand by what has been decided'. The principle upon which the doctrine of precedent is based.

States (Australian) Sovereign regional governments within the Australian federation. Formerly separate, self-governing British colonies that agreed to 'federate' in 1901. Their constitutions and law-making powers are preserved in CHAPTER 5 of the Constitution. They share some powers with the Commonwealth (concurrent powers) and possess unspecified residual powers.

statute law Law made by parliaments. Made by elected members of parliament, statute law has democratic legitimacy and is superior to common law. It is written in broad terms. Bills must pass both houses of the Commonwealth Parliament and be given royal assent before becoming law.

statutory authority An executive agency established by parliamentary statute. For example, the Australian Electoral Commission (AEC) administers the Commonwealth Electoral Act 1918 (Cth.)

statutory interpretation See 'interpretation'.

subjects The inhabitants of a sovereign nation state who lack political rights or freedoms, who cannot participate in their own government and who are ruled by laws made without their consent. Subjects may also lack legal protection from arbitrary power.

summary offence A simple or minor offence. Generally, they are adjudicated in an inferior court such as the Magistrates Court of Western Australia. Minor offences include petty theft and driving offences.

system of government The arrangement, and relationship between, government institutions within a nation state. They are often classified based on their distinguishing features: unitary or federal; republic or constitutional monarchy; democracy or autocracy. A system of government may combine distinguishing features - e.g., a federal parliamentary constitutional monarchy such as Australia.

trial A procedure through which a court resolves disputed issues of fact, applies appropriate legal rules and arrives at a judgement. Adversarial trials are used in common law countries. Inquisitorial trials are used in civil law countries.

trustee (representation) A model of representation in which elected representatives exercise independent judgement to act in the best interests of their constituency. This grants more autonomy to the representative.

tyranny of the majority A system of government in which majority rule is untempered by a liberal respect for the political and legal rights of minorities. There are no legal restraints preventing a 'popular government' based on majority rule from persecuting unpopular minorities.

unicameral A legislature composed of a single legislative chamber. New Zealand, Queensland and both Australian mainland territories (ACT and NT) have unicameral parliaments.

unitary A system of government in which sovereignty is geographically undivided. There is a single national government in which sovereignty is vested.

vested To bestow power upon or within. In Australia, federal legislative power is vested in the Commonwealth Parliament by SECTION 1 of the Constitution, executive power is vested in the King and Governor-General by SECTION 61, and judicial power is vested in the High Court and other federal courts by SECTION 71.

Washminster hybrid A blend of the Westminster system of responsible parliamentary government with the American system of federalism. This is also referred to as the 'Washminster mutation'.

Westminster chain of accountability The relationships between political and legal actors that render the executive accountable to the people. In Westminster systems, parliamentary representatives are elected by the people. In turn, the executive (i.e., Cabinet) is drawn from, and held accountable to, it through conventions of responsible parliamentary government. These include individual and collective ministerial responsibility. Ministers are allocated portfolios and, in turn, are responsible for government departments staffed by public servants. As such, the public service is accountable to their ministers; ministers are accountable to the parliament and the parliament is accountable to the people. This is the Westminster chain of accountability.

Westminster conventions Unwritten rules regarding government powers, processes and procedures in Westminster systems. The most important conventions are those relating to responsible parliamentary government. For example, the government is formed by the party or coalition which secures a majority of seats in the House of Representatives. Likewise, the Governor-General exercises their powers on the advice of the Federal Executive Council (EXCO).

Westminster system A system of government based on the British Westminster system. The executive is drawn from within the legislature and holds it responsible between elections. This is referred to as 'responsible parliamentary government'. Distinguished by the fusion of the legislative and executive powers, and the relatively weak separation between these two branches of government.

winner's bonus The percentage of the total seats won is greater than the percentage of total votes won by the election winner. A disproportionate number of seats is won by an election winner. A feature of all majoritarian electoral systems.

witness A person called to attend a trial that has seen or heard material relevant to a dispute. They provide evidence to the court, but only in compliance with rules of evidence. They provide sworn testimony, the credibility of which may be tested through cross-examination. The adjudicator(s) will determine the 'weight' the evidence should bear in determining the outcome of the trial.

writ A written order issued by a court or legal authority that commands a person to do, or refrain from doing, a particular act. Courts can issue writs of mandamus, which command an officer of the government to do, or refrain from doing, a particular act. The Governor-General issues a writ to initiate an election.

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Page references in **bold** refer to illustrations.
Page references including 't' (e.g. 283t) refer to material in tables.
Page references including **CG** refer to pages in the Companion Guide.
Index entries in *italics* refer to titles of Acts, cases and publications, and foreign language terms.

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In a period where democratic nations are challenged to meet the diversifying needs of their citizens while also promoting good governance, the fundamental tenets of political and legal systems are more important than ever. Liberal democracies are the epitome of popular sovereignty acting in concert with the protection of both individual and group liberties and rights in the political and legal sphere.

This text provides an authoritative reference on:

Democracy: the key principles underlying the functioning of a liberal democracy as well as the structures, processes, procedures and relationship between the arms of government in a vibrant political culture. To legitimise government the people express their will through elections, and the electoral systems translate this to achieve accurate political representation in compliance with the principle of fair elections; and

Justice: the principle and exercise of the rule of law and its elements, as well as the judicial processes necessary to ensure all people have access to and equal treatment within the legal system — including the criminal and civil trial processes in Western Australia — to achieve natural justice.

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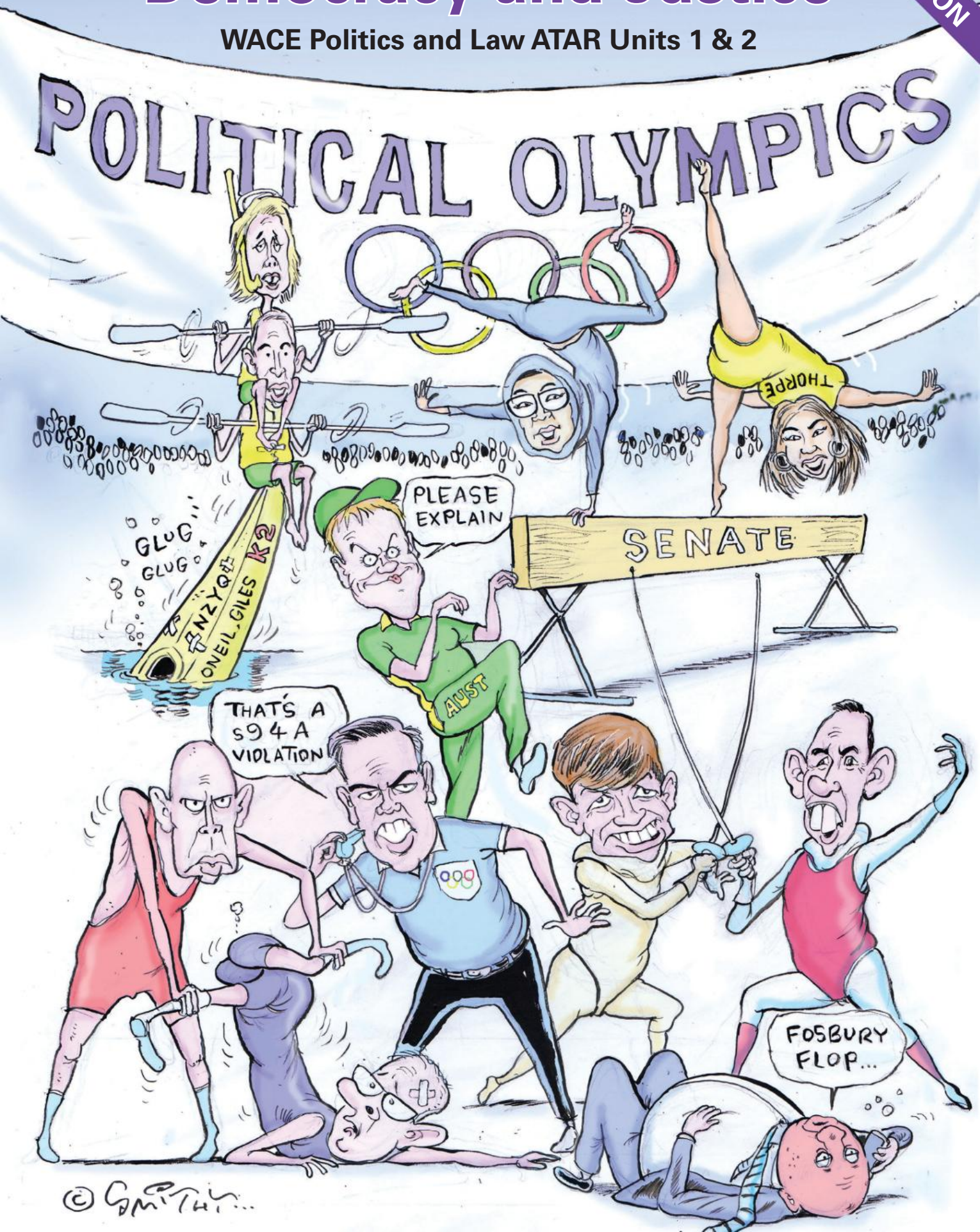
Companion Guide to Democracy and Justice

DIGITAL VERSION

WACE Politics and Law ATAR Units 1 & 2



Democracy & Justice Companion Guide

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PLEAWA is a not-for-profit organisation that exists to foster the development of Politics and Law & Civics and Citizenship as a subject for students and teachers. It aims to promote an interest in, the teaching, research and analysis of the Australian political and legal system as well as other countries. We seek to extend the knowledge and skills of students and teachers through publications and the conduct of seminars on topical issues or events. This Companion Guide is another step towards facilitating these goals and accordingly PLEAWA gratefully acknowledges the contributions of the following persons in the development of this textbook:

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How to Use the Case Studies

Why case studies?

Political and legal case studies summarise real-world situations to illustrate the workings of the Australian political and legal system. In addition, they show how theoretical systems work in practice.

Assessors (i.e. teachers and WACE examiners) use marking guides to judge students' understandings. The marking guides reward a student's grasp of concepts, with evidence and examples being the focus.

Case studies are the best way to develop deep conceptual knowledge because students see ideas applied in genuine settings. In addition, they provide rich evidence of the political and legal system in operation and are detailed examples in themselves.

Case studies are like narratives with a story arc. Stories place ideas and facts within a context that gives them meaning. Case studies invite the reader into the story and spark interest. Sometimes they inspire research when a case study is just the beginning of a larger story.

For students

It would be best to read as widely as you can during your journey through Politics and Law. These case studies provide you with curated reading materials linked to the syllabus. They will enrich your understandings and give you a wide variety of real-world evidence and examples to use in assessment tasks.

How to use a case study

Repetition is the foremost strategy for successful learning. Multiple readings of each case study consolidate your understanding of details and enable you to link it to many syllabus topics. Moreover, reading case studies will significantly enhance your ability to recall evidence and examples in assessments.

Each case study links to multiple syllabus topics. Therefore, you should read each one several times, on different occasions and for different learning intentions . First, read a case study through a particular learning intention lens, which should be related to a syllabus topic. Then, when you reread a case study, please read it with a different learning intention and purpose in mind.

Complete the appropriate activities at the end of each case study. For instance, if you are reading for a Unit 1 learning intention, only complete the Unit 1 activities. Your teacher is the best guide for choosing a case study, which activities to do, and when. They can provide you with specific learning intentions and direct you to the appropriate case studies.

For teachers

Case studies provide teachers with in-depth and authentic evidence and examples in natural settings. Depending on the context, they link to multiple syllabus topics and can be used more than once throughout the course. Use the **Syllabus Links Matrix** at the back of the Companion Guide to select case studies appropriate to your teaching and learning intentions . Encourage multiple readings of each case study by adapting them to different syllabus contexts.

Contents

Case Study 1

The 2022 Federal Election

Unit 1

- **11PAL: Operating principles of a liberal democracy**

Unit 2

- **11PAL: Political representation with reference to the role of individuals, political parties and pressure groups**
- **11PAL: The Western Australian and Commonwealth electoral systems since Federation**
- **11PAL: Advantages and disadvantages of the electoral systems in Australia with reference to at least one recent (the last ten years) election**
- **11PAL: Ways individuals, political parties and pressure groups can participate in the electoral processes in Australia**

On Saturday May 21, Australians went to the polls to elect members to the 47th Parliament. The Labor Party, led by Anthony Albanese was victorious gaining a two-seat majority in the House of Representatives. The Liberal National Coalition lost 17 seats, whilst the Greens gained three seats. The crossbench increased to 12 members, largely due to the influence of the 'teal independents'. In the Senate, the government was not able to form a majority with the influence of the crossbench still crucial. New senators entered the parliament from the Greens, the Jacqui Lambie Network, United Australia Party and David Pocock as an independent.

In the House of Representatives there was a steep decline in support for the major parties. Despite winning government, the Labor Party achieved a primary vote of 32.6% nationwide. This was the lowest primary vote Labor had received since 1903[1] and was lower than the Liberal National Coalition received (35.7%) despite forming opposition.[2] Both major parties suffered swings against them, with the Coalition losing 5.7% of their primary vote. Despite forming government, Labor did not pick this vote up, with their primary vote also declining. The Greens increased their primary vote by 1.8% nationwide and independents across the country received an increase of 1.92%.[3]

Figure 1.1 — Teal wave

In Western Australia the popularity of the McGowan State Government contributed to a significant increase to the Labor Party's vote. Labor increased their primary vote by 7% and won four extra seats compared to the 2019 election. The Liberal Party lost 9.63% of their primary vote, including the blue-ribbon seat of Curtin to independent Kate Chaney.[4]

Of the 17 seats the Coalition lost at the 2022 election, seven were lost to 'Teal independents'.

These independents targeted 'moderate Liberal' electorates and ran campaigns based upon action on climate change and establishing a national integrity commission for politicians. The moderate electorates that were targeted were characterised as traditional Liberal seats. These electorates have high concentrations of wealth but are more inclined to support socially progressive views. Many of the electorates targeted had Liberal incumbents with strong personal profiles, including former Treasurer Josh Frydenberg. However, these electorates favoured Teal candidates promising to deliver mirror representation in the parliament and were elected with a strong mandate to enact policies that reflected the views of the community.

The 2022 election saw a continuation of the trend towards early voting (pre-poll ordinary) and postal voting in the electorate. Nationally 32.2% of eligible voters voted before polling day, whilst 15.9% of the electorate applied for a postal vote.[5] Pre-poll voting has increased in every federal election since its introduction in 2010.[6] Both types of early voting often favour the Coalition, with Labor seeing a decline of 3.1% in two-party preferred pre-poll votes when compared to votes cast on polling day.[7]

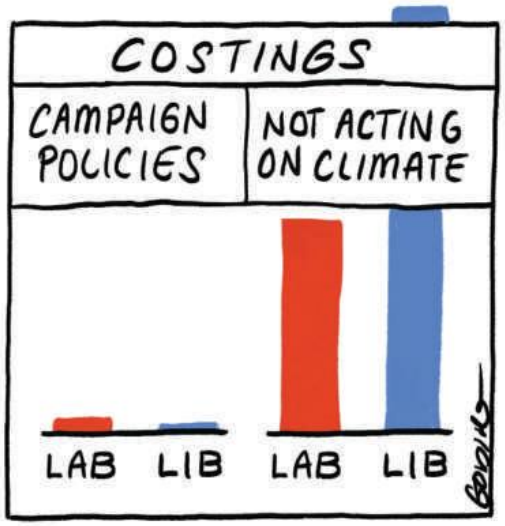


Figure 1.2 — Campaign costings we are yet to see – the 2022 Federal Election

Voter turnout continues to decline with the House of Representatives turnout falling below 90% for the first time since compulsory voting was introduced in 1924.[8] This trend has continued since the turn of the century and is more pronounced in regional areas.[9] The four electorates with the lowest voter turnout were all regional electorates. Lingiari in the Northern Territory recorded the lowest turnout of any electorate with only 66.83% of eligible voters casting a valid vote.[10]

How do I use this?

- The decline in the primary vote for the major parties will make forming government difficult for both Labor and the Coalition in future elections. Whilst the Coalition can draw on support from Liberal and National voters, the Labor vote is primarily based in metropolitan areas. Despite a decline in primary votes, Labor increased its two-party preferred vote by 3.7%.[11] This is a unique feature of Australia's electoral system and demonstrates the power of the major parties in preference flows, despite a decline in their primary vote.
- The Coalition has a narrow path to victory in the next federal election if it cannot win back seats lost to teal independents. The electorate as a whole is moving towards a model of representation that mirrors the views of the electorate, rather than a partisan or trustee model. Voters in teal electorates are more inclined to vote based on values, rather than loyalty to a party. It should be noted that all teal electorates voted 'Yes' in the recent Voice to Parliament referendum.[12] This can be contrasted to the Liberal Party, which predominantly supported the 'No' campaign.
- Early voting continues to trend upwards and can be considered to be a disadvantage in our current electoral system. The *Broadcasting Services Act 1992* prohibits advertising being broadcast from the Wednesday before polling day until the closure of the polls. Early voting opened two weeks before polling day in 2022, meaning many voters could be influenced outside of the blackout period. The rise in early voting also means many voters are voting before costings are released for election promises. Labor did not release their costings until two days before polling in 2022.[13] 23% of the electorate had already voted in 2022 before these costings were released.[14]
- Voter turnout continues to decline especially in remote and regional areas. Participation in elections is a key feature of Australia's democracy, however, regional voters are less likely to vote. This risks creating a parliament that is less representative of Australians and more likely to create legislation that favours metropolitan regions.

Source Analysis

Source

The following is an edited extract from the ABC News entitled *"Federal government concedes key housing demand in bid to secure Senate crossbench support, but Greens remain opposed"*, written by Tom Lowrey and Kamin Gock and updated on 13 June 2023.

The federal government has made a key concession on its centrepiece housing policy to try and garner crossbench support in the Senate, but the Greens still plan to vote against the bill.

If the Senate votes down the Housing Australia Future Fund (HAFF) it will be the Albanese government's first major legislative defeat on the floor of parliament.

Under the policy, a $10 billion fund would be established and invested, with the returns used to build social and affordable housing from 2024-2025 – with a spending cap of $500 million per year.

Housing Minister Julie Collins has written to the Greens and Senate crossbench conceding the government is now willing to remove that cap and instead guarantee spending of $500 million each year – regardless of whether the fund makes money.

Greens housing spokesperson Max Chandler-Mathers said the changes still did not go far enough.

Labor has spruiked the HAFF would build 30,000 homes in its first five years, but the Greens have argued for months it does not do enough to address the current housing crisis.

The minor party has put two demands toward the government: to increase the annual spend from $500 million to $2.5 billion towards social and affordable housing, and to provide $1 billion towards coordinating a national rent freeze with state and territory governments.

Independent Senator David Pocock has argued for a more ambitious bill, but also indicated he will not block it in the Senate.

He said it is a welcome change, but he would still like to see more.

> *"I really welcome the government moving on a number of the key issues myself and other key stakeholders have been raising for a while now," he said. "I'd obviously like to see the figure higher than $500 million, but to have that guaranteed is a really good step forward."*

Unit 1

1. Outline what is meant by a 'crossbencher' in Australia's parliament. (2 marks)
2. With reference to the source, discuss in your own words, **two** ways the crossbench is trying to influence legislation in the Commonwealth Parliament. (4 marks)

Unit 2

3. Discuss **one** advantage and **one** disadvantage of preferential voting in Australia's electoral system. (6 marks)
4. With reference to at least one recent (the last ten years) election, evaluate the extent to which political representation is achieved in Australia's political system. (8 marks)

Notes

1 https://www.abc.net.au/news/2022-07-05/fact-check-barnaby-joyce-labor-primary-vote/101129054
2 https://results.aec.gov.au/27966/Website/HouseStateFirstPrefsByParty-27966-NAT.htm
3 https://results.aec.gov.au/27966/Website/HouseStateFirstPrefsByParty-27966-NAT.htm
4 https://results.aec.gov.au/27966/Website/HouseStateFirstPrefsByParty-27966-WA.htm
5 https://antonygreen.com.au/5647-2/
6 https://antonygreen.com.au/5647-2/
7 https://antonygreen.com.au/the-changing-pattern-of-results-by-vote-type/
8 https://www.aec.gov.au/elections/federal_elections/voter-turnout.htm
9 https://www.aec.gov.au/elections/federal_elections/voter-turnout.htm
10 https://results.aec.gov.au/27966/Website/HouseTurnoutByDivision-27966-NAT.htm
11 https://www.abc.net.au/news/elections/federal/2022/results/party-totals
12 https://antonygreen.com.au/some-graphs-on-the-voice-referendum-result/
13 https://www.abc.net.au/news/2022-05-19/federal-election-labor-costings-released/101080152
14 https://antonygreen.com.au/5647-2/

Sources

Figure 1.1 https://www.smh.com.au/cbd/the-teal-wave-that-launched-a-thousand-books-20220620-p5av6t.html
Figure 1.2 https://www.reddit.com/r/australia/comments/uticf3/campaign_costings_were_yet_to_see_matt_golding

Case Study 2

The First Nations Voice to Parliament Referendum

Unit 1

- **11PAL: Operating principles of a liberal democracy: majority rule, political participation**
- **11PAL: Legislative processes at the Commonwealth level**

Unit 2

- **11PAL: Essential to the understanding of representation and justice are the principles of fair elections, participation and natural justice**
- **11PAL: Political representation with reference to the role of individuals, political parties and pressure groups**

On 14 October 2023, an historic referendum was held in Australia regarding the reform proposal to include a First Nations Voice to Parliament and the executive. This was the culmination of a seventeen-month journey that began on 21 May 2022, when the newly appointed Prime Minister Anthony Albanese pledged to hold a referendum during the Australian Labor Party's first term to enshrine an indigenous Voice. The commitment was rooted in the principles outlined in the **Uluru Statement from the Heart** first shared in 2017.

The **Uluru Statement from the Heart** (the Statement) was an invitation from a group of First Nations people to non-Indigenous Australians which aimed to seek a Makarrata Commission and an indigenous Voice to Parliament. The Makarrata Commission was designed to undertake processes of agreement-making (Treaty) and truth-telling.[1]. The Makarrata Commission proved to be politically problematic with concerns being raised about the possible implications of a Treaty or truth-telling process. A constitutionally entrenched Aboriginal and Torres Strait Islander Voice emerged as the more politically palatable reform to emerge from the Uluru Statement.

The Albanese Government first announced the wording of the referendum question and the actual amendment on 23 March 2023. This was formally approved by parliament through the passage of the Constitutional Alteration (Aboriginal and Torres Strait Islander Voice) Bill 2023 (Cth). The wording of the question was deliberately straightforward so that it could be easily understood:

A Proposed Law: To alter the Constitution to recognise the First Peoples of Australia by establishing an Aboriginal and Torres Strait Islander Voice. Do you approve this proposed alteration?

Figure 2.1 — The commitment to introduce an indigenous Voice to Parliament was rooted in the principles outlined in the Uluru Statement from the Heart first shared in 2017.

The amendment itself would see the insertion of CHAPTER 10, SECTION 129 into the Commonwealth Constitution (Australia).

In recognition of Aboriginal and Torres Strait Islander peoples as the First Peoples of Australia

1. There shall be a body, to be called the Aboriginal and Torres Strait Islander Voice.
2. The Aboriginal and Torres Strait Islander Voice may make representations to the Parliament and the Executive Government of the Commonwealth on matters relating to Aboriginal and Torres Strait Islander peoples.
3. The Parliament shall, subject to this Constitution, have power to make laws with respect to matters relating to the Aboriginal and Torres Strait Islander Voice, including its composition, functions, powers and procedures.[2].

Traditionally, the case for a referendum is put to the voters through an official pamphlet as set out in section 11 of the *Referendum (Machinery Provisions Act) 1984*. The section provides that arguments for and against any proposed change be prepared by members of parliament who had voted for and against the Constitutional Amendment Bill and published in the official pamphlet. Initially, the government opposed the preparation of this pamphlet and argued that it was outdated, preferring instead to fund an education campaign. However, it ultimately went ahead with each side preparing a 2000-word essay outlining their case. The pamphlet was criticised as it was not independently fact checked.[3].

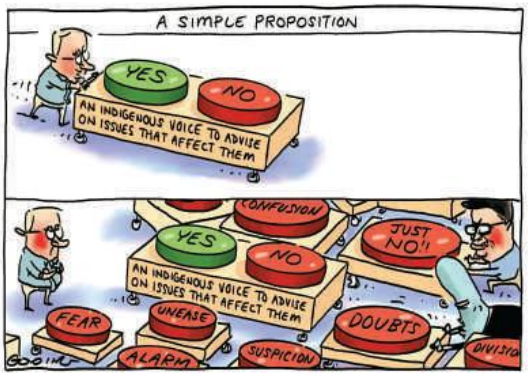
Politically, there were diverse stances on the Voice. The Greens supported the Voice despite a preference for truth telling and Treaty. As instigators of the referendum bill, the Labor Party showed unqualified support. The Liberal Party, however, whilst stating support for indigenous recognition in the Constitution, did not support the Voice proposal. Opposition leader Peter Dutton was vocal in his critique of the Albanese Government for the lack of information regarding the details of the Voice. Further, the party cited concern regarding constitutional risks raised by the reform proposal. Liberal voices were split with moderate backbenchers Bridget Archer and Andrew Bragg indicating their support for the Voice. Notably, internal divisions led to resignations within the Liberal Party, including former Indigenous Australian Minister Ken Wyatt who left the party altogether and Shadow Attorney General Julian Leeser who left the Ministry to sit on the back benchers. The National Party rejected the reform proposal based on concerns about regional inclusivity.

