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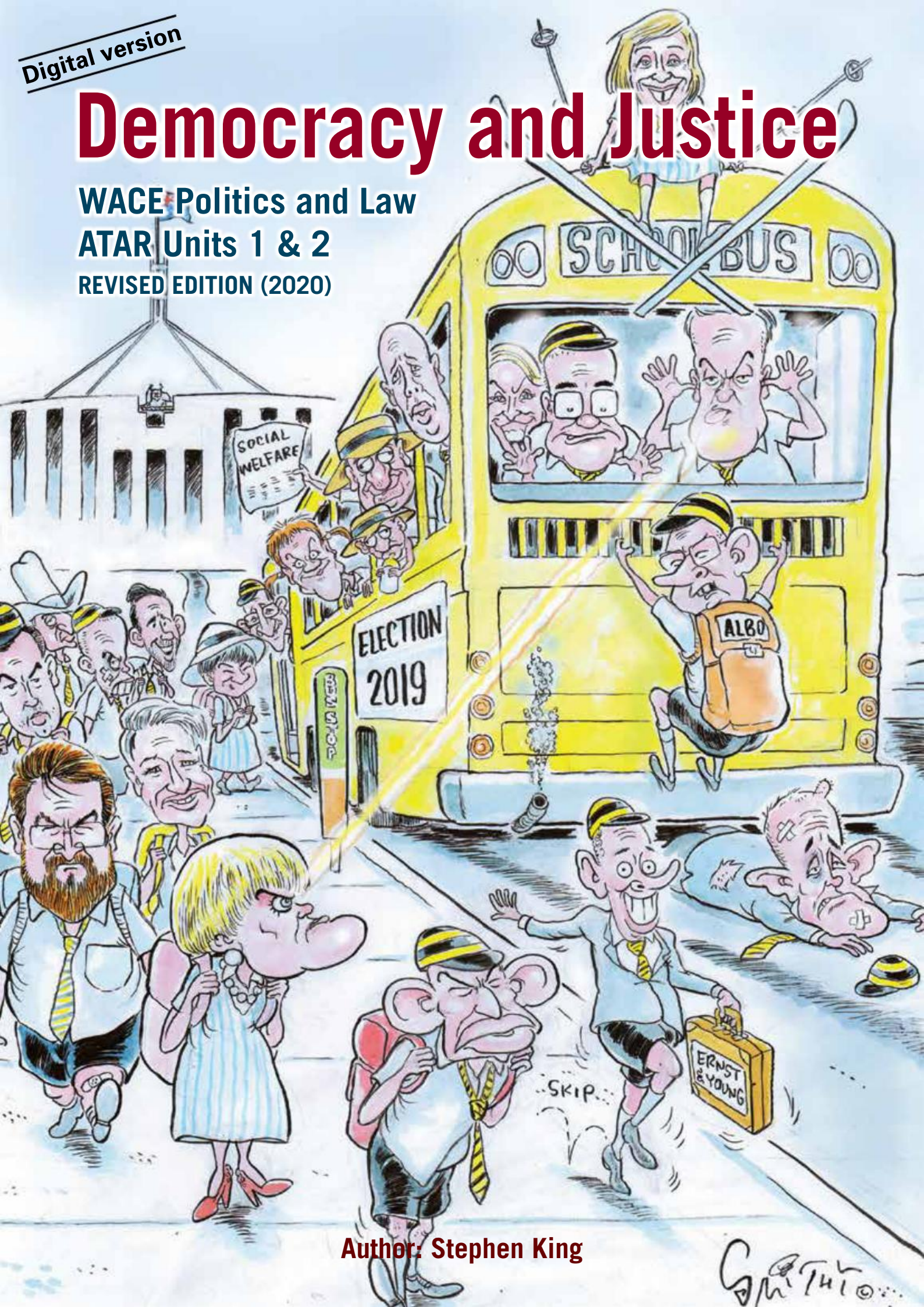
Democracy and Justice

WACE Politics and Law
ATAR Units 1 & 2
REVISED EDITION (2020)



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Acknowledgements:

PLEAWA is a not-for-profit organisation that exists to foster the development of Politics and Law, and 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 those in 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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Democracy and Justice: WACE Politics and Law ATAR Units 1 & 2 Revised Edition (2020)

A catalogue record for this book is available from the National Library of Australia

National Library of Australia Cataloguing-in-Publication data:
King Stephen
Democracy and Justice: WACE Politics and Law ATAR Units 1 & 2 Revised Edition (2020)
ISBN: 978-0-9953547-7-7

Published by: Political and Legal Educators Association of Western Australia (Incorporated)

PO Box 8084