Figure 2.2 — Politically, there were diverse stances on the Voice.

The legal opinions on the proposed Voice to Parliament were divided. Critics raised concerns about the inclusion of "executive government" in CHAPTER 10, potentially encompassing the Governor-General, Prime Minister, senior ministers, and public servants. Anne Twomey dismissed these worries, asserting that in past decisions the High Court defined the executive as the Prime Minister and ministers, excluding statutory bodies. Constitutional law academics, including former superior court Justice David Jackson, worried about the potential for unintended consequences and inequality in citizenship. Concerns were also raised regarding the unlimited scope for representations to the Voice and the lack of parliamentary or executive oversight. On the contrary, legal experts like Greg Craven and Anne Twomey supported the proposal as a "safe and sensible" option.[4] The Law Council of Australia were in support of the proposal viewing it as a "modest step."[5]. In October 2023, 71 constitutional and public law scholars asserted its constitutionally sound nature, emphasizing the importance of indigenous input given historical gaps in recognition and constitutional provisions. They clarified that the Voice lacked veto power and would be subject to parliamentary regulation.

Pressure groups played a key role in during the Voice campaign. In support of the Voice, *Uphold and Recognise*, established in 2015 by lawyer Damien Freeman and Coalition spokesperson on Indigenous Affairs Julian Leeser, advocated for its recognition. The *Uluru Dialogue*, formed in 2017, comprised the creators of the **Uluru Statement of the Heart**, providing an indigenous perspective in support of the Voice. *From the Heart*, operating under Noel Pearson's Cape York Institute in North Queensland since 2020, was another indigenous group in support of the

Voice. Conversely, *Advance* (formerly Advance Australia), a conservative lobby group that opposed the Voice, launched a social media campaign entitled "The Voice is not enough," asserting that the Voice would be too weak and not a top priority for Indigenous Australians. Australians for Unity, led by Warren Mundine and Jacinta Nampijinpa Price, formed in May 2023, combined two separate No campaigns. The No campaign, focused particularly on newer platforms like TikTok. Their campaign emphasized fear with seven main themes and proved more successful in reaching younger voters. In contrast, the Yes campaign focused on 33 varied themes and utilised more traditional media platforms resulting in a more diluted message.[6]



■ Figure 2.3 — The No campaign emphasized fear with seven main themes.

In the lead-up to the referendum, the Yes vote initially held a substantial advantage in opinion polls, standing at 65% in August 2022. However, this support waned over time, plummeting to less than 38% by the time of the vote.[7]. Participation in the poll was high, with 89.92% of all eligible voters casting a vote but it was still slightly lower than the typical turnout in a federal election. This figure included six million pre-poll votes and an additional two million using postal ballots.[8]. Despite high participation, the referendum failed to secure both aspects of the double majority, failing to gain the support of a single state as well as failing to gain a majority of the overall population with over 60.06% voting No. The ACT was the only state/territory which voted in favour of the Voice with 60.8% voting in favour of the proposal.

Formal constitutional change is notoriously difficult in Australia with only eight out of 45 referenda being successful since 1901 Post-referendum analysis revealed that survey data indicated a majority of Australian voters would have supported symbolic recognition of indigenous people in the Constitution, but some voted 'no' due to concerns about division. The 'yes' vote tended to be higher in inner-city areas characterised by higher socioeconomic and educational backgrounds. Interestingly, those seats with the highest Yes vote were those formerly held by the Liberal Party but lost to Teal candidates in the 2022 federal election. For example, the Yes vote in Wentworth was a convincing 60.1%. Conversely, rural electorates in south and central Queensland, returned the lowest Yes vote. The state vote in Queensland reached only 31%.[9]. Regions with a notable proportion of Indigenous Australians tended to vote in favour of the proposal, with Wadeye registering the highest support at 92.1%.[10]

Following the failure of the Voice, supporters called for a week of silence to grieve and reflect on the meaning and significance of the result. The referendum was perceived as a setback for reconciliation in Australia, with some seeing the definitive No vote as a sign of entrenched racism in Australia. Former Deputy Prime Minister Barnaby Joyce noted a shift toward a new type of politics in Australia, characterised as somewhat 'Trumpian'. However, many commentators have attributed to the failure of the referendum to a lack of clarity regarding what was meant by the Voice and the failure of the Yes campaign to present a clear message about the benefits of the proposal for the nation. Much of this criticism was directed towards Prime Minister Albanese whose unwavering support for the Voice saw him lose political support. Despite this, in an address to the media on the night of the referendum, Albanese made the commitment that his Government would listen to indigenous people as "this is not only in the interests of Indigenous Australians. It is in the interest of all Australians to build a better future for our nation."[11]. The Voice referendum showed the complexity involved in political change at a national scale.

■ Figure 2.4 — Support for the referendum waned over time, plummeting to less than 38% by the time of the vote.

How do I use this?

- The liberal democratic principle of majority rule emphasises that decisions within a society should be made by the 'will of the majority', with the understanding that the preferences of the larger population should guide the formation of policies and laws. This concept underscores the idea that democratic governance derives its legitimacy from the consent and support of the majority of citizens.
- The liberal democratic principle of majority rule was demonstrated through the Voice referendum held in Australia on October 14, 2023. The referendum sought to enshrine an Aboriginal and Torres Strait Islander Voice to Parliament in the Constitution, allowing the majority of citizens to determine whether or not to accept the proposed constitutional alteration. However, despite high participation and initially favourable opinion polls, the referendum failed to secure the required double majority, with over 60.06% of voters ultimately rejecting the proposal.
- The liberal democratic principle of political participation emphasises the inclusion and engagement of citizens in the decision-making processes of a government. It advocates for a system where individuals have the right to actively participate in elections, express their opinions, and contribute to public discourse, fostering a society where diverse voices are heard and considered in the shaping of policies and governance.
- The Voice referendum in Australia, upheld the principle of political participation by providing citizens with a direct opportunity to shape the country's constitutional landscape. The historic referendum, allowed voters to express their views on establishing an Aboriginal and Torres Strait Islander Voice to Parliament, emphasizing the liberal democratic value of inclusive decision-making. The comprehensive public discourse, diverse political stances, and high voter turnout of 89.92% reflected a robust exercise of political participation, even though the referendum ultimately failed to secure the required double majority for constitutional change.
- In Australia, the passage of normal legislation involves the proposal of a bill by a member of Parliament, which undergoes thorough examination, debate, and scrutiny in both houses—the House of Representatives and the Senate. A bill must be approved by a majority in both houses and receive royal assent from the Governor-General to become law. In contrast, a referendum bill which is designed to amend the Australian Constitution, requires a more elaborate process. After approval by both houses, the proposed constitutional amendment is put to a national vote in a referendum, where it must achieve a double majority—approval from a majority of voters nationwide and in a majority of states—to be successfully enacted.
- Pressure groups played a crucial role in shaping the discourse around the Voice referendum in Australia. Advocacy groups like *Uphold and Recognise*, the *Uluru Dialogue*, and *From the Heart* actively supported the Indigenous Voice, promoting its recognition in the constitutional reform. Conversely, conservative groups such as *Advance* (formerly Advance Australia) led a No campaign, utilizing social media platforms to emphasize concerns that the proposed Voice would be too weak and not a priority for Indigenous Australians. The engagement of these pressure groups highlighted the diverse perspectives within Australian society, influencing public opinion and contributing to the complex political landscape surrounding the referendum.
- Political parties played a pivotal role in shaping the debate surrounding the Voice referendum in Australia. The Australian Labor Party, led by Prime Minister Anthony Albanese, took a proactive stance by instigating the referendum bill, aligning with the principles outlined in the Uluru Statement from the Heart. In contrast, the Liberal Party whilst stating support for indigenous recognition in the Constitution did not support the Voice proposal citing concern surrounding the constitutional risks of the proposal. The lack of bipartisan support for the Voice was a key factor contributing to the failure of the proposal.
- In the context of the Voice referendum, individuals like Senator Lidia Thorpe played a crucial role by expressing their perspectives and influencing public discourse. Thorpe's call for the referendum to be called off, highlights her agency in shaping the electoral process, as she argued against what she perceived as a symbolic and insufficient Indigenous Voice proposal. Her advocacy for a treaty and other comprehensive measures demonstrates how individuals, particularly those with significant platforms, have the ability to shape the political landscape.

Source Analysis

Unit 1

1. Outline what is meant by the term 'referendum'. (2 marks)
2. With reference to the Source discuss in your own words, **two** key factors underpinning the success of the No campaign in the Voice referendum. (4 marks)
3. Discuss **two** specific factors which affected the outcome of the Voice referendum. (6 marks)
4. Evaluate the extent to which pressure groups were able to influence the electoral process during the Voice referendum. (8 marks)

Unit 2

5. Political parties exert greater influence over the electoral process than pressure groups. Evaluate this claim. (8 marks)

Notes

1 Transcript of incoming Prime Minister Anthony Albanese's full speech after Labor wins federal election, 21 May 2022 https://www.abc.net.au/news/2022-05-22/anthony-albanese-acceptance-speech-full-transcript/101088736

2 Why is Australia holding a referendum in 2023? https://humanrights.gov.au/our-work/aboriginal-and-torres-strait-islander-social-justice/referendums-and-constitutional-change

3 Referendum (Machinery Provisions) Amendment Bill 2022, 22 December 2022 https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/bd/bd2223a/23bd045#:~:text=at%20a%20glance-,The%20Referendum%20(Machinery%20Provisions)%20Amendment%20Bill%202022%20(the%20Bill,be%20conducted%20in%20the%202023

4 Grattan on Friday: A 'No' vote in the Voice referendum would put a serious dent in Australia's image abroad, 23 March 2023 https://theconversation.com/grattan-on-friday-a-no-vote-in-the-voice-referendum-would-put-a-serious-dent-in-australias-image-abroad-201157

5 Voice to Parliament is legally safe, 25 September 2023 https://lawcouncil.au/media/media-releases/voice-to-parliament-is-legally-safe

6 No campaign accused of misrepresenting First Nations commentators in youth-targeted advertisements, 2 June 2023, https://www.abc.net.au/news/2023-06-02/fact-check-fair-australia-not-enough-no-campaign-quotes/102422750

7 Support for Indigenous Voice to Australian Parliament Falls, 4 September 2023, https://www.statista.com/chart/30570/support-for-the-voice-in-australia/

8 Australians reject Indigenous recognition via Voice to Parliament, referendum set for defeat, 14 October 2023 https://www.abc.net.au/news/2023-10-14/voters-reject-indigeneous-voice-to-parliament-referendum/102974522

9 Five insights from the referendum: Liberals win the battle but lose the war, 15 October 2023 https://www.theguardian.com/australia-news/2023/oct/15/five-insights-from-the-referendum-liberals-win-the-battle-but-lose-the-war

10 Australian voice referendum live results, https://www.theguardian.com/australia-news/ng-interactive/2023/oct/17/live-voice-referendum-results-aec-2023-poll-tracker-by-electorate-state-australia-yes-no-vote-polls-percentage-the-australian-indigenous-voice-to-parliament-who-won-result-winner-map-counts

11 Anthony Albanese says vote not 'end of the road' after voice referendum fails, 14 October 2023 https://www.theguardian.com/australia-news/video/2023/oct/14/anthony-albanese-says-vote-not-end-of-the-road-after-voice-referendum-fails-video

Sources

Figure 2.1 Matt Golding, 2023 https://www.smh.com.au/national/nsw/simple-humanity-mundine-overlooks-the-true-nature-of-the-voice-20230420-p5d1vy.html

Figure 2.2 Matt Golding, 2023 https://www.smh.com.au/national/nsw/yes-it-s-time-to-speak-up-for-the-voice-20230526-p5dbgr.html

Figure 2.3 Matt Golding, 2023, https://www.facebook.com/theageAustralia/photos/a.131409591421/10160359340846422/?type=3

Figure 2.4 Matt Golding, 2023, https://www.smh.com.au/national/nsw/what-is-it-with-australian-voters-indigenous-voice-may-be-silenced-while-others-talk-20230613-p5dg1a.html

Case Study 3

The Religious Discrimination Bills

Unit 1

- **11PAL: Operating principles of a liberal democracy – majority rule, political participation**
- **11PAL: Structure of the Australian political system – separation of powers, Westminster conventions of responsible parliamentary government**
- **11 PAL: Roles of the legislative and executive branches of government**
- **11PAL: Legislative processes at the Commonwealth level**
- **11PAL: At least one contemporary issue (the last three years) involving the legislative process**

Unit 2

- **11PAL: Political representation with reference to the roles of individuals, political parties, and pressure groups**

Tensions between religious and secular (i.e., non-religious) freedoms have occasionally surfaced in Australian politics.

In 2017, the Commonwealth Parliament passed the Marriage Amendment (Definition and Religious Freedoms) Bill, which altered the definition of marriage to allow for unions between two people regardless of their gender. This followed the results of the Australian Marriage Law Postal Survey, in which 61.6% of Australian participants expressed support for legislative change[1].

However, a sizeable 'No' vote emboldened conservative politicians and religious pressure groups, who sought to ensure that safeguards for religious freedoms were enshrined in legislation. As put by the Coalition for Marriage, a leading force in the 'No' campaign:

> *'…the 'Yes' campaign assured Australians that a change in the law would have no consequences for them; it is now time to ensure that proper protections for parental rights, freedom of speech and belief are in place.'*[2]

While many commentators acknowledged gaps in the patchwork state and commonwealth protections against religious discrimination, they expressed reservations about attaching safeguards to a bill that focused on marriage equality[3].

The Law Council of Australia argued that this would 'wind back' Australian anti-discrimination laws, enabling unacceptable instances of discrimination against the LGBTQI+ community.[4] Likewise, Professor George Williams suggested that a statutory Bill of Rights was better suited to fulfilling Australia's human rights obligations.[5]

These disagreements highlighted two complications faced by attempts to legislate protections against religious discrimination:

- Religious and secular freedoms may conflict. Religious organisations, for instance, may refuse to employ those that do not demonstrate values consistent with their beliefs. By secular standards, this could be considered discrimination, particularly if the applicant is refused employment on the basis of a protected attribute (e.g., sexual orientation, marital status).

- Safeguards for religious freedoms may require the exemption of individuals and organisations from anti-discrimination legislation. For example, under s37 of the *Sex Discrimination Act 1984 (Cth.)*, religious bodies may discriminate on the basis of sex and/or sexual orientation, so long as this is necessary to avoid infringing on their "doctrines, tenets or beliefs".

Acknowledging the complexity of anti-discrimination reform and seeking a resolution to the issue or marriage equality, Prime Minister Malcolm Turnbull opted to delay legislation. Instead, his government established an Expert Panel, chaired by the Hon. Philip Ruddock, to identify opportunities to better protect the freedom of religion under Australian law.

A Draft Religious Discrimination Package

The Expert Panel into Religious Freedom was established in November 2017. It received 15,620 public submissions and consulted 180 stakeholders, including not-for-profit organisations (e.g., Salvation Army), religious bodies (e.g., Catholic Diocese of Perth), government departments (e.g., Commonwealth Department of Education) and pressure groups (e.g., Equality Australia).

The Panel reported to the Turnbull government in May 2018. While it acknowledged a "high degree" of religious freedom in Australia, supported by protections under state and commonwealth legislation, it noted the "absence of a comprehensive law dealing with freedom of religion." Consequently, the Panel recommended the government make "legislative amendments" to clarify the rights and obligations of religious organisations and "enact a Religious Discrimination Act" to prohibit discrimination on the basis of religious belief.[6]

Figure 3.1 — Religious Discrimination Bill – Second Draft 11 December, 2019

The majority of the Panel's recommendations were adopted by the Morrison government, which committed to introducing legislation after the 2019 election[7]. After securing a two-seat majority in the House of Representatives, the Attorney-General's Department drafted three bills:

1. The Religious Discrimination Bill 2019 – to prohibit discrimination on the grounds of religious belief and create a new office for the Freedom of Religion Commissioner in the Australian Human Rights Commission.
2. The Religious Discrimination (Consequential Amendments) Bill 2019 – to amend existing legislation, for example: the *Fair Work Act 2009*, to support the implementation of the primary bill.
3. The Human Rights Legislation Amendment (Freedom of Religion) Bill 2019 – to amend anti-discrimination legislation to allow exemptions for some discriminatory acts supported by religious beliefs.

The drafts were twice released for public comment between August 2019 – October 2019 and December 2019 – January 2020. The Department received 13,000 submissions, enabling the government to publicise the Religious Discrimination Package and adjust the bills in response to public feedback[8].

The Legislative Process

The bills were introduced into the House of Representatives on the 25 November 2021. The second reading was moved by Prime Minister Scott Morrison, who delivered a speech explaining the purpose and merits of the bills:

> *"In our secular society, every religion and belief should have the same rights and freedoms. That means the faith of any religion, as well as no religion, shouldn't override the rights of others in a free society."*[9]

The second reading debate was then adjourned to allow for scrutiny by parliamentary committees, including the Senate Legal and Constitutional Affairs Committee and the Parliamentary Joint Committee on Human Rights. Following 21 hours of public hearings, and more than 400 public submissions, both recommended that the Religious Discrimination Bills be passed with minor amendments[10].

The Liberal-National Coalition (LNP) and the Australian Labor Party (ALP) both endorsed protections against religious discrimination,

having embedded this in their national platforms. With in-principle support from both major parties, the Religious Discrimination Package secured a second reading – 97 ayes to 6 noes[11].

However, opposition and crossbench Members remained opposed to anti-discrimination exemptions granted on the basis of religious belief. During the consideration in detail debate, they sought to amend these provisions:

- Shadow Attorney General Mark Dreyfus moved an amendment to outlaw religious vilification, with broad exceptions for reasonable conduct undertaken in the public interest (e.g., artistic works, research, reporting). This reflected a commitment in the ALP's 2021 National Platform; and
- Centre Alliance MHR Rebekha Sharkie moved an amendment to prohibit educational institutions from discriminating against students on the grounds of their sexual orientation or gender identity, regardless of their religious beliefs. This reflected her personal concerns regarding "vulnerable members of the community including young people and people living with disability"[12].

As a general rule, amendments moved in the House are unlikely to pass without the support of the government. According to Westminster convention, they control a majority of seats and, as such, can determine the outcome of legislative votes. Unsurprisingly, Dreyfus' amendment was unsuccessful (62 to 61 votes).

However, the Morrison government's narrow majority allowed for the passage of Sharkie's amendment. With a one-seat majority in the House, each division required a cohesive, united response from Coalition members. Yet, the Morrison government failed to address concerns expressed by moderate Liberal backbenchers about the impact of anti-discrimination exemptions on LGBTQI+ students. According to a Cabinet leak published in *The Australian*, several Ministers refused to negotiate, for example: offering amendments, in order to secure legislative success[13]. This created an opportunity for five Liberal backbenchers - Fiona Martin, Bridget Archer, Trent Zimmerman, Katie Allen, and Dave Sharma – to cross the floor and vote with Labor and the crossbench to support Sharkie's amendment (65 to 59 votes). Consequently, the Human Rights Legislation Amendment Bill 2022 passed the House of Representatives in a form opposed by the government.

The Fallout

Following their passage through the House of Representatives, the Religious Discrimination Package was withdrawn from the Senate.

According to Senate Standing Order 111(5), bills received from the House of Representatives in the final third of a sitting period are automatically heard in the next sitting period. This is designed to prevent a 'flood' of legislation. However, bills can be exempted from this with the agreement of the Senate.

With the consent of Coalition Senators, the Religious Discrimination Package was not exempted from the cut-off order[14]. As a result, it was not debated prior to the 2022 Australian Federal Election. This followed criticism from stakeholders, such as the Australian Christian Lobby, who withdrew support for the bills claiming that:

> *"[Exemptions from anti-discrimination laws] enabled faith-based schools to teach their religion and conduct their schools according to their faith values. The loss of this protection would outweigh any benefits that could be obtained by the Religious Discrimination Bill."*[15]

How Can I Use This?

- According to Westminster convention, government is formed by the party or coalition that controls a majority of seats in the House of Representatives. This facilitates majority rule; it allows the government to 'dominate' the lower house and control the legislative agenda.
- The Prime Minister and Cabinet are responsible for the formation of policy and oversee the passage of proposed legislation. In the 46th Parliament, for instance, all proposed laws were introduced by government ministers[16]. This reflects the executive's dominance in the House of Representatives and access to superior resources (e.g., the Australian Public Service).
  - The government has exclusive access to the Office of Parliamentary Counsel, a government agency responsible for drafting proposed legislation. Between 2021-2022, it was comprised of 110 employees that drafted 464 legislative instruments and 110 bills, including the *Religious Discrimination Bill 2022*[17].
- In order to pass legislation, the government must secure majority support in the Senate

and House of Representatives. Therefore, the strength of the executive is heavily influenced by the composition of the legislature. A narrow House majority empowered disgruntled backbenchers, for example: Archer, to cross the floor and amend the Religious Discrimination Package against the will of the Morrison government. Since they lacked a majority in the Senate, the government was discouraged from proceeding further. Ultimately, parliamentary scrutiny forced the executive to withdraw their proposed legislation.

- The passage of a bill opposed by the government through the House of Representatives is rare. Government MPs are unlikely to vote against their party – between 1950 and 2019, only 1.6% of all divisions in the House involved members crossing the floor[18]. Nevertheless, a narrow House majority demands government cohesion. The potential for backbench rebellion may allow representations to be made to Cabinet via party room meetings.
- One role of the Commonwealth Parliament is to deliberate and pass legislation. The Religious Discrimination Package included three bills designed to fulfil an election commitment of the Morrison government. One sought to introduce safeguards against religious discrimination, while the others amended existing statutes, for example: the *Sex Discrimination Act 1984*, to support this. The related bills were dealt with simultaneously.
- Committee hearings, along with an extensive second reading debate, allowed the House of Representatives to consider a broad range of perspectives. This was critical in evaluating the competing freedoms of religious and non-religious Australians. The success of the Sharkie amendment also demonstrates the capacity of the House of Representatives to hold the government to account for its legislation. However, the failure of the Commonwealth Parliament to negotiate the passage of anti-discrimination provisions that received broad electoral support suggests that partisan (i.e., party-based) representation took precedence over securing a representative outcome.
- As organisations with direct influence over the legislative process, political parties provide the most effective means of political representation. The Liberal Party of Australia sought to translate the views of religious constituents into legislative protections for religious freedoms. However, sectional pressure groups, like the Australian Christian Lobby, were also highly influential in the drafting the Religious Discrimination Package, along with its eventual withdrawal. This demonstrates the capacity of pressure groups to engage in campaigns and make effective representations to critical decision makers.
- Liberal backbenchers sought to act as delegates, translating the views of their constituents into concrete action, that is: crossing the floor. This highlights the capacity of individuals to capitalise on positions of power in order to provide effective representation. Prominent Liberals, such as Peter Dutton, criticised the backbenchers for departing from the party line[19]. However, with the exception of Bridget Archer, all lost their seats to Labor or Teal candidates in the 2022 Federal Election.

Source Analysis

Unit 1

1. Outline what is meant by 'consideration in detail'. (2 marks)
2. With reference to the source, and in your own words, discuss **two** challenges faced by the government throughout the legislative process. (4 marks)
3. With reference to examples, discuss **two** purposes of statutes created by the Commonwealth Parliament. (6 marks)
4. Evaluate the impact of **one** contemporary issue involving the legislative process on the Commonwealth Parliament's ability to fulfil its roles. (8 marks)

Unit 2

1. Outline what is meant by the term 'pressure group'. (2 marks)
2. With reference to the source, and in your own words, discuss **two** influences on the Religious Discrimination Bills 2022. (4 marks)
3. Discuss **two** ways that individuals can contribute to political representation in Australia. (6 marks)
4. Evaluate the extent to which political parties allow for more effective political representation than pressure groups in Australia. (8 marks)

Notes

1 Some 79.5% of Australians participated, with the results publicised on the ABS website. See: Australian Bureau of Statistics. (2017). Australian Marriage Law Postal Survey 2017. Retrieved from https://bit.ly/3mKg6lW

2 As referenced in Neilsen, M.A., (2017) 'Marriage Amendment (Definition and Religious Freedoms) Bill 2017', *Bills Digest No. 54,* 2017-2018, https://bit.ly/41d0g2c

3 For a simple overview of legal protections against religious discrimination in Australian jurisdictions, see: Das, S. (2019) 'Do Australians Lack Protection Against Religious Discrimination', *ABC Fact Check,* https://ab.co/2IOL6Bk

4 Law Council of Australia (2017) 'New Bill an Extraordinary Winding Back of Anti-Discrimination Laws Under Cover of Same-Sex Marriage', Retrieved from: https://bit.ly/3UKIrVx

5 Williams, G. (2017) 'Australian Laws Fall Short When It Comes to Protecting Religious Liberty', *Sydney Morning Herald,* https://bit.ly/3GPTIDM

6 Expert Panel into Religious Freedom (2018) 'Religious Freedom Review: Report of the Expert Panel', Retrieved from: https://bit.ly/3ok0VAb, pp. 4-5, 104.

7 Attorney-General's Department (2018) 'Australian Government Response to the Religious Freedom Review', Retrieved from: https://bit.ly/41E4zU3. The government response departed from the Panel's recommendations in some places – e.g., establishing a standalone Freedom of Religion Commissioner (Recommendation 19).

8 For instance, the government removed clauses that prohibited employers from establishing codes of conduct that prevented employees from expressing religious beliefs. This was originally inserted in response to *Folau v Rugby Australia Limited [2019].*

9 Commonwealth, *Parliamentary Debates,* House of Representatives, 25 November 2021 (Scott Morrison, Prime Minister). Retrieved from: https://bit.ly/3UHUuDg

10 Parliamentary Joint Committee on Human Rights (2022) 'Inquiry Report: Religious Discrimination Bill 2021 and Related Bills'. Retrieved from: https://bit.ly/41eCByr; Senate Legal and Constitutional Affairs Legislation Committee (2022) 'Inquiry Report Religious Discrimination Bill 2021 and Related Bills'. Retrieved from: https://bit.ly/3KlyHqh

11 Parliament of Australia (2023) 'Religious Discrimination Bill 2021', *House of Representatives Chamber and Business Documents: Divisions.* Retrieved from: https://bit.ly/3KKuvXg

12 Butler, J. (2022) 'MP Rebekha Sharkie Threatens Legal Action Against Australian Christian Lobby Over Election Flyers', *The Guardian.* Retrieved from: https://bit.ly/3mHUVRj

13 van Onselen, P. (2022), 'No Deal: Cabinet Kills PM's Trade-Off to Save Religious Discrimination Bill', *The Australian.* Retrieved from: https://bit.ly/3MMU3Wg

14 Commonwealth, *Parliamentary Debates,* Senate, 10 February 2022, p. 41. Retrieved from: https://bit.ly/3GRhcTN

15 Francis, W. (2022) 'Rushed Amendment Has Gutted the Religious Discrimination Bill Package', *Australian Christian Lobby.* Retrieved from: https://bit.ly/3A8iN3l

16 Parliament of Australia (2023) 'House of Representatives: Private Members' Bills', *House of Representative Statistics.* Retrieved from: https://bit.ly/3ooa4YE

17 Office of Parliamentary Counsel (2022) *Annual Report and Financial Statements of the Office of Parliamentary Counsel, 2021-2022,* Australian Government. Retrieved from: https://bit.ly/3mLRPMb

18 McKeown, D., Lundie, R., (2020) 'Crossing the Floor in the Federal Parliament 1950 – 2019, *Department of Parliamentary Services.* Retrieved from: https://bit.ly/40j7pMX

19 Brown, G. (2022) 'Conservatives Lash Rebel Liberals Over Religious Bill', *The Australian.* Retrieved from: https://bit.ly/3GUmOMN

Sources

Figure 3.1 https://www.facebook.com/PoliticalCartoonsAustralia/posts/matt-golding/2509621445759257/

Case Study 4

National Cabinet & Electricity Prices

Unit 1

- **11PAL: Essential to the understanding of democracy and the rule of law is knowledge of federalism and the division of powers.**
- **11PAL: Structure of the Australian political system and the Australian legal system, including federalism**
- **11PAL: Legislative processes at the Commonwealth levels**
- **11PAL: At least one contemporary issue (the last three years) involving the legislative process.**

Unit 2

- **11PAL: Political representation with reference to the roles of individuals, political parties, and pressure groups**

The National Cabinet is an intergovernmental forum for Australia's First Ministers – the Commonwealth Prime Minister, State Premiers and Territory Chief Ministers.

It facilitates collaboration between State and Commonwealth Governments on issues of national significance. Its priorities include reforms in health, housing, disability support and firearm regulation.[1]

Formed in response to the COVID-19 pandemic, National Cabinet was designed to promote cooperative federalism, ensuring both levels of government were actively involved in the development of policy. According to the Victorian Government, collaboration would allow for the development of "common goals and principles" while also "recognising that jurisdictions retain sovereignty" and may "implement policies according to local circumstances."[2]

However, not all were convinced of its merits. Alan Fenna, Professor of Politics at Curtin University, argued that National Cabinet was a temporary 'rebranding' of Australian federalism. As the pandemic faded, he predicted that the "messiness, complexity and difficulty of... shared governance" would test the willingness of State and Commonwealth Governments to compromise.[3]

Why is compromise between State and Commonwealth governments necessary? What impact does this have on the Australian political system?

Contemporary Example – The Australian Energy Crisis

In Australia, electricity production relies on the burning of coal and natural gas, and the capture of renewable energy (for example, solar thermal energy). Electricity is generated at power plants, sold to retailers (for example, Synergy, Alinta Energy) and purchased by consumers.

By mid-2022, gas and electricity prices had reached record highs. This was due to:

- A global shortage in coal and gas resulting from the Russian invasion of Ukraine in February 2022;

- An increase in Australian coal and gas exports, largely triggered by higher coal and gas prices; and
- A decrease in output from outdated coal-fired power stations due to unplanned outages and disruptions in coal supply chains.

In July, the price of electricity sold to retailers in the NEM was $360 per megawatt hour (MWh), up from $140 per MWh in 2021. Likewise, monthly gas prices rose from $11 per gigajoule (GJ) in 2021 to $40 per GJ in 2022.[4]

Rising energy prices threatened a promise made by the newly elected Albanese government – to reduce "household power bills by $275 in 2025."[5] The Liberal-National Opposition repeatedly labelled this a "broken promise." [6]

However, solutions were complicated by federalism. In Australia, legislative power is divided between state and commonwealth governments in a written constitution. The authority to legislate on matters relating to energy (for example, resource management, infrastructure) is vested in the states. It is a residual power – one note featured in the Commonwealth Constitution but protected under SECTION 107.

Therefore, any action taken by the Albanese government to curb electricity prices would require the cooperation of the states. However, several states, including NSW and Queensland, had made substantial investments in coal, and stood to benefit from higher prices.[7]

Energising Cooperative Federalism

Since the 1990s, most states have progressively connected their electricity networks with the aim of securing a dependable power supply and establishing standard prices. This has resulted in the National Electricity Market (NEM), which covers more than 40,000 transmission lines and supplies 80% of Australia's electricity.[8]

With interconnected energy sectors, states have sought to develop a single set of rules that would allow for more competition between retailers. This would break the monopoly of state-owned electricity suppliers, improve efficiency and lower prices. These rules were first debated at the Council of Australian Governments (COAG).

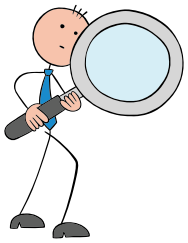
Formed in 1992, this forum operated in a similar manner to National Cabinet. First Ministers, and other relevant Ministers (that is, COAG Energy Council), would meet to develop collaborative reforms. COAG negotiations resulted in several states passing uniform legislation under the National Electricity Market Legislation Agreement. This was followed by the creation of national bodies, such as the Australian Energy Market Commission, which were responsible for making and enforcing rules.

In 2022, the COAG Energy Council was replaced by the Energy and Climate Change Ministerial Council (ECMC), which operates under National Cabinet. It is made up of ministers from the commonwealth and each state and territory with responsibility in these areas of policy. Since the national electricity market is overseen by the ECMC, it represented an ideal forum for the Albanese government to secure state support in lowering electricity prices. However, this would come at a financial cost.

Coercion or Cooperation?

Australian federalism is defined by a vertical fiscal imbalance (VFI). In other words:

- States have spending responsibilities (for example, education, transport, health) that exceed the money that they collect through tax (for example, payroll tax, stamp duty).
- The Commonwealth collects more money (for example, via income tax) than it needs to cover its spending responsibilities.



This idea will be explored further in Unit 3. However, it is important to note that New South Wales and Queensland sought compensation from the commonwealth before agreeing to a limit on coal and gas prices. After all, this would limit the revenue generated by electricity providers in each state.

According to Anne Kallies, the Albanese government could have refused. It could have attempted to pass energy laws under another head of power provided for in SECTION 51 of the Commonwealth Constitution.[9]

In *Commonwealth v Tasmania [1983]*, the Tasmanian Dam Case, the High Court upheld a Commonwealth law that prevented Tasmania's Hydro-Electric Commission from damming the Gordon River. They partly relied on SECTION 51(xx), the power to make laws with respect to "trading or financial corporations formed within the limits of the commonwealth." If electricity generators were considered corporations, then this opened the door to commonwealth energy legislation.

Figure 4.1 — Australian Federal Energy Minister Chris Bowen speaks to the media during an Energy and Climate Change Ministerial Council press conference in Melbourne in July 2024.

However, instead, the Albanese government negotiated an Energy Price Relief Plan with state and territory governments through National Cabinet:

- The NSW and Queensland Governments would introduce a temporary limit on coal prices ($125 per tonne) while the Commonwealth contributed to their costs.
- The Commonwealth would establish a $1.5 billion fund through which households could reduce their electricity bills. However, state and territory governments would match Commonwealth funding "dollar-for-dollar."[10]
- Financial assistance would be provided to state and territory governments through a conditional or 'tied' grant.

Energising Law-Making Processes

The Energy Price Relief Plan was agreed to on 9 December 2022. Though the parliament was in recess due to the Christmas break, the Albanese government advised the Governor-General to recall it under SECTION 5 of the Constitution.

On 15 December, the Albanese government introduced the Treasury Laws Amendment (Energy Price Relief Plan) Bill 2022 into the House of Representatives. A legislative change was required to establish a cap on gas prices and authorise payment to the States.

Since the Labor government enjoyed a one-seat majority in the House of Representatives, it suspended Standing Orders to guillotine debate. In other words, it suspended parliamentary rules to impose time limits on members – 10 minutes for the treasurer and first opposition speaker and 5 minutes for all other members.

Members of the House of Representatives sought to scrutinise the government. Some, such as Leader of the Opposition Peter Dutton, attempted to amend the government's second reading motion, criticising the rushed legislation for showing "contempt" for parliamentary processes. Others, such as Independent Kylea Tink, moved amendments to the bill, seeking to extend the temporary limit on gas prices. However, these were defeated. Ultimately, the bill easily passed the House of Representatives – 85 ayes to 41 noes.[11]

In the Senate, Manager of Government Business Katie Gallagher moved that a three-hour time limit be imposed on debate.12 Amendments were moved by the opposition and Pauline Hanson's One Nation but defeated due to crossbench support by the Australian Greens, Jacqui Lambie Network and David Pocock. In turn, the Energy Price Relief Bill passed the Senate – 28 ayes to 22 noes. Having passed through both Houses of Parliament, the *Treasury Laws Amendment (Energy Price Relief Plan) Act 2023* was given Royal Assent on 16 December 2022.

However, its passage initiated legislative processes at a state and territory level. The NSW Parliament, for instance, amended the Energy and Utilities Administration Act 1987, empowering the Perrottet government to declare a 'coal market energy' and establish temporary limits on coal prices. The Premier did so on 22 December 2022, creating delegated legislation.

How Can I Use This?

- Australia has a federal system where law-making powers and responsibilities are divided between Commonwealth, State and Territory Governments.
- This is determined by a written constitution that contains a division of powers. Exclusive powers are those that can only be exercised by the Commonwealth Parliament (for example, Section 90), while concurrent powers can be exercised by State and Commonwealth Parliaments (for example, SECTION 51xix – marriage). If state and commonwealth laws conflict, then state laws will be deemed invalid to the extent of the inconsistency (that is, SECTION 109).
- Law-making responsibilities that are not set out in the Constitution are deemed to be the residual powers of the states (Section 107). These powers are essential for the delivery of critical services, such as electricity, health, education, and transport.
- As in the case of electricity prices, State and Commonwealth Governments often cooperate in the development and implementation of policy. Cooperative federalism provides states with access to federal financial assistance while, simultaneously, enabling the commonwealth to bypass its inability to legislate.
- Intergovernmental forums, such as COAG and the National Cabinet, facilitate cooperative federalism. However, this is not a guaranteed outcome. Commonwealth and State Governments may seek to use financial and legislative powers as leverage to influence political decision-making.
- The passage of the *Energy Price Relief Plan Bill* also highlights a contemporary issue involving the legislative process – the rapid passage of legislation and its potential to undermine the functions of the Commonwealth Parliament.
  - Having secured an absolute majority in the House of Representatives, the Albanese government used guillotine motions to shorten debate.
  - Along with gag motions – which move that a member be no longer heard – these elements of the Standing Orders improve the efficiency of the legislative process. However, since they are largely used by governing parties, they undermine the ability of members to represent their constituents in legislative debates and scrutinise government decisions.
  - The bill was before the parliament for seven hours. Some members (for example, Peter Dutton, Monique Ryan) expressed frustration with the abridged legislative process, having only been provided with a draft of the bill 48 hours beforehand. Others, namely Prime Minister Anthony Albanese and Treasurer Jim Chalmers, celebrated the opportunity to implement legislation that assisted in the fulfilment of an election promise.

Source Analysis

Unit 1

1. Outline what is meant by 'cooperative federalism'. (2 marks)
2. With reference to the source, and in your own words, discuss **two** reasons for the formation of National Cabinet in 2020. (4 marks)
3. Discuss **two** ways in which federalism influences the types of laws made at a Commonwealth level. (6 marks)
4. Evaluate **two** impacts of the American federal system on the structure of the political and legal system in Australia. (8 marks)

Unit 2

5. Outline what is meant by an 'individual' in the Commonwealth Parliament? (2 marks)
6. With reference to the source, and in your own words, discuss **two** influences on the Albanese government's Energy Price Relief bill. (4 marks)
7. Discuss **two** ways that States can be represented in Commonwealth law and decision-making processes. (6 marks)
8. Evaluate the extent to which partisan representation is dominant within the Commonwealth Parliament. (8 marks)

Notes

1 Department of Prime Minister and Cabinet (2022) *National Cabinet Priorities*. Australian Government. Retrieved September 2023 from: https://bit.ly/48EkTbu

2 Department of Premier and Cabinet (2020) 'Victorian Government Submission to the Senate Select Committee on COVID-19', Victorian Government, Melbourne, p. 3

3 Fenna, A., (2023) 'The Revival of Australian Federalism? Trends and Developments in Commonwealth-State Relations' in Podger, A., Chan, H., Su, T., Wanna, J., (eds.) *Dilemmas in Public Management in Greater China and Australia*, Australian National University Press, Canberra, p. 134

4 Reserve Bank of Australia (2022) 'Statement on Monetary Policy – August 2022', p. 53, https://bit.ly/45f1Z8l

5 Australian Labor Party (2021) *Powering Australia: Labor's Plan to Create Jobs, Cut Power Bills and Reduce Emissions by Boosting Renewable Energy,* Canberra, ALP, p. 4. Retrieved from: https://bit.ly/48vgibL

6 Achenza, M. (2022) 'Peter Dutton Savages Labor Government for Breaking Public Trust Over Energy Price Promise', *NCA Newswire,* https://bit.ly/3LJ9jIG ; O'Brien, T., (2022) 'Labor Doubles Down on Broken Promise', Liberal Party of Australia. Retrieved from: https://bit.ly/3rwWgNn

7 Coorey, P. (2022) 'Power Price Caps Mired in Confusion Over Attempts to Include Coal', *Australian Financial Review*. Retrieved from: https://bit.ly/48BdIGw

8 Western Australia and the Northern Territory are not connected to the NEM due to their geographical isolation and unique energy resources/needs. Department of Climate Change, Energy, the Environment and Water (2023) 'National Electricity Market', Australian Government. Retrieved from: https://bit.ly/46c5AoX

9 This is further explored in Kallies, A., (2021) 'The Australian Energy Transition as a Federalism Challenge: (Un)cooperative Energy Federalism?', *Transnational Environmental Law,* 10(2).

10 Prime Minister of Australia (2022), 'Media Release: Energy Price Relief Plan', 9th December 2022. Retrieved from: https://www.pm.gov.au/media/energy-price-relief-plan

11 Commonwealth. *Parliamentary Debates*. House of Representatives. 15 December 2022, p. 422. Retrieved from: https://bit.ly/3Q1vPZu

12 Commonwealth. *Parliamentary Debates*. Senate. 15 December 2022, p. 2824. Retrieved: https://bit.ly/48x8Dtz

Sources

Figure 4.1 http://photos.aap.com.au

Case Study 5

Civil trials - national defamation law reform

Unit 1

- **11PAL Types of laws made by courts (common law)**
- **11PAL At least one contemporary issue (the last three years) involving the judicial process.**

Unit 2

- **11PAL Strengths and weaknesses of Western Australia's adversarial civil law processes**
- **11PAL A recently implemented or proposed reform (the last ten years) to the civil law process in Western Australia**

The tort of defamation evolved through English common law and is considered a 'civil wrong'. Defamation relates to the communication of untrue material that causes serious reputational harm to a person. The law of defamation must also be balanced with the right to freedom of speech.

In 2005, the Attorneys-General of all states and territories in Australia came together to draft the Model Defamation Provisions, which created a nationally consistent set of principles for defamation law across the country. Defamation law is regulated at state/territory level, and Western Australia then passed the *Defamation Act 2005* (WA), enshrining these nationally agreed upon principles into law.[1]

Figure 5.1 — Attorney General of Western Australia John Quigley opens the Council of Attorneys- General meeting in Perth, June 2018.

In 2018, the Council of Attorneys-General reviewed the Model Defamation Provisions. This Council is comprised of Attorneys-General from all states and territories in Australia along with the New Zealand Chief Minister for Justice.[2] The review was prompted by then NSW Attorney General Mark Speakman, who stated,

> *"Social media has resulted in an explosion of minor cases over minor personal slights, clogging courts with costly litigation …These reforms will bring defamation laws into the modern era, improving the balance between protecting reputations and free speech."*[3]

The review recommended reforms in two stages, and Stage 1 reforms commenced in New South Wales, Victoria, South Australia, Queensland, Tasmania and the Australian Capital Territory by the end of 2021. Western Australia is yet to pass these amendments through parliament.[4, 5]

One of the most significant aspects of the Stage 1 reforms was the introduction of a "serious harm" element. Under the new section 10A, a plaintiff must now prove that,

> *"…the publication of defamatory matter about a person has caused, or is likely to cause, serious harm to the reputation of the person."*[6]

NSW Attorney General Mark Speakman noted in his Second Reading speech that this element was introduced in response to "the increasing use of defamation law for trivial and vexatious matters, including neighbour disputes and instances where individuals sue for comments made on digital platforms."[7] If raised as an issue, this element must be "established as soon as practicable before the trial of defamation proceedings so as to deal with insignificant claims early in the proceedings."[8]

In *Zimmerman v Perkiss* [2022] NSWDC 448, one of the first significant tests of this new provision, the NSW District Court held that serious harm had not been made out, and the mere fact that a defamatory statement is published is not enough, dismissing the proceedings at an early stage.[9]

Another significant aspect of the Stage 1 reforms was the introduction of a new public interest defence. Section 29A now states that "it is a defence to the publication of defamatory matter if the defendant proves that:

(a) the matter concerns an issue of public interest, and

(b) the defendant reasonably believed that the publication of the matter was in the public interest."[10]

The purpose of this defence is to protect media outlets in their reporting by not placing unreasonable limits on freedom of expression.

Stage 2, Part A reforms of the Model Defamation Provisions are intended to take effect in many jurisdictions from 1 July 2024 (not including Western Australia) and were approved by a majority of the Standing Council of Attorneys-General on 22 September 2023. These reforms focus on the publication of defamatory material online, such as on websites, social media and in search engine results[11]. The term 'digital intermediary' has been used in the amendments to cover anyone who provides an online platform where defamatory material may be published but is not the original author of the material (for example, social media platforms such Facebook or X). NSW Attorney General Mark Speakman stated that "almost anyone can post their views on a wide range of platforms at the touch of a screen or a button…it is critical that we balance protecting free speech with the right of individuals to seek redress in appropriate circumstances for harm caused to their reputation."[12] These reforms follow cases such as *Fairfax Media Publications Pty Ltd v Voller* [2021] 273 CLR 346. Fairfax Media was held liable for defamatory comments posted by members of the public on Facebook pages administered by Fairfax Media. The effect of the reforms will likely limit the likelihood of cases being successful with similar circumstances to Voller, due to included exemptions for some categories of digital intermediaries, along with a new defence for digital intermediaries who have an "accessible complaints mechanism" or who "take reasonable access prevention steps."[13]

How do I use this?

The Stage 1 and 2 amendments to the Model Defamation Provisions are a proposed reform to the civil law process in Western Australia, as they have yet to be passed through State Parliament.

Recent high profile defamation cases, such as those involving actor Geoffrey Rush, former SAS soldier Ben Roberts-Smith and parliamentary staffer Bruce Lehrmann, were initiated prior to the passing of the amendments. In particular, the 'serious harm test' and public interest defence may have impacted these cases. With the increasing media and government focus on violence perpetrated by men against women, the defence of public interest may have been applied by Network Ten when defending Lisa Wilkinson's reporting of the allegations against Bruce Lehrmann. The public interest defence however also takes into account the diligence of the journalist in procuring the story, including "the integrity of the sources" and "whether a reasonable attempt was made by the defendant to obtain and publish a response from the [plaintiff]."[14]

The serious harm test also has an important application in upholding justice and reducing costs. Plaintiff's arguing frivolous claims can be dealt with early, protecting the defendant from enduring the lengthy and costly road to trial.

These reforms also aim to balance the need to protect freedom of expression, which is essential in Australia's liberal democracy. In particular, freedom of the media to report matters in the public interest without fear of legal repercussions.

Source analysis

Unit 1

1. Outline the meaning of the term 'civil law'. (2 marks)

Unit 2

2. With reference to the Source discuss, in your own words, how proposed defamation law reforms will enhance the delivery of justice in Western Australia. (4 marks)
3. Discuss **one** strength and one weakness of Western Australia's adversarial civil trial process. (6 marks)
4. Evaluate the extent to which **one** contemporary issue involving the judicial process has impacted upon natural justice in Western Australia. (8 marks)

Notes

1 https://www.ruleoflaw.org.au/civil/defamation/social-media-and-law-reform/

2 https://www.ag.gov.au/about-us/who-we-are/committees-and-councils/standing-council-attorneys-general

3 Speakman, M. 2020, 'Nation Agrees to NSW-Led Defamation Revolution', *NSW Government Media Release*

4 https://dcj.nsw.gov.au/about-us/engage-with-us/past-consultations/statutory-reviews/review-model-defamation-provisions.html#:~:text=On%2031%20March%202021%2C%20Attorneys%2DGeneral%20agreed%20that%20New%20South,as%20soon%20as%20possible%20thereafter.

5 https://www.afr.com/companies/professional-services/why-is-wa-dragging-the-chain-on-defamation-20221117-p5bz2q

6 *Defamation Act 2005 (NSW)*, s10A

7 New South Wales, Parliamentary Debates, Legislative Assembly, 29 July 2020 (the Honourable M Speakman SC, Attorney General.

8 Defamation Amendment Bill 2020 (NSW), Explanatory Note (b)

9 https://hwlebsworth.com.au/a-recent-snapshot-of-defamation-law-in-australia/

10 *Defamation Act 2005 (NSW)*, s29A

11 https://hwlebsworth.com.au/moving-on-from-voller-stage-2-defamation-reforms-on-the-horizon/

12 Speakman, M. 2022, 'National defamation reform for search engines and social media opens for comment', *NSW Government Media Release*

13 https://hwlebsworth.com.au/moving-on-from-voller-stage-2-defamation-reforms-on-the-horizon/

14 *Defamation Act 2005 (NSW)*, s29A

Sources

Figure 5.1 http://photos.aap.com.au

Case Study 6

The Canadian federal political and legal system

Unit 1

- 11PAL: The Canadian Federal System
- 11PAL: Federalism
- 11PAL: Essential understanding – division of powers
- 11PAL: Essential understanding – separation of powers doctrine
- 11PAL: Representative and responsible government
- 11PAL: Judicial independence
- 11PAL: One democratic political and legal system

Australia's Founding Fathers looked to other liberal democracies for 'constitutional inspiration' when designing the political and legal system they were creating in the 1890s. Britain was the obvious source of constitutional ideas and was the source of the Westminster system they adopted for the new Commonwealth. However, the mother country was unable to furnish all the constitutional solutions needed. Therefore, the Founding Fathers looked to other 'settler societies', whose history, geography and demography were similar to Australia's.

Australia shared much with Canada and the United States of America (US). Each sprung from European expansion after the 1600's and eventually all three came under the rule of the British Empire. Each was profoundly influenced by Britain's political and legal systems. For example, each adopted English common law, bicameralism and constitutionalism through the separation of powers and judicial independence and. All three were continental in scale, encompassing vast tracts of territory populated by different peoples and with economic foundations.

Figure 6. 1 — National flag of Canada

The US claimed their independence after a prolonged war with British Imperial forces and developed a federal republic system of representative democracy which allowed the division of powers within the state. The US federal system allowed previously self-governing colonies to federate, developing one central government and multiple regional governments, each with their own spheres of interest and power. Australia adopted federalism from the US style federalism. However, the Founding Fathers did not draw on American republicanism or its presidential system of executive government.

Australia looked to the Canadian model that melded both the US federal system of government and the Westminster system of responsible government including its

conventions and English Common Law. The last two were familiar systems of governance and law for Australia. Canada managed to combine these two systems into what has become known as the 'Washminster' system of government.[1] It was from this Canadian innovation – the 'Washminster solution' – that Australia's Founding Fathers drew inspiration.

The Canadian federal parliamentary system is a bicameral constitutional monarchy. The federal parliament has three components – the Monarch (British), the House of Commons and the Senate, however only one of the houses is democratically elected. The House of Commons is thoroughly Westminster in character because it forms government according to Westminster conventions. Thus, the Canadian executive is a responsible government formed by and accountable to the lower house. This was the model Australia adopted for its House of Representatives.

Canadian Senators are appointed [not elected] by the Governor General on the advice of the Prime Minister. This is similar to the British system where the Monarch appoints individuals to the House of Lords. Canadian Senators can and have been appointed to Cabinet. Once appointed Senators can remain in the Senate until they reach a retirement age of 75. This model was not adopted by Australia, which instead modelled its Senate on the US upper house. The US upper house is appointed by the President, not elected by the people.

The provinces of Canada were once colonies, and each had a system of governance, including legislative assemblies and well understood principles of parliamentary law. Today, the provincial governments of Canada are unicameral with only a lower house or legislative assembly, which is democratically elected. One major difference between Canada and Australia's structure of government is that Canada has no history of a strong, elected upper house in its provincial or federal parliaments. This had little influence on the Australian system because the Founding Fathers were unconcerned about state governments; they were only designing the commonwealth level of government.

Canada is a constitutional monarchy. Like Australia, Canada's Head of State is the reigning monarch of Britain, at present King Charles III. Although in Australia, Chapter III of the *Constitution Act 1867 and 1982* gives significant power to the monarch and their representative, the Governor General, their executive powers are limited by constitutional convention. This

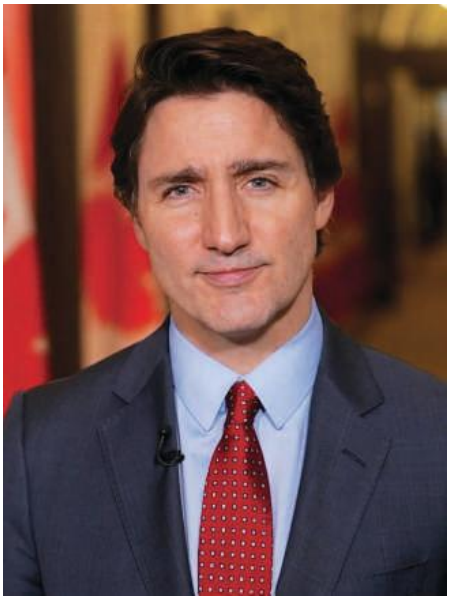


Figure 6.2 — Justin Trudeau PC MP

model directly inspired Chapter two of the Australian Constitution.

Canada's constitution is written, but also embodies unwritten conventions drawn from Westminster. The written parts create the three branches of the federal level of government and make the provinces sovereign. It also establishes a firm separation of the judicial branch, ensuring its independence. The unwritten conventions apply to the executive branch. The constitution then establishes the federal division of powers between the levels of government by specifying legislative and financial powers for the provinces (the equivalent of Australia's states) and the federal government. Residual powers are left to the federal government. The Canadian federal division of powers is similar to Australia's, but the method of distributing them is not. Instead, Australia's Constitution leaves residual powers to the states.

Constitutional change in Canada is achieved through the unanimous consent of both the federal and provincial governments,[2] depending on the type of amendment being made. Generally, the approval of the House of Commons and Senate, as well as two thirds of all provinces with sufficient to cover at least half of the population of Canada is needed.[3] Informal constitutional change is achieved by 'judicial reinterpretation'.[4] Australia did not adopt this Canadian practice, instead applying the Swiss model of direct democracy for formal constitutional change. Australia's High Court can interpret the Constitution, thereby altering its meaning in the same manner as its Canadian counterpart.

The highest source of law in Canada is the Constitution. Canada's highest court is the

Supreme Court of Canada, and it has a federal court system dealing with federal laws. Each province and territory have a court hierarchy. The Canadian Constitution sets out the areas subject to federal law in Section 91, and those areas subject to provincial law in Section 92.

Canada has a mixed legal system, with criminal and administrative law based on the British common law tradition, the adversarial system. Property and contract law is also based on this system in all provinces and territories except for Quebec,[5] which follows the Inquisitorial legal system.

How do I use this?

- The Washminster hybrid model – a Canadian innovation that blends constitutional ideas from Britain and the US – is the single most important Canadian influence on the Australian political and legal system. It embodies the following:
  - A hybrid written/unwritten constitution;
  - A Constitutional monarchy with a Governor-General appointed by the British Monarch at the recommendation of the Prime Minister;
  - Responsible government from, by and accountable to the lower house of parliament;
  - A lower house modelled on Britain's House of Commons;
  - A constitutional court;
  - Federalism; and
  - The separation of powers doctrine.
- A hybrid written/unwritten constitution – whereby the federal level of government is created by the written constitution but much of the operation of the executive branch, in particular, is left to convention.
- Constitutional monarchy – a form of inherited legislative and executive power that is limited through the operation of constitutional conventions.
- Responsible government – where the executive branch of government is drawn from and responsible and accountable to parliament. It is synonymous with the Westminster system of responsible government, under which ministers must be members of the parliament.
- The lower house of parliament is both a house, representative of the people and a house of government. As a legislative body in which senior executive officials sit, it achieves the separation of the legislative and executive functions through Westminster conventions such as ministerial responsibility.
- Constitutional courts are superior courts with original jurisdiction to interpret the fundamental law of the constitution. They are thus empowered to alter the meaning of the constitution through interpretation.
- Federalism is the division of power within a nation, with one central government and two or more regional governments. Both Canada and Australia divide the powers of government, but they do so in different ways. In Canada, residual powers are left to the federal level. In Australia residual powers are left to the states.
- The separation of powers doctrine is the principle that power is divided within a government body to ensure no individual or group attains absolute power and provides checks and balances. Westminster systems of responsible government have a weak separation between the executive and legislative branches because they both have parliamentary executives where government is formed in the lower house of parliament. Separation of these branches is achieved through unwritten conventions and parliamentary procedures, such as Question Time. The judicial power is strictly separated from the other two by the written constitution. In the separation of all three powers, Canada and Australia are more like each other than either is to Britain or the US.

Source Analysis

Unit 1

1. Outline what is meant by the term 'Washminster hybrid model'? (2 marks)
2. With reference to the source, discuss in your own words, why Australia chose to follow the Canada when designing Australian federalism. (4 marks)
3. Discuss **one** similarity and **one** difference between the Canadian and Australian federal executive. (6 marks)
4. Canada's federal system has developed strong regional governments and a weaker central government, due to the enumeration of the division of powers in the *Constitution Act 1867* of Canada. Evaluate the validity of this claim. (8 marks)

Notes

1 The Commonwealth constitution is sometimes called a Washminster system because it combines elements of the Washington (US) and Westminster (UK) systems of government.

2 Section 41, Constitution Act 1982

3 Section 38 (1), Constitution Act 1982

4 Ackerman 1991

5 Quebec [was New France] was ceded to England by France in 1860's under reparation terms of the *Treaty of Paris*

Sources

Figure 6.1: https://en.wikipedia.org/wiki/Canada#/media/File:Flag_of_Canada_(Pantone).svg
Figure 6.2: https://en.wikipedia.org/wiki/Justin_Trudeau#/media/File:Justin_Trudeau_-_2023_-_P060471-887832_(cropped).jpg

Case Study 7

The Western Australian Labor super-majority

Unit 1

- **11PAL Roles of the legislative, executive and judicial branches of government**
- **11PAL Legislative processes at the State or Commonwealth level**
- **11PAL At least one contemporary issue (the last three years) involving the legislative process**

Unit 2

- **11PAL The Western Australian and Commonwealth electoral systems since Federation, including:**
  - **Compulsory voting**
  - **Preferential voting**
  - **Proportional voting**
  - **The franchise**
- **11PAL A recently implemented or proposed reform (the last ten years) to the electoral systems in Australia**

The Australian Labor Party (ALP) was elected to government in the 2017 Western Australian state election, under the leadership of Mark McGowan. The ALP defeated the two-term incumbent Liberal-WA National government, led by Colin Barnett. The ALP won 41 of the 59 seats in the Legislative Assembly, and 14 of the 36 seats in the Legislative Council. Mark McGowan became the new Premier of WA.

The McGowan Government was popular during its first term, which was partly a result of its handling of the COVID-19 pandemic in the state. McGowan was seen as a strong and relatable leader, who imposed appropriate restrictions to keep COVID-19 out of WA, and who stood up to the Commonwealth Government when there were disagreements about how to handle the pandemic.

Figure 7.1 Mark McGowan – 30th Premier of Western Australia (2017 to 2023).

After one term in government, the next election was held in March 2021. The incumbent Labor Government won a second consecutive four-year term in office in a historic landslide victory. Labor increased its already large majority by winning 53 of the 59 seats in the Legislative Assembly, and 22 of the 36 seats in the Legislative Council, which meant they now had a majority in both houses of parliament. The number of seats won by all parties in both houses are as follows:

Legislative Assembly

Party	Seats
Labor	53
Liberal	2
Nationals	4

Legislative Council

Party	Seats
Labor	22
Liberal	7
Nationals	3
Greens	1
Legalise Cannabis	2
Daylight Saving	1

In most Australian jurisdictions where there are bi-cameral Westminster parliamentary systems in operation, it is rare for a government to win a majority in both lower and upper houses, because of the proportional voting systems used in most upper houses. When a government wins a double majority in this manner, it provides a rare opportunity for a government to pass legislation through parliament without significant review in either house.

The Labor Government has used its double majority to pass a number of pieces of legislation that might otherwise have received closer scrutiny in parliament. Such legislation includes:

- *Constitutional and Electoral Legislation Amendment (Electoral Equality) Act 2021*, which introduces 'one-vote, one value' in the Legislative Council, and abolishes group ticket voting. Previously, Legislative Council members had been elected from six regions of varying populations, with six members elected from each region. This system gave more weighting to voters in rural regions, whose populations were significantly less than city regions. This Act abolished the six regions, and replaced it with one statewide region, from which 37 members would be elected. The National Party, representing regional areas, was strongly opposed to these changes, but did not have the numbers to oppose them in parliament. The Act also abolished Group Voting Tickets, which allowed micro-party candidates to be elected with very small amounts of first preference votes. For example, Wilson Tucker from the Daylight Saving Party was elected to the Legislative Council in 2021 with just 98 first preference votes. Preference deals between small parties allowed enough preferences to flow to Tucker for him to win a seat. The Act abolishes Group Voting Tickets, which will make it more difficult for preference deals to help elect micro-party candidates in this way.[1]
- Public Health Amendment (Safe Access Zones) Bill 2021 introduced safe access zones around abortion clinics. The zones will prevent protesting and picketing within 150 metres of abortion clinics, allowing women visiting those clinics to do so without being harassed by anti-abortion protestors. WA was the last state to legislate safe access zones.[2]
- Aboriginal Cultural Heritage Bill 2021 aims to create a system for Aboriginal people to determine what qualifies as Aboriginal cultural heritage and therefore is afforded protection under the legislation. It differs from the old *Aboriginal Heritage Act 1972*, which established a statutory committee to evaluate the importance of Aboriginal cultural heritage on behalf of the Aboriginal community. It replaced outdated rules on the old Act which allowed the destruction of a 46,000-year-old sacred site at Juukan Gorge by Rio Tinto.[3]

As of the 13 September 2022, of the 58 bills passed by the current parliament, not one of these bills contained an amendment that was not moved by the Government. Upper house Greens MLC Brad Pettit claimed that the Government had stated that they were not accepting amendments from other parties. Furthermore, the Labor Government has been reluctant to refer bills to parliamentary committees for closer examination. The Standing Committee on Legislation is a group of four MLCs tasked with considering bills in more detail than normal parliamentary sittings would allow. They have the power to conduct public hearings and take submissions from members of the public, experts, pressure groups, and public servants to inform a more detailed inquiry into a bill. Over the course of the previous parliament, the Committee reported on 15 separate bills, meeting 38 times in 2020. After the 2021 election,

the Labor-controlled Legislative Council has not referred any bills to this Committee, meaning it has not had any work to do.[4]

These developments mean that the WA Parliament is less able to fulfil two of its crucial roles: scrutinising legislation and holding the government accountable. The small number of seats held by opposition parties (6 out of 59) means that they have limited resources to examine legislation in detail, a job that would normally be shared by a larger number of members.

The passage of the Criminal Law (Mental Impairment) Bill 2022 illustrates this point. In his contribution to the second reading debate on this Bill, the Leader of the Opposition, Shane Love MLA (Nationals WA), said that *"given the size of the Bill and the complexity of the surrounding legal infrastructure, it is impractical to expect a single member of Parliament without legal training to offer a sufficient critique of this Bill. For this reason, the Opposition believes that this Bill should be referred to the Standing Committee on Legislation in the other place [the Legislative Council] for it to examine the clauses of the Bill in great detail, with the assistance of the professional advice that it can seek, to ensure that it will have no unintended consequences and will do everything that it sets out to do."* Shane Love is one of only four Nationals WA MLAs in the Legislative Assembly, which means that they have minimal assistance to examine large Bills in detail in a short period of time.[5]

The operation of the Estimates Committee in 2023 presents another example of how the Labor Government's large majority has affected the parliament's ability to hold the executive to account. The Estimates Committee is a committee of the parliament whose role is to examine the government's budget. It has the power to question ministers and senior public servants about proposed government spending, and about broader issues of government administration. Where Ministers and public servants are not able to provide information at committee hearings, the Committee may request supplementary information to be provided at a later date. In the last four years of the previous Coalition Government, the total number of supplementary information answers provided in 2013 was 107; in 2014 it was 139; in 2015 it was 170; and 2016 it was 189. In the last four years of the current Labor Government, in 2020 there were 45 supplementary information answers provided; 27 in 2021; 34 in 2022; and 20 in 2023. This indicates that the current Labor Government has been less transparent about its answers to the Estimates Committee's questions, making it more difficult for the parliament to hold the government accountable.[6]

How Can I Use This?

- In the Westminster system used in both the federal and state levels of government, the executive is drawn from and responsible to the legislature. The party or coalition that wins the majority of seats in the lower house of parliament (the Legislative Assembly in WA) forms the government, and the leader of that party becomes the Prime Minister or Premier. One of the issues with this system is that the executive and the legislature are fused, and by definition, the executive will almost always dominate proceedings in the lower house. While there are quite often checks and balances on the executive through opposition and crossbench parties in both houses, the example of the WA Labor super-majority demonstrates how an executive can circumvent the debate and scrutiny functions of parliament if it has such a dominant majority in both chambers.
- The legislative process at both the commonwealth and state level is intended to be a rigorous process that is designed to ensure that Acts of Parliament are thoroughly considered and scrutinised, and contain input from multiple viewpoints and stakeholders. During the first, second, and third reading stages of legislation, members of parliament should be able to propose amendments to improve legislation or to reflect the views of their electorate. Bills that need closer examination are able to be referred to specialised committees, who can collect evidence from community groups and experts to inform a report to parliament. The WA Labor super-majority has allowed the government to avoid more detailed scrutiny of legislation, especially through committees.

- The 2021 state election was the last election in WA which used Group Voting Tickets in the Legislative Council, which allow voters to select party groups rather than individual candidates. Parties then submit lists to the Electoral Commission, specifying the order in which they want candidates to be elected if voters select their party. While this was intended to make voting easier, it had the unintended consequence of allowing very small parties to make complicated preference deals with each other that were not known to voters. The result was that micro party candidates were able to win a seat in the Legislative Council after winning only a very small percentage of first preference votes, but were able to reach the quota for winning a seat from the flow of preferences gained through Group Voting Tickets and secret preference deals. The 2021 reforms abolished Group Voting Tickets, which will make it more difficult for micro parties like the Daylight Saving Party to win a seat, and will mean that the Legislative Council will more accurately reflect the will of the voters, not the parties.
- Malapportionment is a feature of an electoral system which means that some votes are worth more than others. In Australia, it most often occurs when some electorates have more or less people than others, meaning that the votes of the people in those electorates are worth more or less than the votes of people in other electorates. A fundamental principle of a fair electoral system is 'one vote, one value', which means that all votes should be worth the same amount, so that no one person or group of people is able to wield more voting power than others. In Australia, this principle has often been deliberately circumvented in order to equalise the voting power of regions that may have otherwise been marginalised. For example, the Australian Senate deliberately consists of 12 Senators for each state, even though some states have much smaller voting populations than others (e.g. Tasmania has approximately 408,000 voters, while NSW has approximately 5.6 million). Malapportionment has also been deliberately used in the West Australian electoral system, where the state was divided up into six regions, which each elected six members to the Legislative Council. The three rural regions had much smaller populations than the three urban regions, which meant rural votes received more weight in the Legislative Council The 2021 reforms abolished the six regions, and replaced them with one statewide region from which 37 members would be elected to the Legislative Council. While this will get rid of malapportionment in WA, it will mean that regional voters' voices may be outweighed by urban voters.

Source Analysis

Unit 1

1. Outline what is meant by a 'parliamentary committee'. (2 marks)
2. With reference to the source, and in your own words, discuss **two** consequences of the Labor Party's supermajority in the WA Parliament. (4 marks)
3. Discuss **one** strength and **one** weakness of the legislative process in the Westminster system. (6 marks)
4. Evaluate the impact of **one** contemporary issue involving the legislative process on Australia's political and legal system. (8 marks)

Unit 2

1. Outline what is meant by 'malapportionment'. (2 marks)
2. With reference to the source, and in your own words, discuss **two** consequences of the *Constitutional and Electoral Legislation Amendment (Electoral Equality) Act 2021*. (4 marks)
3. Discuss **one** advantage of preferential voting compared to proportional representation, and **one** advantage of proportional representation compared to preferential voting. (6 marks)
4. With reference to a recently implemented or proposed reform to Australia's electoral systems, evaluate the extent to which Australia's electoral systems achieve effective representation. (8 marks)

Notes

1 R Shine & J Kagi, *Mark McGowan announces sweeping changes to WA's electoral system, abolishing regions,* ABC News, 2021, Mark McGowan announces sweeping changes to WA's electoral system, abolishing regions - ABC News

2 R Shine, *Abortion clinic protests banned in WA as safe access zones bill approved to protect women,* ABC News, 2021, Abortion clinic protests banned in WA as safe access zones bill approved to protect women - ABC News

3 R Trigger & S Goerling, *WA Aboriginal heritage law passes but concerns remain it won't prevent another Juukan Gorge,* ABC News, 2021, https://www.abc.net.au/news/2021-12-15/aboriginal-heritage-law-aimed-at-stopping-another-juukan-passes/100701120

4 K Bourke, *How has WA Premier Mark McGowan used his power since winning control of parliament?,* ABC News, 2022, https://www.abc.net.au/news/2022-09-13/how-has-mark-mcgowan-used-his-total-control-of-wa-parliament/101429866

5 S Love, *Parliamentary Debates (Hansard),* Parliament of Western Australia, 21 February 2023, p522 (https://www.parliament.wa.gov.au/Hansard/hansard.nsf/0/52CDD519C992A892482589600025DC0B/$file/A41%20S1%2020230221%20All.pdf?)

6 P Rundle, *Parliamentary Debates (Hansard),* Parliament of Western Australia, 13 June 2023, p2664 (https://www.parliament.wa.gov.au/Hansard/hansard.nsf/0/8B5421CE0EF48EF0482589D3000A64AD/$File/A41%20S1%2020230613%20All.pdf?)

Sources:

Figure 7.1 https://en.wikipedia.org/wiki/Mark_McGowan#/media/File:Mark_McGowan_headshot.jpg

Case Study 8

Morrison's secret ministries

Unit 1

- **11PAL: Essential to the understanding of democracy and the rule of law is knowledge of: representative government, Westminster conventions of responsible parliamentary government**
- **11PAL: Structure of the Australian political system and the Australian legal system, including: representative government, Westminster conventions of responsible parliamentary government**

Unit 2

- **11PAL: Political representation with reference to the role of individuals, political parties and pressure groups**

Since federation there have been few challenges to the unwritten Westminster conventions of responsible government underpinning Australia's system of government. The most significant to date, had been the '1975 constitutional crisis' during which time the undemocratically appointed Governor-General Sir John Kerr, used his reserve powers to dismiss the popularly elected Prime Minister Gough Whitlam. A second significant challenge to these conventions occurred more recently between March 2020 and May of 2021, when Prime Minister Scott Morrison, on the advice of former Attorney General Christian Porter, appointed himself 'to administer' five separate portfolios of government. He did this during the early stages

Figure 8.1— The self-appointment by Prime Minister Scott Morrison to five separate portfolios of government was a significant challenge to Westminster convention.

of the COVID-19 Pandemic. Morrison argued that he was 'steering the ship in the middle of the tempest.'[1] These appointments were made in secret even though there was already an incumbent in each of the portfolios. These appointments "fundamentally undermined" the principles of responsible government.[2]

The first appointment made was to the Department of Health on 14 March 2020. This appointment was made with the full knowledge of Health Minister Greg Hunt who agreed that the appointment was a prudent 'check and balance' on power given the extraordinary powers granted to the Health Minister under the Section 477 and 478 of the *Biosecurity Act 2015* due to the health emergency created by COVID-19. To ensure the legality of such an appointment being made without the knowledge of both parliament and the people, Morrison consulted with Attorney General Christian Porter. The advice provided by Porter was that the appointment could be made using an 'administrative instrument' without need for 'swearing in' by the Governor-General. In this circumstance the role of the Governor-General would be limited to the signing of the administrative instrument. Further, Porter advised that there would be no constitutional barrier to having two ministers appointed to administer the same portfolio. Such advice contravened the Westminster convention which requires the appointment of ministers to be transparent thus enabling the parliament to hold the minister to account for their actions.

Morrison also determined that such measures should also be applied to the Finance Ministry given the extraordinary measures taken by the government to deal with the pandemic. As such, Morrison swore himself in as the Finance Minister alongside Mathias Cormann on 30 March 2020. In this instance; however, Cormann was unaware of the appointment. A third secret appointment was made to the Ministry of Industry, Science, Energy and Resources alongside Keith Pitt on 15 April 2021. According to the coalition agreement between the Liberal/National Party this ministerial role is to be filled by a member of the National Party. Not only did Morrison break convention with this appointment he also stepped on the toes of his coalition partner by taking on the role himself. This became particularly controversial in the lead up to the 2022 election when Prime Minister Morrison rejected the approval for the PEP11 offshore gas project which had been given the go-ahead by Minister Pitt. This broke Westminster convention as the appointment of two ministers to one portfolio made it difficult to determine who was responsible for making a decision thus confusing the ability to hold a minister to account for the actions of themselves and their department. Further, Morrison's Liberal colleagues were not made aware of the fact that he had been responsible for the scrapping of the project and not the sitting Minister Keith Pitt.

The final two appointments were made on 6 May 2021 to the powerful Departments of Home Affairs and Treasury. Neither the Minister for Home Affairs Karen Andrews, nor the Treasurer, Josh Frydenberg were made aware that they were sharing their role with Morrison. As a change in the responsibilities of an existing minister each of these five appointments was achieved by an 'administrative instrument' signed by Governor-General David Hurley. Sharing of ministerial responsibilities in such a manner is a common practice where a minister may be unable to fulfil their functions for some reason. Under normal circumstances such an arrangement would have been revealed to the Cabinet and made public through publication in the Government Gazette.

Governor-General Hurley later stated he believed he acted within the Constitution, noting that publicising ministerial appointments is the responsibility of the federal government. Further he stated that "he had no reason to believe Scott Morrison's self-appointments to ministerial positions wouldn't be publicly announced".[3] The Governor-General had followed convention in accepting the advice of his Prime Minister of the day and acted accordingly. Hurley stated that he had acted within the Constitution and the Solicitor- General agreed, that the 'GG has no discretion to refuse to accept the PM's advice in relation to such an appointment.'[4]

Figure 8.2- The final two appointments were made on 6 May 2021 to the powerful Departments of Home Affairs and Treasury.

News of the five secret appointments was only revealed to the public and the parliament in a news article on 13 August, 2022. By this time there had been a turnover in government and a Labor Prime Minister, Anthony Albanese, was now in place. Upon learning of the appointments, Albanese referred to Morrison's actions as "an unprecedented trashing of our democracy".[5] In an attempt to justify the appointments Morrison claimed "I believed it was necessary to have authority, to have what were effectively emergency powers, to exercise in extreme situations that would be unforeseen, that would enable me to act in the national interests."[6] Furthermore, Morrison stated that as the relevant ministers were not aware that he had been appointed to the ministries it was evidence that he "was not co-administering any of these."[7] According to the Solicitor-General's report, the appointment of secret ministries was neither illegal nor unconstitutional. However, the Solicitor-General did criticise the appointments, stating that 'Donaghue said it was "impossible for parliament and the public to hold ministers accountable for the proper administration of particular departments if the identity of the ministers who have been appointed to administer those departments is not publicised".[8] An inquiry into the five ministries, overseen by former High Court Justice Virginia Bell, found that the appointments were "corrosive" to trust in government. She recommended legislation to ensure all ministerial appointments were made public.[9] Acting on the findings of the Bell Inquiry, Scott Morrison was formally censured by the House of Representatives.

On 30 November 2022, the House of Representatives voted, by 86 votes to 50, for a government motion to censure Scott Morrison for failing to disclose to the parliament and the public his secret appointments to a number of ministries. All non-Coalition votes were in favour, as well as that of Liberal MP Bridget Archer. All other Coalition votes were against, as well as that of Bob Katter. By this time, Morrison was sitting in the parliament as a member of the opposition with no formal position other than as representative for the division of Cook. In response to the censure Morrison stated, "I have no intention now of submitting to the political intimidation of this government, using its numbers in this place to impose its retribution on a political opponent". In a further justification of his position, he stated "Had I been asked about these matters at the time at the numerous press conferences I held, I would have responded truthfully about the arrangements I had put in place." Aside from the media and public attention brought about by the censure there were few repercussions for Morrison as a result of the censure.

A key element of the Westminster system of government is that those responsible for exercising power should be known and as such are able to be held to account both by the people and the parliament. Under normal circumstances, the Prime Minister would recommend appointments for the ministry to the Governor-General who then formally swears them in under SECTION 64 of the Constitution. Appointments are then made public through an announcement in the Government Gazette. This ensures that the new minister can be held to account for their actions and those of their ministry either through election or through various parliamentary processes and procedures. In the case of Morrison's five ministries, it was the lack of transparency surrounding the appointments that was of greatest concern. Appointments were made without even the knowledge of the Cabinet and the ministers who had accepted formal responsibility for a portfolio. This undermines the key Westminster conventions which have underpinned the Australian system of government since federation. The secret ministries also raise questions about the ethics of Hurley and whether he had a duty to either refuse to cooperate or to report those concerns and also has broader implications for constitutional governance and transparency in Australia.

How do I use this?

- Representative democracy is a form of government in which citizens elect representatives to parliament in order to govern on their behalf. Parliament exercises the people's sovereignty to make laws supported by the majority of citizens. Transparency in government is crucial in a representative democracy as it ensures accountability by allowing citizens to scrutinise the actions and decisions of elected officials. By providing access to information, transparency fosters an informed electorate, empowering citizens to make well-informed decisions and holding their representatives accountable for policies that align with the public interest.
- Possible combination: Former Prime Minister Scott Morrison's covert acquisition of five ministerial positions between March 2020 and May 2021, conducted without the awareness of relevant ministers, severely compromised transparency in government. These undisclosed appointments not only hindered the public's ability to make informed decisions, thereby undermining the democratic process leading up to the 2022 federal election, but also compromised the principle of Westminster system of responsible government. By secretly assigning himself to key portfolios, Morrison challenged established conventions and prevented parliamentary oversight, crucial for holding the executive accountable and ensuring transparency in governance.
- Furthermore, Morrison's deviation from convention, such as the unprecedented move to personally administer the Ministry of Industry, Science, Energy and Resources despite a coalition agreement designating it for a National Party member, disrupted the clarity of decision-making and accountability within the government. This departure from established norms complicated the identification of responsible parties for policy decisions, exemplified by Morrison rejecting the approval for the PEP11 offshore gas project without informing Minister Keith Pitt, creating confusion and hindering accountability.
- Ultimately, the lack of transparency in Morrison's secret ministerial appointments contradicted the core principles of the Westminster system, eroding public trust and prompting a formal censure by the House of Representatives. The subsequent recommendation for legislation to ensure public disclosure of ministerial appointments underscored the necessity of upholding transparency in the functioning of Australia's representative democracy.
- Scott Morrison's adoption of five separate ministries also demonstrated much about the role of the Governor-General in the Australian system of Government. A quick read of the Commonwealth Constitution would suggest that the Governor-General can wield significant power as the head of executive government; however, in reality this power is generally exercised on the express advice of the Prime Minister and Cabinet. This was clearly demonstrated by the fact the Governor-General Hurley was not more active in attempting to dissuade the Prime Minister from taking on the various ministries. The Governor-General David Hurley stated that he acted within the Constitution and that it was the responsibility of the government itself to announce ministerial appointments. The Office of the Governor-General indicated that the Governor-General followed the advice of the Prime Minister in accordance with the 'principles of responsible government'.

Source Analysis

Unit 1

1. Outline **one** key role of the Prime Minister in the Australian political system. (2 marks)
2. With reference to the Source explain, in your own words, **two** key Westminster conventions breached by Scott Morrison through his adoption of five ministerial roles during the COVID crisis. (4 marks)
3. With reference to examples, discuss the changing relationship between the Prime Minister and ministry in the Australian political system. (6 marks)
4. Evaluate the extent to which the Commonwealth Constitution accurately reflects the role of the executive in the Australian political system. (8 marks)

Notes

1 https://www.reuters.com/world/asia-pacific/australias-morrison-says-he-took-five-ministries-because-he-was-steering-ship-2022-08-17/

2 Karp, P., 2022, *Scott Morrison's secret ministries 'fundamentally undermined' responsible government, advice shows,* <https://www.theguardian.com/australia-news/2022/aug/23/scott-morrison-secret-ministries-minister-portfolios-fundamentally-undermined-responsible-government-advice-shows, accessed 5 July 2024.

3 Butler, J., 2022, Why didn't the Governor-General push back against Scott Morrison's secret ministries, <https://www.theguardian.com/australia-news/2022/aug/18/why-didnt-the-governor-general-push-back-against-scott-morrisons-secret-ministries>

4 https://www.sbs.com.au/news/article/heres-what-we-know-and-what-we-dont-about-scott-morrisons-secret-ministries/xc8pvu83u

5 Weeks, Timothy, 2022, Press Conference Parliament House Canberra, ACT, https://www.pm.gov.au/media/press-conference-parliament-house-canberra-act-1

6 Butler, J., 2022, Define Morrison resists pressure to resign as Governor-General says he thought appointments would be made public, <https://www.theguardian.com/australia-news/2022/aug/17/defiant-scott-morrison-resists-pressure-to-resign-defends-secret-portfolios-as-necessary>

7 Butler, J., 2022, Define Morrison resists pressure to resign as Governor-General says he thought appointments would be made public, <https://www.theguardian.com/australia-news/2022/aug/17/defiant-scott-morrison-resists-pressure-to-resign-defends-secret-portfolios-as-necessary>

8 https://www.theguardian.com/australia-news/2022/aug/23/scott-morrison-secret-ministries-minister-portfolios-fundamentally-undermined-responsible-government-advice-shows-n

9 Karp, P. & Remeikis, A., 2022, Morrison sought advice on a sixth ministry and did not agree to be interviewed by inquiry, <https://www.theguardian.com/australia-news/2022/nov/25/scott-morrisons-secret-ministries-were-unnecessary-and-corrosive-of-trust-in-government-report-finds>

Sources

Figure 8.1 Matt Golding, 2022, < https://www.theage.com.au/national/victoria/our-government-is-stable-despite-our-constitution-20220816-p5badr.html

Figure 8.2 Matt Golding, 2022, https://www.facebook.com/PoliticalCartoonsAustralia/posts/5254381561283218/?paipv=0&eav=Afa1qlpWygHQ9V4D-WudcEWOqWY8jnjQWIQUwEnJX4a0olyQtVO_QbSVt_1izaPNBFY&_rdr

Case Study 9

R v Lehrmann

Juror Misconduct, Criminal Law Trial Reform and Defamation

Unit 1

- 11PAL Key processes (pre-trial, trial and post-trial) of civil and criminal trials in Western Australia
- 11PAL Essential to the understanding of democracy and the rule of law is knowledge of:
  - judicial independence

Unit 2

- 11PAL A recently implemented or proposed reform (the last ten years) to the civil or criminal law process in Western Australia
- 11PAL Essential to the understanding of representation and justice is knowledge of:
  - natural justice

In August 2021, Bruce Lehrmann was charged with the offence of engaging in sexual intercourse without consent, contrary to Section 54(10) of the *Crimes Act 1900* (ACT).[1] This offence was alleged by the complainant, Brittany Higgins, to have been committed on 23 March 2019.[2] Ms Higgins made her initial statement to police on 1 April 2019, however, following the announcement of the federal election on 11 April 2019, she informed police she did not wish to pursue her complaint further. At the time of the complaint, both Mr Lehrmann and Ms Higgins were colleagues at Parliament House in Canberra, employed by the office of then Defence Industry Minister Linda Reynolds.[3]

On 4 February 2021, Ms Higgins notified police that she would like to proceed with her 2019 complaint against Mr Lehrmann. Around this time, Ms Higgins gave a number of interviews to the media, including a recorded interview for *The Project* on Channel Ten with journalist Lisa Wilkinson, which aired on 15 February 2021.[4] Ms Higgins also participated in an interview with Samantha Maiden for news.com.au that was published on that same day[5]. In both interviews, Higgins alleged she was raped by an unnamed colleague in then Defence Industry Minister Linda Reynolds' ministerial office.

Figure 9.1— Bruce Lehrmann

In the lead up to the trial in 2022, the accused, Mr Lehrmann made numerous attempts to delay proceedings due to the publicity surrounding the case. His first application in April 2022 argued that an impartial jury would not be possible,[6] which was rejected by the Chief Justice Lucy McCallum. His second application in June 2022 related to the publicity following Lisa Wilkinson's acceptance speech for her Logie Award win for her story on Brittany Higgins. This application was successful and resulted in the trial being delayed due to the judge's finding that there

now existed a significant possibility of prejudice by the jury towards the facts of the case.[7]

The trial commenced in October 2022, with the jury retiring for deliberations on 19 October 2022.[8] On day five of deliberations, a juror was found to have brought in an academic paper on sexual assault into the jury room that was not part of the evidence submitted by the parties at trial. As a result, Chief Justice McCallum had to discharge the jury and a retrial was set for February 2023. In her comments, Chief Justice McCallum stated that "At the very least, the fact that the paper was located and taken into the jury room by the juror indicates that it may have influenced that juror's contribution to the jury's deliberations."[9] While in some jurisdictions, such as New South Wales, jurors can be fined for bringing in external information to deliberations, this is not the case in the ACT (or Western Australia).

On Friday 2 December 2022, ACT Director of Public Prosecutions, Shane Drumgold, announced that the charges against Mr Lehrmann would be dropped and consequently the retrial scheduled for February 2023, would not proceed due to the "unacceptable risk to the life of the complainant [Ms Higgins]."[10] Mr Drumgold stated that he had "received compelling evidence from two independent medical experts that the ongoing trauma associated with this prosecution presents a significant and unacceptable risk.[11]"

Following the dropping of the charges, it was revealed that in November 2022 ACT Director of Public of Prosecutions, Shane Drumgold, raised concerns that ACT police had inappropriately interfered with the conduct of the case. In his letter to the ACT Chief of Police, Mr Drumgold alleged that there was pressure from the Australian Federal Police not to charge Mr Lehrmann and "then when charges resulted, the [investigators'] interests have clearly aligned with the successful defence of this matter rather than its prosecution."[12]

The ACT government initiated a public inquiry that began in May 2023 to investigate the handling of the case by both the ACT police and Director of Public Prosecutions. The inquiry was conducted by former Queensland Solicitor-General and retired judge of the Queensland Supreme Court and Court of Appeal, Mr Walter Sofronoff KC. Mr Sofronoff was independent of the ACT Government. In his report delivered to the government on 31 July 2023, Mr Sofronoff found that the decision to take the matter to trial by the Prosecution was appropriate.[13] It was, however, found that "at times, Mr Drumgold lost objectivity and did not act with fairness and detachment as was required by his role."[14] In relation to the conduct of the ACT police, Sofronoff concluded that "although I think that police investigators accomplished a thorough investigation, I have found that they made some mistakes. None of these mistakes actually affected the substance of the investigation and none of them prejudiced the case. Some of them caused unnecessary pain to Ms Higgins and others."[15] Mr Drumgold sought judicial review of the Board of Inquiry's findings on the basis of apprehended bias, after it was revealed that Mr Sofronoff provided his Report to Janet Albrechtsen, a journalist for *The Australian*, on the same date that he provided it to the Chief Minister for the ACT.[16] In his findings for Mr Drumgold on 4 March 2024, Acting Justice Stephen Kaye stated that "the amount, context, nature, manner and content of the communications, that occurred between Mr Sofronoff and Ms Albrechtsen, were such that a fair-minded lay observer... might reasonably have apprehended that Mr Sofronoff... might have been influenced by the views held and publicly expressed by Ms Albrechtsen."[17] On 13 May 2024, the ACT Integrity Commission announced an investigation into "allegations of corruption regarding the conduct of the Hon Walter Sofronoff KC as it relates to the Board of Inquiry."[18]

On 7 February 2023, Bruce Lehrmann initiated defamation proceedings against Network Ten and News Corp in relation to their media coverage of the allegations made by Brittany Higgins. Lehrmann settled his claim against News Corp on 30 May 2023 for their reporting of an interview between Brittany Higgins and journalist Samantha Maiden on news.com.au. Lehrmann received $295,000 from News Corp as a contribution towards his legal costs[19].

On 6 April 2023, Lehrmann initiated defamation proceedings against the Australian Broadcasting Corporation for its broadcast of Brittany Higgins' address to the National Press Club, in which while he was not expressly named by Ms Higgins, he argued he was readily identifiable. On 22 November 2023, Mr Lehrmann and the ABC settled the dispute. The ABC agreed to pay Mr Lehrmann $150,000 as a contribution to his legal costs for these proceedings.[20]

The defamation case between Mr Lehrmann and Network Ten, centred on the interview between Ms Higgins and Lisa Wilkinson on 15 February 2021. In the interview, while Mr Lehrmann was not named, he claimed that he was readily identifiable. During the civil

trial, Network Ten and Lisa Wilkinson argued the defence of truth, maintaining that even if Lehrmann was identifiable (which they denied), the rape allegations by Ms Higgins were true on the balance of probabilities. They also argued that the defence of qualified privilege applied, because the coverage of the story was a matter of public importance. On 15 April 2024, Justice Lee held that Lehrmann did not make out his claim of defamation against Network Ten and Lisa Wilkinson. Justice Lee found that on the balance of probabilities, Mr Lehrmann had sexual intercourse with Ms Higgins to which she did not consent and "in his pursuit of gratification, he did not care one way or another whether Ms Higgins understood or agreed to what was going on." On 10 May 2024, Justice Lee ordered that Mr Lehrmann pay Network Ten's costs on an 'indemnity basis'. Justice Lee stated that 'an award of indemnity costs is not a punitive measure, but is designed to compensate a party fully for costs incurred when the court takes the view that it was unreasonable for the party against whom the order is made to have subjected the innocent party to the expenditure of cost.'[21] In making this order, Justice Lee accepted Network Ten's submission that 'Mr Lehrmann engaged in an abuse of the Court's processes, ran a case based on falsities, and put Network Ten to the cost of defending a baseless proceeding.'[22] In a costs hearing on 1 July 2024, the Federal Court ordered that Bruce Lehrmann pay Network Ten $2 million. Network Ten estimated that its costs were approximately $3.7 million, but they would accept $2 million as a lump sum payment.

In December 2022, Brittany Higgins also filed and settled a civil claim for personal injury against the Commonwealth Government. Her claim related to issues of alleged sexual harassment, sex discrimination, disability discrimination, negligence and victimisation[23]. It was revealed in December 2023 that the Commonwealth Government paid $2.4 million to settle this claim with Ms Higgins, including $400,000 for hurt, distress and humiliation, $1.48 million for lost earning capacity, $220,000 for medical expenses, $100,000 for past and future domestic assistance and $245,000 for legal costs.[24]

How do I use this?

- This case study illustrates the potential for natural justice and the rule of law to be undermined in cases where there is significant media attention and/or a jury trial. The presumption of innocence is a cornerstone of Australia's criminal justice system, however, it can be threatened by reporting by the media and juror misconduct.
- In August 2023, the Australasian Institute of Judicial Administration released its report commissioned by the Commonwealth Attorney General into a review of sexual assault trials.[25] The report highlighted many issues, including that 'victim-survivors may be re-traumatised at multiple stages in the criminal justice process'.[26] Possible reforms highlighted in the report included juryless trials for those involving sexual offences, trauma-informed training for court personnel and use of pre-recorded evidence.[27]
- The public inquiry that followed the dropping of the charges against Bruce Lehrmann also highlighted the importance of transparency and accountability in the courts and criminal justice system to maintain public confidence. This public confidence was, however, undermined by the conduct of the Chair of the Board of Inquiry, Mr Walter Sofronoff KC.
- Civil trials can be very costly, which has been demonstrated in both the settlement payments provided to Mr Lehrmann and Ms Higgins, along with the orders for costs awarded against Mr Lehrmann. In particular, plaintiffs and defendants risk high cost orders where they refuse reasonable offers to settle in the lead up to trial, such as is the case with Mr Lehrmann and Network Ten.
- The defamation trial initiated by Bruce Lehrmann demonstrated the differences between civil and criminal trials, notably in relation to the standard of proof required. While criminal law requires proof of the charges beyond reasonable doubt, in civil law a claim must only be proven on the balance of probabilities by the plaintiff. Further, in a defamation trial such as Mr Lehrmann's, the defence of truth meant that the defendants led evidence to prove Mr Lehrmann sexually assaulted Ms Higgins; and proof of this assault in a civil trial is at a much lower standard than a criminal trial. It is important to note however, that a civil finding that Mr Lehrmann did in fact sexually assault Ms Higgins on the balance of probabilities has no impact on criminal culpability. In his judgement, Justice Lee observed that, despite avoiding a possible criminal conviction for raping Ms Higgins, in initiating these defamation proceedings "having escaped the lions' den, Mr Lehrmann made the mistake of going back for his hat."[28]

Source Analysis

Unit 1

1. Outline the meaning of the term 'jury'. (2 marks)
2. With reference to the Source, discuss, in your own words, **two** issues highlighted in Walter Sofronoff KC's report from the public inquiry into the Bruce Lehrmann trial. (4 marks)

Unit 2

3. Discuss **two** strengths of Western Australia's adversarial civil and/or criminal law processes. (6 marks)
4. Evaluate the impact of **one** recently implemented or proposed reform (the last ten years) to the civil or criminal law process in Western Australia. (8 marks)

Notes

1 *R v Lehrmann (No 3)* [2022] ACTSC 145 at 1
2 *R v Lehrmann (No 3)* [2022] ACTSC 145 at 13
3 https://www.abc.net.au/news/2024-01-12/private-messages-in-lehrmann-defamation-case-released-by-court/103312500
4 *R v Lehrmann (No 3)* [2022] ACTSC 145 at 15
5 https://www.news.com.au/national/politics/parliament-house-rocked-by-brittany-higgins-alleged-rape/news-story/fb02a5e95767ac306c51894fe2d63635
6 ACT law dictates a jury is required for trials involving sex crimes https://www.abc.net.au/news/2022-04-29/act-court-dismisses-bruce-lehrmann-stay-application/101026536
7 *R v Lehrmann (No 3)* [2022] ACTSC 145 at 38
8 https://www.courts.act.gov.au/__data/assets/pdf_file/0008/2359124/Drumgold-v-Board-of-Inquiry-Criminal-Justice-System-and-ors-2023-ACTSC-394.pdf
9 https://lsj.com.au/articles/lehrmann-trial-discharged-due-to-jury-misconduct/
10 https://www.abc.net.au/news/2022-12-02/bruce-lehrmann-rape-charge-to-be-dropped-brittany-higgins/101725242
11 https://lsj.com.au/articles/unpacking-the-bruce-lehrmann-trial/
12 https://www.theguardian.com/australia-news/2022/dec/08/bruce-lehrmann-trial-brittany-higgins-dpp-director-public-prosecution-shane-drumgold-act-police
13 Sofronoff, W. 2023, 'Final Report' *ACT Board of Inquiry, Criminal Justice System* at 219
14 Sofronoff, W. 2023, 'Final Report' *ACT Board of Inquiry, Criminal Justice System* at 226
15 Sofronoff, W. 2023, 'Final Report' *ACT Board of Inquiry, Criminal Justice System* at 14
16 *Drumgold v Board of Inquiry & Ors (No. 3)* [2024] ACTSC 58 at 219
17 *Drumgold v Board of Inquiry & Ors (No. 3)* [2024] ACTSC 58 at 352
18 ACT Integrity Commission, 2024, 'Integrity Commission announces investigation into the conduct of the Hon. Walter Sofronoff KC'
19 https://www.smh.com.au/national/nsw/abc-paid-150-000-to-settle-lehrmann-defamation-claim-20231206-p5epns.html
20 https://www.smh.com.au/national/nsw/abc-paid-150-000-to-settle-lehrmann-defamation-claim-20231206-p5epns.html
21 *Lehrmann v Network Ten Pty Limited (Costs)* [2024] FCA 486 at 28
22 *Lehrmann v Network Ten Pty Limited (Costs)* [2024] FCA 486 at 49
23 https://www.abc.net.au/news/2022-12-13/brittany-higgins-settles-compensation-case-with-commonwealth/101769012
24 https://www.smh.com.au/national/nsw/details-of-brittany-higgins-2-4-million-settlement-with-commonwealth-revealed-20231207-p5epyx.html
25 George, AJ. Lowik, V. Suzuki, M. Corbett-Jarvis, N.,, 2023, 'Specialist Approaches to Managing Sexual Assault Proceedings: an Integrative Review' Australian Government, *Australasian Institute of Judicial Administration*
26 George, AJ. Lowik, V. Suzuki, M. Corbett-Jarvis, N.,, 2023, 'Specialist Approaches to Managing Sexual Assault Proceedings: an Integrative Review' Australian Government, *Australasian Institute of Judicial Administration* at p.i
27 George, AJ. Lowik, V. Suzuki, M. Corbett-Jarvis, N.,, 2023, 'Specialist Approaches to Managing Sexual Assault Proceedings: an Integrative Review' Australian Government, *Australasian Institute of Judicial Administration* at 5.7
28 R v Lehrmann SMH 15 April 2024, https://www.smh.com.au/national/the-lehrmann-imbroglio-the-wry-observations-of-justice-michael-lee-20240415-p5fjyt.html

Sources

Figure 9.1 AAP photo no: 20231214001877617365

Case Study 10

Judicial Independence:

Judicial Impartiality and Apprehended Bias

Unit 1

- 11PAL: Role of judicial branch
- 11PAL: Structure of legal system
- 11PAL: Rule of law
- 11PAL: Court hierarchy- appeals process

Unit 2

- 11PAL: Strengths and weaknesses of Western Australia's adversarial (trial) processes (that is - apprehension of bias)
- 11PAL: A recently implemented or proposed reform (the last ten years) to the (trial) process in Western Australia (that is - procedures for handling bias)
- 11PAL: Natural justice: impartial adjudication

Apprehended bias is a concept arising if a court concludes that a fair-minded and reasonably informed observer may consider that a decision-maker, in this case a magistrate or judge might not fulfil their role with a sufficient level of impartiality (Groves, 2020).[1] The issue of apprehended bias was highlighted in the case of *Charisteas v Charisteas* [2021] HCA 29 when the High Court of Australia unanimously allowed an appeal from the Full Court of the Family Court of Australia, which had dismissed an appeal from the Family Court of Western Australia.[2] The issues under consideration were whether the Family Court's orders should be set aside due to apprehended bias and whether the Family Court had the authority to make property settlement orders under section 79 of the *Family Law Act 1975*.

The appellant, the husband, and the first respondent, the wife, were married in 1979 and separated in 2005. The husband initiated proceedings in 2006 seeking property settlement orders under section 79 of the Family Law Act 1975. In 2011, the Family Court made property settlement orders, including early vesting orders for a trust. On appeal, the Full Court of the Family Court set aside the early vesting orders without making any consequential orders.

In 2015, the trial judge held that the 2011 Property Orders were not final and that the Court still had the power to make orders under section 79. However, on February 12, 2018, the trial judge purported to make property settlement orders inconsistent with the 2011 Property Orders.

In May 2018, it was revealed that the wife's barrister disclosed to the husband's solicitor that she had met Justice Walters for a drink or a coffee on at least four separate occasions, exchanged numerous text messages, and spoke on the phone on at least five occasions between March 2016 and February 2018. The husband did not know of and had not consented to these communications. The judge did not disclose his communications with the wife's barrister.

The husband appealed Justice Walters' variation of the 2011 Property Order to the Full Court of the Family Court of Australia. The appeal was based on an apprehension of bias by Justice Walters. The appeal was dismissed. The husband applied for Special Leave to Appeal to the High Court of Australia. While the majority of the Full Court

had dismissed the appeal, the High Court ruled unanimously that the 2018 Property Orders should be set aside due to apprehended bias. The court explained that a fair-minded observer might reasonably apprehend that the trial judge would not bring an impartial mind to the case, as there had been inappropriate communication between the judge and one of the parties outside the presence or knowledge of the other party. The High Court found it "particularly troubling" and "difficult to comprehend" that Justice Walters had failed to declare his communications with the wife's barrister when he made variations to the Property Orders.

The High Court concluded that the matter should be remitted for rehearing before a single judge of the Family Court. Furthermore, the court affirmed that the Family Court of WA retained the power under section 79 of the Act to deal with the property subject to the early vesting orders. The High Court also held the Full Court of the Family Court accountable for the dismissal of the first appeal. It stated that the Full Court incorrectly concluded that a lay observer (that is an ordinary reasonable person) would believe that Justice Walters and the wife's barrister maintained "professional restraint" in their communications and maintained that a lay person would not believe that Justice Walters would have mistakenly thought he did not need to disclose the communications (High Court of Australia, 2020).

This matter caused the Australian Law Reform Commission (ALRC) to investigate judicial impartiality in the court system after which it tabled and released its final report in parliament on 2nd August 2022. The ALRC is an Australian Government agency within the Attorney-General's portfolio, operating under the *Australian Law Reform Commission Act 1996* (Cth), and the *Public Governance, Performance and Accountability Act 2013* (PGPA Act).The ALRC carries out research and suggests recommendations to reform the law on topics selected by the Attorney-General of Australia. ALRC recommendations do not automatically become law, however over 85 per cent of ALRC reports have been either substantially or partially implemented—making the ALRC one of the most effective and influential agents for legal reform in Australia.

Figure 10.1 — High Court of Australia

The ALRC makes recommendations that:

- bring the law into line with current conditions and needs;
- remove defects in the law;
- simplify the law;
- adopt new or more effective methods for administering the law and dispensing justice; and
- provide improved access to justice.

The ALRC's role is also to ensure that proposals and recommendations it makes do not affect personal rights and liberties of citizens negatively but instead relies on judicial decisions rather than administrative ones as far as practicable. These recommendations are usually consistent with Australia's international obligations and the ALRC considers their impact on the costs of, access to, and dispensing of, justice. It is important to note that the ALRC's responsibilities and roles do not include legal advice or handling of complaints. It can neither intervene in individual cases nor act as a 'watch-dog' for the legal system/profession (Australian Law Reform Commission (ALRC), 2023).

The report titled "*Without Fear or Favour: Judicial Impartiality and the Law on Bias*",[3] concluded that while the existing statutory framework was satisfactory, a number of measures concerning judges' appointment, education and ethics, court procedures, transparency and oversight and support of judges, should be implemented.

The report presented 14 recommendations aimed at strengthening impartial decision-making and upholding the legitimacy of the federal judiciary. The report highlighted the importance of maintaining public trust in the courts by ensuring they adjudicate disputes impartially. Some of the key recommendations include:

- Clarifying procedures for disqualifying judges: The ALRC suggests creating court-specific guidelines on judicial disqualification to enhance transparency and understanding of the processes involved in resolving claims of bias.

- Discretionary transfer of bias applications: The ALRC recommends introducing a new procedure for transferring applications for judge disqualification to address concerns about a chilling effect on parties raising such applications. The transfer would be discretionary, balancing the risk of abuse with potential delays, and would be accompanied by a streamlined appeals procedure for disqualification decisions.
- Establishment of a federal judicial commission: The ALRC proposes the creation of a federal judicial commission to enhance accountability, integrity, and education within the judiciary. The commission would oversee complaints, provide guidance on ethical issues, and facilitate ongoing professional development and training.
- Strengthened institutional supports for judicial impartiality: The report suggests implementing new processes for the appointment and training of judicial officers, as well as better understanding the experiences of court users. These measures aim to bolster institutional structures and procedures that support judicial impartiality.

The ALRC's recommendations, if adopted, aim to enhance both the reality and perception of impartial adjudication, thereby maintaining the legitimacy of the federal justice system and the quality of its decision-making. The report acknowledges the generally positive perception of impartiality and confidence in Australian courts and judges, while also addressing areas of concern and the potential impact of social and cultural factors on judicial decision-making.

The federal government responded by publishing its response to the report on 29th September 2022 and is considering the merits and design of such a body. This was announced by Attorney-General, Hon Mark Dreyfus KC MP on 25th October 2022 in the context of the 2022-23 federal budget (Attorney-General's Office, 2023).

How do I use this?

- The judicial branch's role is to interpret the law by adhering to adversarial trial procedures based on natural justice principles. One key element of natural justice is the idea of impartial adjudication. This role is carried out by the judge who is an independent and impartial adjudicator within the adversarial system. Their role is to hear evidence from both sides and deliver their verdict. In cases where they fail to be impartial, judges should remove themselves from the case and report their concerns. If they fail to do so, they may cause apprehended bias which gives parties grounds for appeal.
- The process of appeals within the Australian legal system emphasises the importance of the court hierarchy in terms of the appeals process. The right to appeal is a fundamental principle of justice and appeals can hold judges and/or courts accountable. In the case of *Charisteas v Charisteas* [2021] HCA 29, the High Court appeal found that Justice Walters had not disclosed circumstances causing an apprehension of bias. It also held the Family Court of WA accountable for dismissing the first appeal. Through the High Court's decision, the expectations for judges and courts throughout Australia's court hierarchies have been set.
- Establishing a federal judicial commission to oversee judges' conduct to prevent future instances of apprehended bias from occurring. However, the report specifies that the commission will be established "under judicial control". This reflects the paradox of judicial accountability and independence meaning that accountability by parliament or other institutions outside the judiciary could undermine judicial independence.
- The establishment of a federal judicial commission would follow the creation of similar bodies in five of Australia's states and territories. A federal judicial commission would complement the National Anti-Corruption Commission which commenced operation in 2023, further building on the Australian Government's strong commitment to integrity, fairness and accountability across all areas of government.
- It is important to consider that all other states have already referred their family law powers to the Commonwealth which led to the creation of the Federal Family Court. WA is the only state which has not referred its family law powers and has its own Family Court. Family law is complex, gives rise to many appeals and has resulted in significant reforms to procedure and courts in recent years. Could this issue of 'apprehended bias' have been avoided otherwise?

Source Analysis

Unit 1

1. Outline what is meant by the term 'federal judicial commission'? (2 marks)
2. With reference to the source, explain in your own words, **two** benefits of having a federal judicial commission in Australia (4 marks)
3. Discuss the importance of the appeals process in Australia's legal system. (6 marks)
4. "Apprehended bias undermines the principles of natural justice". Evaluate this claim. (8 marks)

Notes

1 Attorney-General's Office. (2023). Scoping the Establishment of a Federal Judicial Commission: Overview. Retrieved from https://consultations.ag.gov.au/legal-system/federal-judicial-commission/

2. Australian Law Reform Commission (ALRC). (2023). About. Retrieved from https://www.alrc.gov.au/about/

3. Australian Law Reform Commission (ALRC). (2023). Without Fear or Favour: the ALRC's new report on judicial impartiality and the law on bias. Retrieved from https://www.alrc.gov.au/news/without-fear-or-favour/

4. Groves, M. (2020). CLARITY AND COMPLEXITY IN THE BIAS RULE. Melbourne University Law Review [Vol 44(2):Adv]. Retrieved from https://law.unimelb.edu.au/__data/assets/pdf_file/0004/3606538/Groves-442-Advance.pdf

5. High Court of Australia. (2023). Case P6/2021: Charisteas v. Charisteas & Ors. Retrieved from https://www.hcourt.gov.au/cases/case_p6-2021

Sources

Figure 10.1 https://en.wikipedia.org/wiki/High_Court_of_Australia#/media/File:Court_1_at_the_High_Court_of_Australia.jpg

Case Study 11

Iran – a theocracy

Unit 1

- **11PAL: Structures and processes of one non-democratic political and legal system, with reference to the operating principles of liberal democracy.**

Unit 2

- **11PAL: Essential to the understanding of democracy and the rule of law are the separation of powers doctrine, constitutionalism and judicial independence.**

Iran is a vast country located at a strategic intersection between the Arab, Turkish, Russian, and Indian worlds, making it a crucial point of transit for the Middle East, the Persian Gulf, Central Asia, the Caucuses, and the Indian subcontinent.[1] In contrast to other countries in the Middle East, Iranians speak the Persian language, which is also known as "Farsi". The country is culturally diverse and is home to an estimated population of 86.5 million people.

Iran's ancient culture has a long history of freedom and respect for human rights. However, in recent decades, Iran has struggled to establish a democratic government and, while the country is largely pro-Western in outlook, the people of Iran are oppressed by a religious theocracy.

The modern Persian identity developed during the Constitutional Revolution in Persia from 1900 to 1906. Constitutionalists aimed to replace arbitrary power with the rule of law, respect for popular activism, representative government, social justice, economic independence, and limits on the power of the conservative religious establishment through modern education and judicial reforms.

During the two World Wars and the Cold War, Iran's internal politics, foreign policy, and society were frequently influenced by the Soviet Union. The Cold War affected domestic and foreign policies and resulted in the emergence of radical Islamism in the region. In 1979, a series of riots took place in Iran, causing the overthrow of the US-allied government of Iran, led by Pahlavi,[2] and the installation of Ayatollah Khomeini's anti-US Islamic regime.

The Khomeini decade from 1979 until his death in 1989 was a period of great upheaval, marked by extreme revolutionary actions such as the execution of supporters of the previous regime, the taking of foreign hostages, and the spread of religious fervor throughout the Islamic world. The situation was made even more intense by the eight-year war with Iraq, which resulted in over one million casualties. The former President, Ali Khamenei,[3] succeeded Khomeini as Supreme Leader.

Structure of the Iranian Political & Legal System

The Assembly of Experts, a group of 88 members, mostly composed of clerics, is responsible for overseeing, removing, and electing the Supreme Leader. Under the Constitution, the Supreme Leader has vast powers, including:

- formulating and overseeing the implementation of policies;
- acting as the supreme commander of the armed forces;
- appointing and dismissing members of the Guardian Council;
- appointing and dismissing the Chief Justice of Iran, and the heads of the Clerical and Revolutionary courts;
- appointing and dismissing the commanders of the regular armed forces, Revolutionary

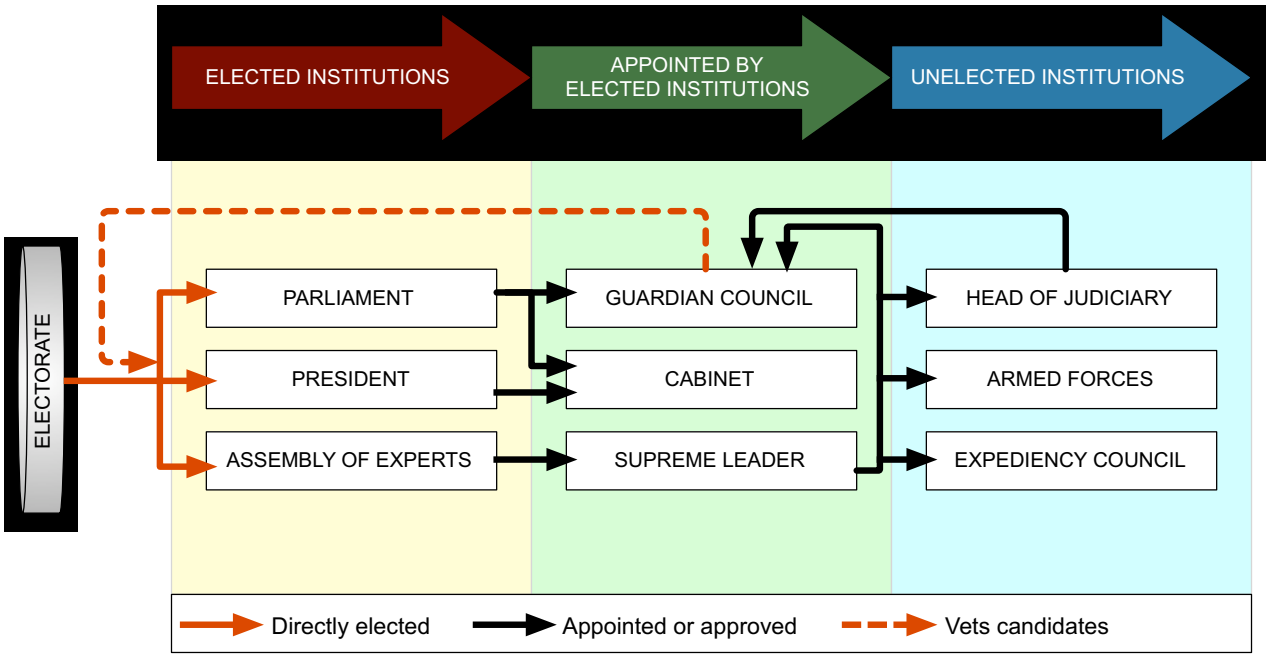


Figure 11.1 — The structure of the Iranian political system

Guards, Basij, and the Islamic Republic of Iran Broadcasting (IRIB); and

- the authority to make all significant decisions relating to security, defence, and foreign policy.

In contrast, the President of Iran is elected by popular vote for up to two consecutive four-year terms and the cabinet that he appoints must be confirmed by the parliament – the Majlis.

According to the Constitution of the Islamic Republic (IR), the Guardian Council has extensive authority over the parliament. Its main responsibility is to ensure that all legislation complies with the Constitution and Sharia law. The Council consists of twelve judges, six of whom are appointed by the Supreme Leader, while the remaining six are selected by the parliament from a list of non-clerical judges recommended by the Head of the Judiciary.

The Clerical Court is a distinct judicial system that prosecutes crimes committed by scholars and clerics, whether they are ordinary or political in nature. The court has the power to defrock and disbar the jurists, and can also hand out a range of sentences, including imprisonment, corporal punishment, and execution. It operates independently of the regular Iranian judicial system and has its own security and prison facilities.[4]

The Revolutionary Court's primary role is to prosecute individuals charged with committing crimes, as defined in the country's penal code. These crimes include *moharebeh*, which refers to acts of war against both the state and God; *baghei*, or armed insurrections against the government; and insulting the leadership. Additionally, drug-related offenses are prosecuted by this court.

The Islamic Revolutionary Guard Corps (IRGC) is a branch of the Armed Forces with the primary responsibility of ensuring the integrity of the Islamic Republic, while the Iranian Army protects the country's sovereignty in a traditional capacity. The Basij, a paramilitary volunteer militia made up of people fiercely loyal to the leader and under the command of the IRGC, maintains internal security in Iran. It has played a leading role in the quashing of dissent in Iran.

The IRGC is the Islamic Republic's most important institution. The military-security institution commands huge influence in every aspect of Iranian public life, from culture and the environment to the economy, politics, and judicial processes. Whatever the field or area, the IRGC is not required to report to anybody – it is answerable to no one.

The IRGC is also the main law enforcement agency in Iran. It plays a crucial role in prosecuting and intimidating the opposition. Its Intelligence Organization is the most powerful security entity in the country and can influence court rulings through its allied judges. The IRGC also owns and runs various educational and operational cyberspace centres. It employs the most effective hacker groups and has designed a specific base for monitoring and controlling activities on social media. The IRGC's anti-riot units are the country's most important military and militia units responsible for suppressing public protests and riots.

Several major news agencies in Iran, like Tasnim, Daneshju News, Nasim, Javan Newspaper, and Fars, are close to the IRGC. A vast network of journalists, newspapers, journals, and even social media users also act as the IRGC's propaganda wing.[5]

Liberal Democracy in Iran

The legitimacy of elections in Iran is questionable. While elections for the President and Members of Parliament occur regularly, control over candidacy means elections are not free and fair.

The Guardian Council accepts or eliminates candidates based on their political beliefs, eliminating over 90 percent of the candidates in recent elections.[6] Those over 16 can vote, but there is no electoral roll. Voters present their national identification book to get their ballot. The ballot is secret, but the vote-counting process is not transparent. Western journalists and analysts are forced to rely on Iranian statistics, and there is no capacity to check their accuracy. In the 2024 election, only 41% of voters participated in parliamentary elections, suggesting significant dissatisfaction with the choice of candidates and the government.

The media is mainly controlled by the regime, and the main sources of news and information are obtained from foreign media. Journalists and independent media outlets in Iran are regularly persecuted. Illegal arrests and harsh punishments follow grossly unfair trials in Revolutionary Courts. A centralized system filters, monitors, and censors internet content, and the government controls digital infrastructure, technology and regulatory bodies.

From 1979 to the present there have been a wide variety of protests against the government in Iran:

- Women have continued to protest against the compulsory wearing of the hijab from 1979 to the present;
- In 2016, regime corruption, anti-sharia law and a desire for regime change triggered significant protests;
- There were further protests against the regime in 2017-18 in over 31 provinces involving 100 cities;
- Economic issues among the underprivileged also triggered economic protests in 2019-20;
- All of the protests from 2016 to 2020 were ruthlessly suppressed with a significant loss of life; and
- In 2022 a 22 year old Iranian woman, Mahsa Amini, died in Tehran after being detained and allegedly beaten by Iran's religious morality police for wearing an improper hijab. Amini's death resulted in a series of protests with nearly 500 people believed to have been killed by the security forces attacking protests across the country. Amini's death ignited the Woman, Life, Freedom movement which demanded an end to compulsory hijab laws and other forms of discrimination and oppression against women in Iran.

In 2024, a significant number of ordinary Iranians continued to protest against the country's regime by refusing to vote in the presidential elections.

Figure 11.2 — Mahsa Amini

How do I use this?

- According to the Iranian Constitution, the judiciary is supposed to be an independent institution that safeguards individual and societal rights while upholding the separation of powers. However, the Supreme Leader, who is the Head of State under the Constitution, appoints and oversees the Head of the Judiciary. This amounts to executive interference in judicial affairs, which undermines the independence and impartiality of the judiciary.
- Since the 1979 Revolution and the establishment of the Islamic Republic in Iran, the Clerical and Revolutionary courts have had the power to award the death penalty and have jurisdiction over national security crimes. In the revolution of 1979, the Khomeini regime quickly replaced the existing legal system with Islamic Sharia law. The changes were extensive and affected criminal and civil codes, as well as family laws, which governed marriage, divorce, child custody, and women's rights. The Islamic penal code introduced controversial articles, such as the *Qisas*, or law of retribution,

for murder, the punishment of stoning for adultery, amputations for theft and certain national security offenses, and flogging for a wide range of offenses. This undermines the right to life, a fundamental political freedom disposed of through irreversible capital punishment.

- Numerous laws in the Islamic Republic were formulated using ambiguous language, resulting in subjective, inconsistent interpretations by judges. Consequently, the judiciary is widely regarded as one of the most dysfunctional institutions in the country.
- The judicial branch is disproportionately influenced by clerics. Only those who have received training in Islamic jurisprudence or hold degrees in religious law are eligible to become judges. Women are not allowed to become judges. Furthermore, all Supreme Court judges, the country's Prosecutor General, and the head of the judiciary must be high-ranking clerics.
- The process of selecting judges involves in-depth investigations into the political beliefs of candidates, rather than their professional competence and legal qualifications. Once appointed, judges are not guaranteed job security, as their employment is dependent on the discretion of the Chief Justice of Iran. This creates little motivation for judges to act against the wishes of the Chief Justice, which undermines their independence and impartiality.
- The judicial system of the Islamic Republic has a significant role in suppressing dissent and prosecuting dissidents, often on charges of "acting against national security." The judiciary works closely with intelligence services and has tried a wide range of opponents and critics, including students, street protesters, civil society activists, and political reformers for decades. However, the trials are often criticized for a lack of evidence and not conforming to fundamental standards of due process. Detainees can be held for long periods in solitary confinement, and many are denied access to their lawyers. Verdicts are often based on "confessions" extracted during interrogations, and many are sentenced to lengthy prison terms.
- Iran's Revolutionary Courts primarily handle prosecutions involving acts against national security, as well as drug smuggling and espionage. After a disputed presidential election in 2009, the judiciary emerged as a critical instrument to intimidate protestors and remove many leading activists and opinion makers, which were both crucial to the regime's survival.
- The Revolutionary Courts occasionally hold show trials, which include televised confessions. More than 250 people have been tried, including protestors, prominent journalists, human rights defenders and reformist politicians. The punishments range from floggings to prison terms of up to 10 years and even executions. Many of the defendants are forced to make confessions, which are used as evidence against them. Since they are held in solitary confinement prior to the trial, without access to their lawyers, it is likely that many confessions were obtained by coercion.
- Iran undermines political participation through the Guardian Council's stringent control over candidate selection, which discourages voters and diminishes the legitimacy of election results. The absence of independent and transparent electoral processes further erodes authorities' credibility. Systematic censorship, and the persecution of independent journalists, suppress dissent, stifling the engagement of Iranian citizens, and undermining majority rule.

Source Analysis

Unit 1

1. Outline what is meant by 'judicial independence'. (2 marks)
2. With reference to the source, and in your own words, discuss how the Islamic Revolutionary Guard Corps limits the political freedoms of Iranian citizens. (4 marks)
3. Discuss **two** ways in which the structures and/or processes of **one** non-democratic political and legal system undermine the doctrine of the separation of powers. (6 marks)
4. Evaluate the extent to which political participation and majority rule are upheld in **one** non-democratic political and legal system. (8 marks)

Notes

1 Before 1935, the nation that we now recognize as Iran was commonly known as Persia. Therefore, the adjective used to refer to the people of Iran transformed from "Persian" to "Iranian". In 1959, the government declared that "Persia" and "Iran" could be used interchangeably in formal communications.

2 The Pahlavi dynasty, which ruled Iran for nearly 54 years from 1925 to 1979, was the last royal family in the country.

3 Ayatollah Ruhollah Khomeini was the fundamentalist religious leader of the Islamic Republic Regime in Iran.

4 Künkler, M. (2013) 'The Special Court of the Clergy and the Repression of Dissident Clergy in Iran', in Arjomand, S., and Brown, N. (eds.) *The Rule of Law, Islam, and Constitutional Politics in Egypt and Iran*, SUNY Press, pp. 57-100

5 ABC News (2022) 'What We Know About the Basij, the Paramilitary Volunteer Group Cracking Down on Protesters in Iran', *Associated Press*, (13 October, 2022), https://www.abc.net.au/news/2022-10-13/what-we-know-about-the-basij-in-iran/101534184

6 Motamedi, M. (2024), 'Ghalibaf Among Six Approved to Run in Iran's Presidential Election', *AlJazeera,* (9 June, 2024), https://www.aljazeera.com/news/2024/6/9/ghalibaf-among-six-approved-to-run-in-irans-presidential-election

Sources

Figure 11.1 Aliazimi, The political power structure of Iran, CC BY-ASA 3.0, ttps://commons.wikimedia.org/wiki/File:Iran_gov_power_structure.svg

Figure 11.2 https://en.wikipedia.org/wiki/Death_of_Mahsa_Amini

Case Study 12

The 2022 US midterm elections

Unit 1

- **11PAL: Operating principles of a liberal democracy**

Unit 2

- **11PAL: Essential understanding – the principles of fair elections, participation**
- **11PAL: The electoral systems of another country**

On the 8th of November 2022, the Democrats defied expectations, preventing a 'red wave' from sweeping the United States in the nation's midterm elections.

Signalling the midpoint of President Joseph Biden's term, these polls provided an important opportunity for voters to hold the executive, and other elected representatives, to account, as expressed through ballots for:

- All 435 seats in the House of Representatives
- 35 of 100 seats in the Senate
- 39 Governorships across 36 states and 3 territories

Historically, midterm elections have favoured the party that is not in control of the presidency.

In the 40 midterm elections held since 1946, the president's party has gained House seats only twice, and Senate seats only four times.[1]

For Democrats, this disadvantage was made worse by domestic and international crises that heightened voter frustration. In June 2022, the inflation rate, which represents a general increase in the price of goods and services, rose to 9.1% – a forty year high.[2] One year prior, the Biden administration ordered the withdrawal of US troops from Afghanistan, resulting in the Taliban's takeover of Kabul and the reinstatement of the Islamic Emirate. This decision was made despite recommendations from senior US military officials to maintain their presence in Afghanistan.[3]

On the eve of the election, polling indicated that only 39% of Americans approved of President Biden.[4] This led many commentators to speculate that a 'red wave' would sweep the United States, and result in the Republican's control of Congress. However, this did not eventuate. Instead, Democrats retained control of the Senate and, despite modest losses in the House, boasted a successful midterm result.

Did Redistricting Produce A Fair Election?

Article 1, Section 4, of the US Constitution grants states the power to regulate the 'manner' in which they hold elections. Consequently, the boundaries for congressional districts (that is, electorates) will be redrawn by state governments following the national census.[5]

In April 2021, the Census Bureau calculated the number of seats that each state was entitled to in the House of Representatives, based on their population in 2020. States in the northeast and midwest (for example, Illinois, Michigan, New York) lost a seat, along with California, while states in the south and west (for example, Texas, Florida, North Carolina) added at least one. Following reapportionment, states were required to redraw their electoral maps. In some, this was completed by a legislature, with new maps being approved or vetoed by their governor. However, other states, such as Michigan and Virginia, created independent and/or bipartisan commissions to undertake this process.[6]

Redistricting presents an opportunity for gerrymandering – the manipulation of electoral boundaries to benefit a particular political party. This influenced the outcome of the 2022 midterm elections, albeit to a moderate extent. Republican Governor Ron DeSantis and the Republican-controlled Florida Legislature adopted a new map that allowed the party to gain four additional seats in the House of Representatives. This flipped three districts previously held by Democrats, increasing the Republicans' advantage – 20 seats to 8. Meanwhile, in Illinois, Democrat Governor Jay Pritzker and the Democrat-controlled Illinois General Assembly passed the *Illinois Congressional Redistricting Act*, which enabled the party to extend their statewide advantage – 14 seats to 3. Consequently, the Republican Party lost two seats, despite increasing their popular vote from 38.6% in 2018 to 43.7% in 2022.[7]

In states with bi- or non-partisan redistricting commissions, electoral maps were more balanced. The California Citizens Redistricting Commission, for example, eliminated a Democratic district due to slower population growth, but also adjusted the boundaries of California's 22nd and 27th Districts, both held by Republicans, which increased their competitiveness in future elections.[8]

However, the effectiveness of redistricting commissions relies on how their members are appointed. In New York, leaders of the State Assembly appointed 8 of the 10 members of the New York State Independent Redistricting Commission. This led to a deadlock along party lines, preventing the commission from producing a second map after their first was rejected by the State Assembly. As a result, the Democrat-controlled legislature passed an alternative map, dubbed the 'Hochulmander' after the State's Democrat Governor, Kathy Hochul. This map sought to increase the Democrats' statewide advantage – 22 to 4.[9] Ultimately, the New York State Court of Appeals blocked this map, ruling that it was biased and violated the state's constitution. Evidently, even in states with redistricting commissions, gerrymandering continues to threaten the integrity of election outcomes and the accuracy of political representation in the United States.

Results of the 2022 Midterm Elections

According to the Census Bureau, 52.2% of eligible voters participated in the 2022 midterm elections, while 66.3% participated in the 2020 presidential elections.[10] This can be attributed to a range of factors, including a lack of media coverage, heightened voter fatigue and the allocation of fewer resources to midterm campaigns, which are widely perceived as 'less important' than presidential elections.

Figure 12.1 — Vice President Kamala Harris

Though they failed to attract a 'wave' of votes, the Republican Party secured a majority in the House of Representatives, claiming an additional 9 seats. They also won the popular vote – 50.6% to 47.8%.

Two states had a disproportionate impact on the Republicans' success. In New York, a court-appointed expert, Jonathan Cervas, redrew electoral maps to produce "eight competitive races across the state".[11] This enabled Republican candidates to flip three seats in their favour, leading 15 Democrats and 11 Republicans to represent New York in the House of Representatives.[12] In Florida, the Republican gerrymander added an additional four seats to their total. The results in both states highlight the critical influence of redistricting on election outcomes, along with a modest swing that has enabled House Republicans to interfere with the Democrats' legislative agenda. In the Senate election, Democrats exceeded expectations, gaining a seat and maintaining control of the chamber, though still relying on Vice-President Kamala Harris to break tied votes. In doing so, they won the popular vote – 50.0% to 47.4%.

In Pennsylvania, Democrat John Fetterman defeated television personality Mehmet Oz, flipping a Republican seat. Despite concerns about Fetterman's health, due to a stroke during

Figure 12.2 — Protestors in Foley Square defending the right to abortion following the leak of a draft Supreme Court opinion that would overturn Roe v. Wade.

his primary campaign, he secured 51.25% of the popular vote. This victory can be attributed to increased voter turnout and the prominence of abortion in public debates. Nearly 60% of Pennsylvanian citizens cast a Senate ballot in 2022, including:

- 60.1% of eligible Pennsylvanian women, compared to 53% nationwide.
- 50% of eligible non-white Pennsylvanians, compared to 41.5% nationwide.
- 40.4% of eligible Pennsylvanians aged 18 - 29, compared to 31.2% nationwide.[13]

This is significant because age, race, and gender influence voting preferences in US elections. According to the Pew Research Centre, younger and non-white voters disproportionately supported Democratic candidates in 2022.[14] Likewise, although 48% of women cast ballots for Republican candidates, the Supreme Court's decision in *Dobbs v Jackson Women's Health Organisation [2022]*, which overruled constitutional protections for abortion, likely motivated many women in Pennsylvania to support Fetterman.[15]

Voter turnout can play a crucial role in electoral outcomes, even beyond that of the policies debated during campaigns. In the lead up to the 2024 election, many Democrats and Republicans will seek to mobilise their voter base while attempting to suppress votes for their political opponents. In a country with non-compulsory voting, their strategies could significantly impact the results, highlighting the importance of political participation in achieving free and fair elections.

How do I use this?

- Liberal democracies should facilitate the active involvement of citizens in the political system, through voting and other means. However, in the United States, voting is non-compulsory. Consequently, candidates and political parties dedicate significant time and effort to mobilising their supporters. The 2018 and 2022 midterm elections had the highest turnouts since 1914, indicating that eligible voters are becoming more politically engaged.
- However, officials can stifle voter participation through reforms to electoral law. Georgia, for instance, passed the *Election Integrity Act of 2021* to reduce the availability of ballot drop boxes and strengthen voter identification requirements. While targeting voter fraud, this will likely disadvantage African American citizens that, overwhelmingly, support Democratic candidates. Alternatively, parties can engage in gerrymandering to dilute the power of certain groups and distort political representation. Due to constitutional constraints, each state has its own laws and regulations governing elections, with minimal federal oversight. Though the federal government can provide guidance and/or funding for fair electoral practices, through the Federal Election Commission, and seek to enforce anti-discrimination laws, such as the *Voting Rights Act,* their influence is limited. A lack of independent oversight in states such as Florida and Illinois, for instance, undermined the principles of fair elections in 2022.

- Some states (for example, New York, California) opted to create independent or bipartisan redistricting commissions, with the intention of reducing the influence of gerrymandering. While the success of such initiatives is dependent on the appointment and power of each commission, they clearly sought to promote an equality of political rights, ensuring each citizen's vote had equal weight.
- Most states, with the exception of Washington and Maine, used first-past-the-post (FPP) voting for the Senate and House of Representatives, with voters selecting a single candidate to represent their state/district. Since the 'winner took all', this produced a large amount of vote wastage. In 2022, 46.33% of eligible Pennsylvanians voted for a Republican candidate, Mehmet Oz, but achieved no representation in the Senate. Likewise, FPP voting favoured the two major parties, discouraging votes for independents or minor parties, who were unlikely to achieve a simple majority.
- Yet, in the context of a two-party system, FPP voting produced a clear majority in the Senate and House of Representatives, which aligned with the popular vote for each chamber. However, this was not guaranteed. FPP also exaggerated the representation of winning parties in Congress, particularly when their voter base was concentrated (for example, in the gerrymandered districts of Florida or Illinois).

Source Analysis

Unit 1

1. Outline what is meant by 'political participation'. (2 marks)
2. With reference to the source, and in your own words, discuss the impact of midterm elections on majority rule in the United States. (4 marks)
3. Discuss the separation of powers doctrine as it applies to **one** democratic political and legal system. (6 marks)
4. Evaluate the extent to which the Australian political system encourages a 'tyranny of the majority'. (8 marks)

Unit 2

1. Outline what is meant by 'gerrymandering'. (2 marks)
2. With reference to the source, and in your own words, discuss the impact of gerrymandering on the outcome of the US midterm elections in 2022. (4 marks)
3. With reference to examples, discuss **two** strengths of the electoral systems of another country. (6 marks)
4. Evaluate the extent to which the Commonwealth electoral system and the electoral systems of another country uphold **one** principle of fair elections. (8 marks)

Notes

1 Sabato, L. (2023) 'Introduction: Another Confounding Election' in Sabato, L., Kondik, K., Whaley, C.O., Coleman, J. (eds.) *The Red Ripple: The 2022 Midterm Elections and What they Mean for 2024,* Bowman & Littlefield, p. 20

2 Cox, J. (2022) 'Inflation Rose 9.1% in June, Even More Than Expected, as Consumer Pressures Intensify', *CNBC* (13 July, 2022), https://www.cnbc.com/2022/07/13/inflation-rose-9point1percent-in-june-even-more-than-expected-as-price-pressures-intensify.html

3 Chalfant, M. (2021) 'General Contradict Biden, Say They Advised Leaving Troops in Afghanistan', *The Hill* (9 August, 2021), https://thehill.com/policy/defense/574283-top-generals-contradict-biden-say-they-advised-leaving-2500-troops-in/

4 Reuters (2024) 'Ipsos Poll: Presidential Approval Ratings', *Reuters* (2 July, 2024), https://www.reuters.com/graphics/USA-BIDEN/POLL/nmopagnqapa/

5 The decennial reapportionment process is outlined in §2a of the United States Code.

6 See, for example, the Virginia Redistricting Commission, comprised of eight legislative members and eight citizens selected by leading figures in the Virginia General Assembly https://www.virginiaredistricting.org/.

7 Kondik, K. 'Not Much But Good Enough: The GOP's House Takeover' in Sabato, L., Kondik, K., Whaley, C.O., Coleman, J. (eds.) *The Red Ripple: The 2022 Midterm Elections and What they Mean for 2024,* Bowman & Littlefield, pp. 76-101.

8 McGhee, E., & Paluch, J. (2022) 'Racial Representation and Partisan Leanings in California's Final Redistricting Maps', *Public Policy Institute of California* (12 January, 2022), https://www.ppic.org/blog/racial-representation-and-partisan-leanings-in-californias-final-redistricting-maps/.

9 Li, M. (2022) 'What Went Wrong with New York's Redistricting?', *Brennan Centre for Justice* (7 June, 2022) https://www.brennancenter.org/our-work/research-reports/what-went-wrong-new-yorks-redistricting

10 Fabina, J. & Martin, M. (2022) 'Voting and Registration in the Election of November 2022', *United States Census Bureau,* https://www2.census.gov/library/publications/2024/demo/p20-586.pdf

11 Smith, R., Aponte, C., Joseph, G., Sandoval, G. (2022) 'Special Master Carves Up New York's Congressional and State Senate Seats with New Maps', The City (16 May, 2022), https://www.thecity.nyc/2022/05/16/special-master-new-york-city-redistricting-maps/

12 George Santos, the representative for New York's 3rd congressional district, was later expelled from the Congress and replaced by Democrat Tom Suozzi.

13 United States Census Bureau (2023) 'Tables 4a-4c', *Voting and Registration in the Election of November 2022,* U.S. Department of Commerce, https://www.census.gov/data/tables/time-series/demo/voting-and-registration/p20-586.html

14 Hartig, H., Daniller, A., Keeter, S., Green, T. (2023) 'Republican Gains in 2022 Midterms Driven Mostly by Turnout Advantage', *Pew Research Centre* (12 July 2023), https://www.pewresearch.org/politics/2023/07/12/voting-patterns-in-the-2022-elections/

15 See, for example, the CNN Exit Poll, which indicated that 57% of women, in a group of 2,660 voters, supported Fetterman. CNN Politics (2022) 'Exit Polls for Midterm Election Results 2022', CNN (11 April 2023), https://edition.cnn.com/election/2022/exit-polls/pennsylvania/general/us-senate/0

Sources

Figure 12.1 https://en.wikipedia.org/wiki/Kamala_Harris
Figure 12.2 https://en.wikipedia.org/wiki/File:May_2022_abortion_protest_at_Foley_Square_08.jpg

Case Study 13

The Detention of Human Rights Lawyer Wang Quanzhang

Unit 1

- **11PAL: Operating Principles of a liberal democracy**
- **11PAL: Structures and processes of one non-democratic political and legal system**
- **11PAL: Essential to the understanding of the rule of law and separation of powers.**
- **11PAL: key processes of one non-common law system**

Unit 2

- **11PAL: Essential to the understanding of natural justice**
- **11PAL: Strengths and weaknesses of the processes and procedures of at least one non-common law system**

After President Xi Jinping came to power in 2012, China tightened pressure on dissidents. On 9 July 2015, the Chinese government began a mass arrest of 200-300 human rights lawyers and pro-democracy advocates. This event became known as the "709 crackdown" with reference to the date it began. UN Special Rapporteur on the Situation of Human Rights Defenders, Mary Lawlor, spoke at a conference in Geneva on 16 December 2020, stating that since the 709 crackdown "the profession of human rights lawyer has been effectively criminalised in China".[1]

Wang Quanzhang was one of the lawyers arrested. During his legal career he had defended political campaigners, filed suits for the victims of forced land seizures and represented followers of the banned Falun Gong spiritual movement.[2]

In August 2015, Wang left Beijing by train to meet with clients in Shangdong province. One morning he stopped answering calls from his wife Li Wenzu. Li was turned away by officials when she enquired about his whereabouts. It wasn't until five months later in January 2016 that she received a notice that her husband was arrested and charged with "subversion of state power".[3]

From September 2015 to January 2016, Wang was arbitrarily detained in Tianjin. He would later tell reporters that he was kept in a 20 square meter cell. He was monitored 24-hours a day by two armed officers. Some days he was commanded to stand for 15 hours at a time with his hands up in the air. When he dropped them, the guards would yell "traitor". His ordeal left him so weak he could hardly stand for more than few minutes. At night he was forbidden from rolling over in his sleep. One day he was slapped in the face for hours and then made to accept an affidavit stating that he had tried to subvert the government by receiving funds from overseas.[4]

Li networked with the wives of other lawyers who had been taken during the crackdown. They had not been permitted to talk to their husbands since their arrest. Together the women organised various campaigns calling on the release of those taken. On 4 April 2018, 1,000 days after the crackdown began, Li started a 100km march from Beijing to Tianjin where she thought her husband might be being detained. On the 7th day of her march, she was taken by plain clothes officers and returned to her home in Beijing. She was placed under house arrest. She was

Figure 13.1 — In 2023, Wang Quanzhang and his wife were forced to move 13 times in two months, as part of a pattern of harassment. They ended up in a suburb where the power is frequently cut off. The two of them are seen here looking at their phone and laptop in the dark..

reported to have called out from her balcony to the crowd outside her apartment, "My husband has been held for over 1,000 days and I don't know if he's even alive or dead. I went to find my husband – what have I done wrong?".[5]

In mid-December 2018, Li and three other wives of detained lawyers shaved their heads in a park in front of foreign journalists, and then marched to China's Supreme People's Court to petition for their husbands' release.[6]

On the 24 December 2018, Li was informed that her husband would face trial in Tianjin on 26 December, nearly three and a half years after his arrest. On the day of the trial, Li tried to leave her house to attend court but was stopped by state security agents. The agents told Li that the trial was closed as it concerned state secrets and she was not permitted to leave her house.[7] The trial was conducted behind closed doors, with foreign journalists and diplomats kept away from the court by police. Li tried to hire several lawyers to represent Wang, but none were permitted to have access to her husband.

In January 2019, the Tianjin Court released a statement that Wang had been found guilty and sentenced to four and a half years' imprisonment.[8] When Wang tried to appeal his sentence the judicial officer threatened to extend the sentence to eight years' imprisonment.[9]

Wang was finally released from prison on 5 April 2020. However, he was taken to the city of Jinan 400km away from his family and told he needed to quarantine because of the Covid-19 pandemic. After his 14-day quarantine period, he was still unable to travel to see his wife and son because of heavy surveillance. After hearing that his wife had been hospitalised because of extreme abdominal pain, Wang travelled back to Beijing. He was initially stopped on route by state officials but was eventually allowed to reunite with his family. On 27 April 2020, he returned home under the escort of around 10 state minders.[10]

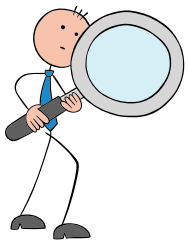
In addition to his prison sentence, Wang was given a further three years' deprivation of political rights which bar him from service in public positions, publishing and speaking publicly. Wang has stated that he intends to appeal his prison sentence and the revocation of his lawyer's licence.[11]

How do I use this?

- The detention, conviction and sentencing of Wang demonstrates that the Chinese government's claims to uphold the rule of law are merely a facade. Under the pretext of protecting the rule of law in China, the government has arbitrarily detained lawyers, the very people who work to uphold the country's legal system. A fundamental aspect of the principle of rule of law is that government power is limited to acts which are authorised by the law. In China, the law does not constrain the government but is used by the government to control its people. Accordingly, the political and legal system of China may be characterised as establishing rule *by* law rather than upholding the rule *of* law.
  - The treatment of Wang Quanzhang emphasizes the importance of separation of power. The Communist Party of China (CPC) controls all three branches of government. The executive State Council drafts laws that are effectively rubber

stamped by the legislative National People's Congress. This allows for the creation of criminal offences such the charge of "subversion of state power" which can be used to suppress opposition to the government. The CPC's control over the Judiciary ensures that those charged with politically motivated offences will be found guilty and sentenced, thereby deterring others from speaking out against the government.

- The treatment of Wang Quanzhang demonstrates the importance of the principles of natural justice.
  - Firstly, the principle that trials be heard by an impartial justice was not apparent in Wang's case. The judiciary in China are controlled by the executive branch and the Communist Party of China. His conviction and sentence were politically motivated. Although little is known about the trial, it can be presumed that the trial judge had a vested interest in finding Wang guilty of the offence.
  - Secondly, the principle that both sides are able to present their case in a trial has been breached. Wang was unable to talk to lawyers who were hired to represent him.
  - Thirdly, the principle that decisions be made on evidence has also been infringed. The case against Wang seems to rely on an affidavit that was agreed to under duress. The case is an extreme example of the abrogation of the right to silence that exists in common law countries.
  - Finally, holding the trial behind closed doors prevents the public having any confidence in it being fair and in due process being adhered to. The public has no information on the evidence relied on by the State, whether or not Wang was given an opportunity to defend himself or the reasons for the court's decision.
- The experience of Wang and his wife Li, highlights the importance of the value of various human rights which will be covered in Unit 4. Many of these rights come from the Common Law and are now enshrined in International Law through documents such as the Universal Declaration of Human Rights (UDHR). Article 9 of the UDHR protects the right to freedom from arbitrary arrest and detention. This human right can trace its origins to the Common Law writ of *habeas corpus* ('produce the person'), which required a prisoner to be brought before a court so that the court could determine whether or not a person should be detained, thereby ensuring that the independent judiciary held oversight over the deprivation of a person's liberty. Wang was kept in state detention in secret for months before even being charged, without access to his family or legal representatives. Li's rights were also breached as her freedom of movement was arbitrarily restricted without her being found guilty or even charged with an offence.



- Other relevant rights are those espoused in the UDHR - the rights to life, liberty and security of person (Article 3), freedom from torture (Article 5), equal treatment before the law and equal protection by the law (Article 7), fair and public hearings by independent and impartial tribunals (Article 10), presumption of innocence (Article 11), freedom of movement (Article 13), freedom of opinion and expression (Article19) and the right to take part in the government of one's country (Article 21).

Source Analysis

Unit 2

1. Outline what is meant by 'arbitrary detention'. (2 marks)
2. With reference to the source, in your own words, discuss **two** principles of natural justice. (4 marks)
3. Discuss the importance of **two** common law rights that apply to criminal trials. (6 marks)
4. Evaluate the claim that the absence of the principles of natural justice would make a trial unfair. (8 marks)

Notes

1 'China: Shock at continued crackdown on human rights defenders and lawyers – UN expert', *United Nations Office of the High Commissioner of Human Rights,* (online, 16 December 2020) <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=26612>.

2 'Wang Quanzhang: China releases jailed human rights lawyer', *BBC News* (online, 5 April 2020) <https://www.bbc.com/news/world-asia-china-52174952>.

3 Bill Birtles, 'China cracks down on human rights lawyers challenging the system', *ABC News* (online, 11 May 2016) < https://www.abc.net.au/news/2016-05-11/human-rights-lawyers-taking-extraordinary-risks-in-china/7406494>.

4 Yuichiro Okuma, 'Human rights lawyer accused China of extracting confession by torture', *Kyodo News* (19 June 2020) <https://english.kyodonews.net/news/2020/06/6181e6aa2317-breaking-news-lawyer-accuses-china-of-extracting-confession-by-torture.html>.

5 'Wife of detained lawyer placed under house arrest in Beijing', *The Guardian* (online, 11 April 2018) <https://www.theguardian.com/world/2018/apr/11/wife-of-detained-lawyer-placed-under-house-arrest-beijing-china>.

6 'Chinese activists shave heads to protest persecution of partners', *ABC News* (online, 17 December 2018) <https://www.abc.net.au/news/2018-12-17/chinese-activists-shave-heads-to-protest-persecution-of-partners/10629078>.

7 'DW reporters in China: Documenting the erosion of fundamental rights', *DW News* (online, 6 May 2021) <https://www.dw.com/en/dw-reporters-in-china-documenting-the-erosion-of-fundamental-rights/a-57437810> ('DW Reporters in China').

8 'Chinese human rights lawyer Wang Quanzhang sentenced to jail for subversion', *ABC News* (online, 28 January 2019) <https://www.abc.net.au/news/2019-01-28/chinese-human-rights-lawyer-wang-quanzhang-sentenced-to-jail/10756204>.

9 Okuma (n4).

10 Laurie Chen, 'Video: Released Chinese rights lawyer Wang Quanzhang finally reunites with family', *Hong Kong Free Press* (online, 27 April 2020) <https://hongkongfp.com/2020/04/27/video-released-chinese-rights-lawyer-wang-quanzhang-finally-reunites-with-family/>.

11 'DW Reporters in China' (n7).

Sources

Figure 13.1 https://gdb.voanews.com/01000000-0a00-0242-6d4f-08db7e9d40f7_cx0_cy9_cw0_w1023_r1_s.jpg

Case Study 14

Criminal Trials in China

Unit 1

- **11PAL: Structures and processes of one non-democratic political and legal system**
- **11PAL: Key processes of at least one non-common law system**

Unit 2

- **11PAL: Strengths and weaknesses of the processes and procedures of at least one non-common law system**

In 1949, the Communist Party of China (CPC) established a People's Republic and abolished all legislation passed by the former Nationalist government. It sought to establish a "civil law system governed by socialist ideology" – codified laws supported by the absolute authority of the Party as a provider of good government.[1]

Today, China's judiciary rarely challenges its governing party. In 2019, President Xi Jinping dismissed "Western constitutionalism, separation of powers and judicial independence" as contrary to Chinese prosperity, reiterating that judicial officers were "loyal to the Party, to the people and to the law."[2] Despite Xi's focus on *yifa zhiguo* (依法治国) – "governing the nation in accordance with law" – the rule of law is limited in contemporary China. By subjecting the judiciary to a legislature that it controls, the CPC avoids accountability and institutes a 'rule by law'.

Article 62 of the Constitution enables the National People's Congress (NPC) to amend the Constitution and pass legislation. It oversees the work of the executive by appointing and removing officials (for example, judges), repealing administrative regulations and reviewing reports from government agencies. When the NPC is not sitting, these powers are exercised by the Standing Committee (NPCSC), a body of 175 delegates that meet every two months.

In 2023, the membership of the Chinese Communist Party expanded to 100 million people.[3] As explained in Chapter 4 of *Democracy and Justice*, the Party mobilises their vast membership to control local legislatures and dominate elections. Its members form a super-majority in local, provincial, and national legislatures, where they are bound by party discipline.[4] As a result, the CPC appoints all government officials, including judges, the NPC Presidium and the NPCSC. These bodies exercise the power to add or omit bills from the legislative agenda and propose interpretations of law. In turn, as observed by Qin Qianhong of Wuhan University:

"[T]here has never been a case that the NPC or NPCSC rejected a bill that is endorsed by the [Communist Party], nor a case that a bill is passed into law…without the [Party's] approval."[5]

Judicial Power & Consistency in China

Judicial power is exercised by People's Courts, which operate in a hierarchy. Each court has a geographical and legal jurisdiction. The Supreme People's Court (SPC), for instance, hears civil and criminal matters that are likely to impact the entire nation, along with appeals from the judgements of the Higher People's Courts.[6]

Ordinary Chinese courts are not permitted to interpret statutes. This power is exercised by the NPCSC and delegated to the SPC and Supreme People's Procuratorate. Where appropriate, the SPC will issue 'guiding cases', which allow for the consistent application of law.

In 1995, for instance, Nie Shubin, was wrongfully executed for homicide and rape. His conviction in the Intermediate People's Court was based on a false confession forcibly obtained by police. Following a retrial in 2016, the Supreme People's Court acquitted Nie and found that, even when confessions were obtained by police:

> *"...if guilty confessions are inconsistent with the authenticity and reliability of other evidence in the archived documents...the accused must be found innocent."*[7]

This was issued as case guidance, to be referred to by other courts in cases with similar circumstances. However, unlike in common law systems, inferior courts were not required to follow the decision. Instead, should competing interpretations of the law emerge, the Supreme People's Court or legislature will issue a binding decision and initiate monitoring/disciplinary processes against the original decision-maker .[8]

Pre-Trial Processes

Police, also known as public security organs, are responsible for the investigation of crimes reported to them by victims and informants. If there is evidence to suggest that an offence has occurred, they will file a case, apprehend suspects and initiate "coercive measures". These include questioning, conditional release, home detention and formal arrest.[9] Coercive measures are not approved by an independent judge, but a procuratorate in each jurisdiction. The procuratorate is an executive body charged with the prosecution of criminal offences and supervision of judicial proceedings.

According to the *Public Procurators Law*, the procuratorate performs the following functions:

1. Using the exclusive power of prosecution. Between January and September 2022, 1.025 million people were prosecuted – a prosecution rate of 74.8%.10
2. Investigating offences committed by public servants that constitute an abuse of power and infringe on citizens' rights.
3. Supervising investigative activities, including pre-trial detention, and other aspects of criminal justice (for example, imprisonment).
4. Lodging appeals against criminal judgements believed to contain errors.

In theory, the roles of police and procurators are separate. The former is responsible for compiling a dossier – a documentary record of evidence, including witness statements and interrogation records. After concluding an investigation, this is reviewed by a procuratorate and forms the basis for a Bill of Prosecution, which transfers the case to a relevant court. However, researchers have identified two major flaws in pre-trial processes.

Historically, the police, procuratorate and courts have been dependent on one another. This is due to an appraisal system, which tied financial bonuses and promotion opportunities to prosecution, conviction and appeal rates. This undermined the impartiality of decision-makers by creating mutually beneficial relationships between executive and judicial bodies. Even with the removal of this system in 2015, cooperation persists.

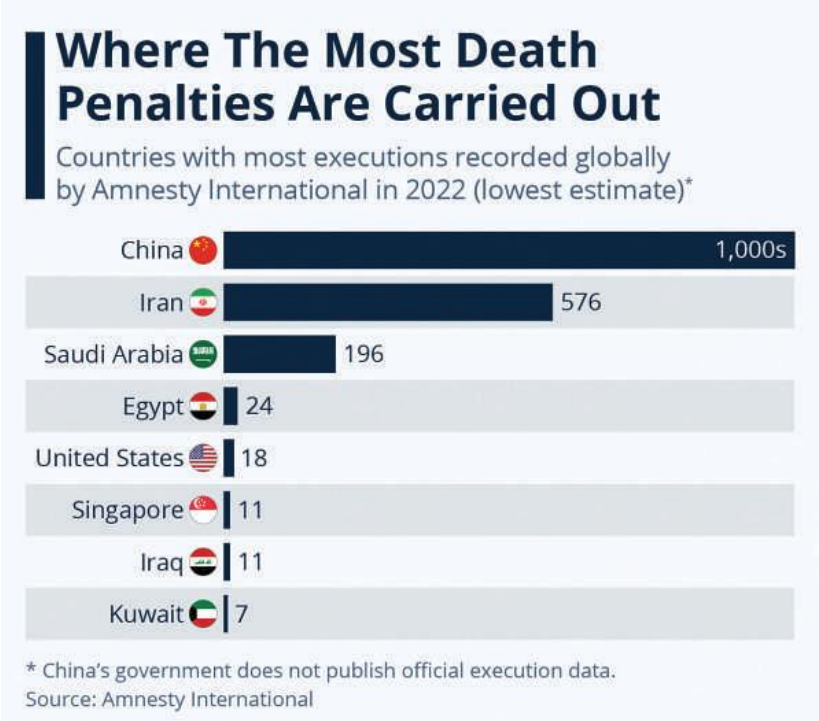


Figure 14.1 — Where the most death penalties are carried out.

This is complemented by their hostility towards the defence. According to the *Criminal Procedure Law,* suspects have the right to engage a lawyer, who may provide legal advice, file complaints, and collect evidence on their behalf.[11] However, the defence faces an uphill battle in safeguarding the defendant's rights and participating in pre-trial processes. For instance, during interrogation, a suspect may only refuse to answer questions "irrelevant to the case", limiting their right to silence. Likewise, though defence lawyers can gather evidence and review dossiers, they face interference from police and accusations of evidence tampering.

The most well-known example is Li Zhuang, a defence lawyer convicted of forcing a witness to change his testimony and give false evidence in 2009.[12] Li was acting on behalf of Gong Gangmo, a local businessman charged with organised crime offences in a crackdown ordered by the CPC Secretary of Chongqing. Throughout the investigation, Li had several disagreements with Chongqing police regarding the suppression of evidence. He also encouraged Gong to withdraw a confession made to police, believing it was obtained through torture. Despite medical evidence that supported this, Gong withdrew claims of a false confession and testified against Li in his trial. Ultimately, he was found guilty of 'lawyer's perjury' and sentenced to 18 months' imprisonment.

Adjudication

Serious criminal trials are overseen by a collegiate panel comprised of professional judges and people's assessors – citizens that participate in trial processes to improve judicial credibility. Assessors participate on equal footing with judges, including in the determination of sentences. They must be at least twenty-eight years old, possess a high school education and uphold Chinese laws.

In sensitive cases related to "foreign affairs, state security, and social stability", a case may be reviewed by an internal panel comprised of a court's president, vice-presidents, and senior judges.[13] This Adjudication Committee may overrule the collegiate panel and insist upon their reasoning. Since court officials are CPC members, this ensures critical decisions are tightly controlled by the Party.

Since 2015, the scope of review by the Adjudication Committee has narrowed due to reforms introduced by the Xi administration. However, this has not allowed for greater judicial independence. According to Xin He, Professor of Law at the University of Hong Kong, the CPC uses three other means to influence judicial decision-making:[14]

1. A digital Case Management System that enables court presidents and superior courts to evaluate the efficiency of judicial decision-making, targeting high rates of finalisation and low rates of appeal.
2. The *Law on Governmental Sanctions for Public Employees*, which enables judges, as civil servants, to be dismissed for public acts opposing the Constitution, the Party's leadership, or the socialist system.[15]
3. The National Supervisory Commission, which may investigate judges following public complaints relating to corruption, factual mistakes, inappropriate application of the law and clerical flaws.[16]

Therefore, though judicial decision-making may appear to function independently in Chinese courts it is tightly controlled by the CPC. Through internal and external mechanisms, party officials can monitor the outcomes of criminal cases.

Trial Process

1. A judge assesses the investigation dossier and determines whether the grounds for a criminal trial have been met. If so, copies of the indictment, along with the witness and evidence list, are delivered to all parties, while a collegiate panel is assigned to the case.
2. In the opening stage of the trial, the procurator, victim and accused present statements to the court. The accused is then cross-examined, first by each party and then the collegiate panel.
3. If the parties raise an objection to a witness statement, and the court "deems it necessary", that witness will be required to testify and answer questions, though these may not be leading questions.
4. The collegiate panel concludes the examination of evidence and initiates a debate on conviction and sentencing. Afterwards, the accused presents a closing statement, and the collegiate panel adjourns to deliberate. According to Articles 51 and 55 of the *Criminal Procedure Law*, the burden of proof lies with the procuratorate, which must prove the elements of an offence beyond reasonable doubt. If this standard is met, then the accused will be pronounced guilty, and a sentence imposed.
5. After a trial, parties have access to a single appeal to a superior court regarding errors of fact and/or law.[17] There are limited exceptions reserved for cases involving the death penalty and petitions to the People's Court to consider fresh evidence.

How do I use this?

- An independent judiciary is critical to the rule of law and the separation of powers. China's People's Courts are subject to their respective legislatures, which appoint judicial officials and issue interpretations of law. Due to its control of national and local legislatures, the CPC can determine the composition of Adjudication Committees and, by extension, influence the outcome of criminal trials. This has led some commentators to suggest that China 'weaponises' its courts against dissent and targets foreign nationals when diplomatic tensions arise.
- Reforms introduced by the Xi administration sought to reduce the influence of external parties (for example, Adjudication Committees, politicians) on judicial decisions. However, they increased scrutiny on individual judges, who can still be disciplined for their perceived betrayal of the CPC. This undermines the separation of powers and natural justice, particularly in politically sensitive cases.
- Evidence-based decisions are a prerequisite for natural justice. Under Xi Jinping, the CPC has sought to promote "trial-centred" justice, where evidence is used, and tested, in accordance with law. In 2012, for instance, China adopted a standard and burden of proof comparable to most Western democracies. Likewise, it introduced regulations for the exclusion of illegal evidence and forced confessions, which enhanced Chinese evidence law.[18]
- This progress is undermined by China's inquisitorial system. Under Chinese law, the procedural rights of all parties are protected. However, in practice, the procuratorate occupies a 'privileged position' as supervisor of criminal proceedings. It weaponises the law to deter the participation of defence lawyers (for example, Article 306) and forms mutually beneficial relationships with police and judicial officers.
- Courts are highly dependent on the investigation dossiers provided by the procuratorate. Researchers suggest that the participation rate of witnesses in criminal trials is low (2-8%),[19] despite legal requirements for their attendance. This stifles any attempt to challenge written statements, placing the defence at a disadvantage and contributing to China's near-perfect conviction rate – 99%.

Source Analysis

Unit 1 and Unit 2

1. Outline what is meant by 'procuratorate'. (2 marks)
2. With reference to the source, in your own words, discuss **two** issues faced by the defence in criminal trials in China. (4 marks)
3. Discuss the extent to which **two** processes or procedures in a non-common law system provide for evidence-based decisions. (6 marks)
4. Evaluate the extent to which the structures and/or processes of **one** non-democratic political and legal system can be considered non-democratic. (8 marks)

Notes

1 Zhang, M. (2010). The Socialist Legal System with Chinese Characteristics: China's Discourse for the Rule of Law and a Bitter Experience. T*emple International & Comparative Law Journal, 24,* 1-64.

2 Geo, C. (2019). Xi: China Must Never Adopt Constitutionalism, Separation of Powers, or Judicial Independence. *The Diplomat.* https://thediplomat.com/2019/02/xi-china-must-never-adopt-constitutionalism-separation-of-powers-or-judicial-independence/

3 Kawase, D. (2023) 'Chinese Communist Party Membership Approaches 100 Million', *The Japan News.* https://japannews.yomiuri.co.jp/politics/politics-government/20230730-126342/

4 Communist Party of China. (2017). *Constitution of the Communist Party of China.* Xinhua News Agency. http://www.xinhuanet.com//english/download/Constitution_of_the_Communist_Party_of_China.pdf, Article 3.

5 Jiangyu, W. (2020). The Party in the Legislature and the Judiciary. In Z. Yongnian & L. Gore (Eds.), *The Chinese Communist Party in Action: Consolidating Party Rule* (pp. 181-198). Routledge. pg. 186. On party discipline see: Articles 10 and 25 of the *Organic Law of the National People's Congress of the People's Republic of China.*

6 For more on the Chinese court hierarchy, see: Wang, Y., Biddulph, S., & Godwin, A. (2017). *A Brief Introduction to the Chinese Judicial System and Court Hierarchy.* Asian Law Centre, University of Melbourne. https://law.unimelb.edu.au/__data/assets/pdf_file/0004/2380684/ALC-Briefing-Paper-6-Wang,-Biddulph,-Godwin_5.pdf

7 Hu, Y., Xia, D., Yu, Z., Guan, Y., Luo, Z., (2020) 'The People v Nie Shubin' in *Selected Cases from the Supreme People's Court of the People's Republic of China,* Springer

8 See Chapter II, Section 4 of the *Legislation Law of the People's Republic of China.* For examples of guiding cases see: https://cgc.law.stanford.edu/guiding-cases/

9 See Chapter VI of the *Criminal Procedure Law of the People's Republic of China.*

10 Supreme People's Procuratorate. (2021). *Data on Major Cases Handled by Prosecutors Nationwide from January to June 2021.* SPP. https://www.spp.gov.cn/spp/xwfbh/wsfbt/202107/t20210725_524723.shtml#2

11 *Criminal Procedure Law of the People's Republic of China,* Article 34-39

12 Li Zhuang was prosecuted under Section 306 of the Criminal Law of the PRC. Liu, S., Liang, L., Halliday, T. (2014) 'The Trial of Li Zhaung: Chinese Lawyers' Collective Action Against Populism', *Asian Journal of Law and Society,* pp. 79-97.

13 Supreme People's Court, 'Opinion of the Supreme People's Court on Deepening Reform of the People's Courts Comprehensively: Outline of the Fourth Five-year Reform of the People's Courts (2014–2018)'. Retrieved 28 December 2023, from: https://www.chinalawtranslate.com/en/court-reform-plan/

14 He, Xin (2023), 'From Hierarchical to Panoptic Control: The Chinese Solution to Monitoring Judges', *International Journal of Constitutional Law,* 21(2), pp. 488-509.

15 Article 28 of the Law on Governmental Sanctions for Public Employees (2020).

16 See Article 25 of the Supreme People's Court document – 'Several Opinions to Perfect Judicial Responsibilities'. Retrieved 28 December 2023, from: https://www.chinalawtranslate.com/en/judicial-accountability/

17 *Criminal Procedure Law of the People's Republic of China,* Article 10

Sources

Figure 14.1 https://www.statista.com/chart/8921/countries-with-most-executions-worldwide/

Case Study 15

Miscarriage of Justice – Gene Gibson

Unit 1

- **11PAL: Essential understanding – natural justice**

Unit 2

- **11PAL: Strengths and weaknesses of Western Australia's adversarial criminal law process**

In the early hours of 26 February 2010, 21-year-old Josh Warneke's body was found on the side of the road in Broome by a taxi driver. A post-mortem examination concluded that the cause of death was 'head injury…with acute alcohol intoxication', including extensive fracturing of the skull.

Two years after the incident, Gene Gibson, an Aboriginal man from the remote community of Kiwirrkurra in the Gibson Desert in Western Australia, was identified as a person of interest in the investigation of Mr. Warneke's death. Mr. Gibson was 18 years old at the time of the incident.

Between 2010 and 2012, several people, including Mr. Gibson, were identified as persons of interest in the investigation. At the end of July 2012, the police decided to interview Mr. Gibson as a witness.

The initial interview lasted for almost three hours and no interpreter was present, despite the fact that Mr. Gibson's first spoken language was Pintupi, a local Aboriginal language. During this interview, Mr. Gibson made a number of inconsistent comments, and admitted that he had assaulted Mr. Warneke.

It was not until after Mr. Gibson had made a number of these admissions that a camera was used to record the interview. A translator was not arranged until part way through the interview. Not long after the commencement of the recorded interview, Mr. Gibson exercised his right to obtain legal advice. By phone, the Aboriginal Legal Service (ALS) advised him not to answer any more questions. Despite this, the interview continued, with neither police officer clarifying whether Mr. Gibson was willing to do so.

Mr. Gibson accompanied police officers to Broome to participate in a re-enactment and a further interview. During the Broome interview, Mr. Gibson was not assisted by an interpreter, nor was he given the opportunity to seek further legal advice. Mr. Gibson was charged with murder, to which he pleaded not guilty, and a trial date was set for August 2014.

In March 2014, Mr. Gibson applied to the WA Supreme Court for a ruling that his interviews with police were 'inadmissible because his participation was not voluntary and because the police had failed to comply with the *Criminal Investigation Act 2006 (WA)*, which includes the right to be assisted by an interpreter. Justice Stephen Hall held that the interviews were inadmissible, as they were not voluntary, were obtained in breach of the [Act], and to admit them would…be unfair to the accused'. Despite this, in July 2014, Mr. Gibson pleaded guilty to manslaughter and, on 22 October 2014, was sentenced to seven years and six months imprisonment.[1]

Mr. Gibson's appeal against his conviction was heard in April 2017 by the WA Court of Appeal.

Evidence from a clinical psychologist and clinical neuropsychologist established that Mr. Gibson 'suffered from cognitive impairments that were significant and pervasive', and 'seriously affected his capacity to ...respond effectively in novel situations, ...make decisions of importance, ...and to remember reliably detailed information'. The Court found that Mr. Gibson was 'compliant and agreeable, ... and vulnerable to suggestions by others. The Court also found that Mr. Gibson had limited English proficiency. He could not read written English, and his oral English skills were inadequate to understand and communicate in the context of the issues raised in police interviews and legal proceedings, including giving instructions and receiving legal advice.[2]

Through a Pintupi interpreter, Mr. Gibson told the Court he did not kill Mr. Warneke. On the night of Mr. Warneke's death, he had been drinking with friends and 'smoking ganja'. He had been driving back to where he was staying in Broome, when he passed a man lying down. He said he did not stop because he was frightened.

Mr. Gibson told the Court that when police first came to see him, he did not understand everything they said to him. He said the police kept asking him if he killed 'the white boy', and he said at one point that he did it. He also told the Court that in an admission to his lawyer in Casuarina Prison that he had hit Mr. Warneke 'with an iron bar was also untrue, and that he made the admission 'because he wasn't listening to my story and the police weren't listening to my story'.[3]

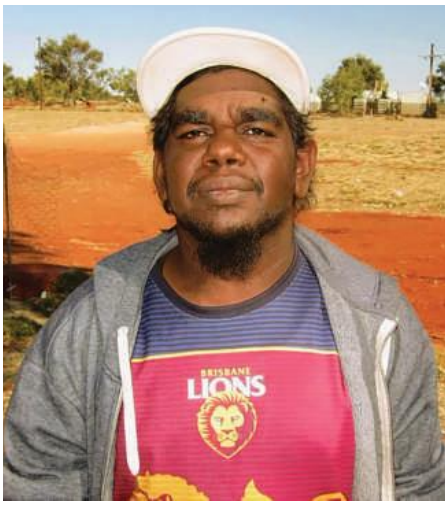


Figure 15.1 — Gene Gibson

He told the Court that he was advised to plead guilty to manslaughter because if he pleaded not guilty, he would get 'big time'. But Mr. Gibson said that he 'didn't really understand what was going on.'

The Court found that a miscarriage of justice had occurred as, due to his cognitive impairment and English language difficulties, Mr. Gibson did not adequately understand the nature and implications of his plea of guilty, legal advice regarding the plea, the legal process, or the case against him. The Court set aside the conviction of manslaughter and entered a judgement of acquittal.

By this time, Mr. Gibson had spent nearly five years in prison. The State Government awarded him $1.3 million ex-gratia payment and apologized to Mr. Gibson 'for the terrible suffering he had to endure for four years and eight months in prison'. [4]

How do I use this?

Natural Justice

- The principles of natural justice are meant to ensure that criminal proceedings and trials are as fair as possible for all parties. The four principles of natural justice are:
  - Impartial adjudication;
  - Hearing both sides equally;
  - Evidence-based decisions; and
  - Open trials.
- In *Gibson v Western Australia*, Justice Hall identified a number of failings in this case that affected Mr. Gibson's access to natural justice:
  - Mr. Gibson was interviewed as a witness, not a suspect, which meant that he was not cautioned or arrested, the interview was not recorded, and an interpreter was not used. Because of these decisions, Mr. Gibson had limited rights.
  - There was a failure to ensure that Mr. Gibson, once arrested, was assisted by a qualified interpreter as required by the *Criminal Investigation Act 2006*.
  - There were problems with the administering of the caution to Mr. Gibson. A caution usually includes words to the effect that 'you have the right not to answer questions, and any answers can be used in evidence against you'. The purpose of a caution is to ensure that any confession made is voluntary. Justice Hall found it was unlikely that Mr. Gibson understood the caution, nor his right to silence.

  - There was a failure to cease the interview after Mr. Gibson's lawyer advised police that he did not wish to answer questions.
- This case highlights the inherent difficulties of policing and administering justice in a state and country where there is a significant minority group who experience systemic economic and social disadvantages. The Western Australian legal system has evolved from the English common law system that was introduced by colonists, and to this day is almost universally administered by people who have been trained in that system, and who have relatively little experience of indigenous communities. This large cultural gap makes it vital that there are processes and procedures in place to ensure that indigenous Australians are able to access the legal system on an equal footing with other Australians.
- Unfortunately, the case of Gene Gibson indicates that there may still be some work left to do. The statistics tell a particular story. Western Australia has the highest rate of indigenous incarceration in the country. 3,464 out of 100,000 adult prisoners are indigenous in Western Australia, compared to 2081 nationally. The non-indigenous imprisonment rate is 217 out of 100,000 adults, making indigenous peoples in WA 16 times more likely to be in prison.[5]
- There are approximately 5,500 children in the care of the WA Department of Child Protection. Approximately 3000 are indigenous. A disproportionate number of children in child protection end up in the criminal justice system.[6]
- The Aboriginal Legal Service reports that indigenous people tend to occupy public space more than non-indigenous people, and so can end up being charged with offences related to being in these spaces, such as disorderly behaviour directed at police, swearing, refusing to give a name and address to police, public drinking, or assaulting police or ambulance officers. Fines are often issued for these offences, and when the fines are unable to be paid, they can accumulate, and ultimately lead to a term of imprisonment.

Strengths and weaknesses of the adversarial system

- The Gene Gibson case highlights the adversarial system's tendency to' incentivise' the presentation of enough proof by the parties in order to win a case, rather than the discovery of the absolute truth by an inquiring adjudicator. The police believed that they had found the perpetrator, so they built their case around that person, to the exclusion of others.
- Furthermore, Western Australia's adversarial system creates an incentive for accused people to plead guilty early, as they will receive a discount of up to 25% off their sentence if they do so. While this is designed to save the courts time, money, and resources, it can lead to the situation where an accused person will plead guilty to a lesser offence, rather than face trial on the original charge against them, so they receive a guaranteed lesser sentence. This is especially problematic when the accused person has cognitive impairment, language difficulties, and does not understand what is being said to them by police officers, lawyers, and judges, as was the case with Gene Gibson.

Source Analysis

Unit 2

1. Explain what is meant by evidence that is 'inadmissible'. (2 marks)
2. With reference to the source, and using your own words, explain **two** reasons why Justice Stephen Hall found that Mr. Gibson's access to natural justice had been impeded. (4 marks)
3. Discuss **one** strength and **one** weakness of open trials. (6 marks)
4. The adversarial system is primarily designed to resolve disputes rather than discover the truth. Evaluate this claim. (8 marks)

Notes

1 Tulich,T, Blagg,H & Monchaux,A Miscarriage of Justice in Western Australia: the case of Gene Gibson. Cited in Griffith Journal of Law & Human Dignity Vol 5, Issue 2, 2017

2 Tulich, Blagg,& Monchaux 2017

3 Tulich, Blagg, Monchaux 2017

4 https://www.abc.net.au/news/2018-04-18/gene-gibson-gets-payment-after-josh-warneke-wrongful-conviction/9671792

5 https://electionwatch.unimelb.edu.au/articles/the-wa-election-and-indigenous-incarceration

6 Talk by Peter Collins, Director of Legal Services at Aboriginal Legal Service of WA.

Sources

Figure 15.1 https://www.abc.net.au/news/2018-04-18/gene-gibson-gets-payment-after-josh-warneke-wrongful-conviction/9671792

	CASE STUDIES														
Syllabus Links Matrix	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15
Syllabus Topics	The 2022 Federal Election	First Nations Voice to Parliament Referendum	Religious discrimination bills	National Cabinet	Civil Trial Reforms	The Canadian Political and Legal System	The McGowan Super Majority Government	Morrison's Secret Ministries	R v Lehrmann	Judicial Independence	Iran - a theocracy	US Mid-term Elections	Chinese Human Rights Lawyer Wang Quanzhang	Criminal Trials in China	Miscarriage of justice - Gene Gibson
UNIT 1 Syllabus															
Political and Legal Systems															
Essential understandings			x	x		x		x		x	x		x		
the separation of powers doctrine			x			x					x		x		
sovereignty of parliament															
division of powers				x		x									
representative government						x		x							
Westminster conventions of responsible parliamentary government			x			x		x							
constitutionalism											x				
federalism				x		x									
judicial independence						x			x		x				
Operating principles of a liberal democracy	x	x	x								x	x	x		
equality of political rights															
majority rule		x	x												
political participation		x	x												
political freedom															
Structure of the political and legal system in Australia			x	x				x P		x L					
Roles of the legislative, executive and judicial branches of government			x				x			x					
Key influences on the structure of the political and legal system in Australia															
the Westminster system of government															
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one democratic political and legal system						x									
one non-democratic political and legal system											x		x	x	
Types of laws made by					x										
parliaments					x										
courts					x										
subordinate authorities					x										
Legislative processes at the state or Commonwealth levels		x	x	x			x								
The court hierarchy, methods of statutory interpretation and the doctrine of precedent										x					
Key processes of civil and criminal trials in Western Australia									x						
Key processes of at least one non-common law system													x	x	
Political and Legal Issues															
At least one contemporary issue (the last three years) involving the legislative process			x	x			x								
At least one contemporary issue (the last three years) involving the judicial process.					x										

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UNIT 2 Syllabus															
Political and Legal Systems															
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principles of fair elections	x	x										x			
participation	x	x										x			
natural justice		x							x	x			x		x
Political representation with reference to the role of	x	x	x					x							
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political parties	x	x	x					x							
pressure groups	x	x	x					x							
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Advantages and disadvantages of the electoral and voting systems in Australia with reference to at least one recent (the last ten years) election	x														
A recently implemented or proposed reform (the last ten years) to the electoral and voting systems in Australia							x								
The electoral systems of another country												x			
Ways individuals, political parties and pressure groups can participate in the electoral processes in Australia	x														
individuals															
political parties															
pressure groups															
Strengths and weaknesses of Western Australia's adversarial civil and criminal law processes					x					x					x
A recently implemented or proposed reform (the last ten years) to the civil or criminal law process in Western Australia					x				x	x					
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Political and legal issues															
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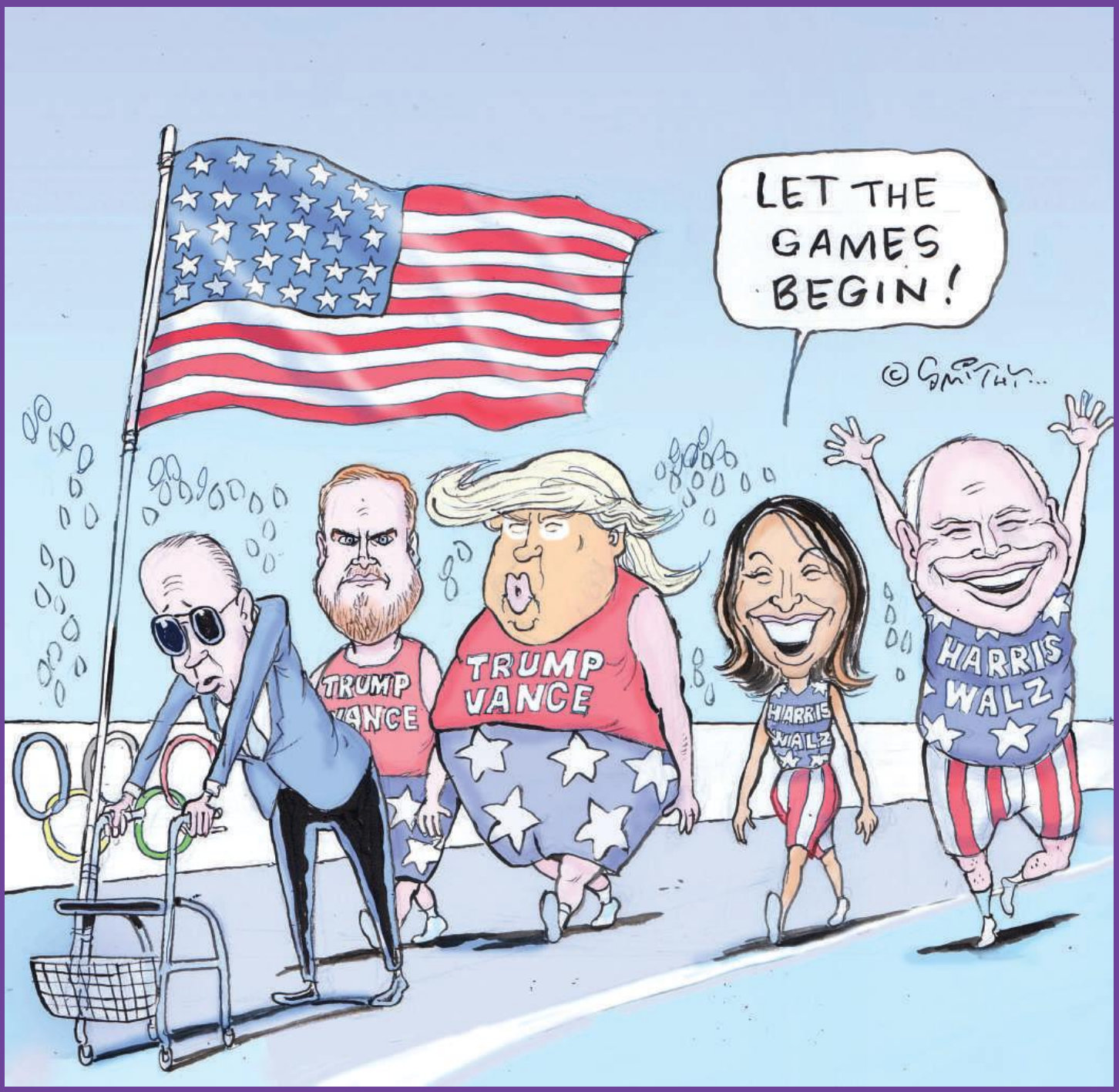
and															
At least one contemporary issue (the last three years) centering on justice.															

Index

Page references in **bold** refer to illustrations.
Index entries in *italics* refer to titles of Acts, cases and publications, and foreign language terms.



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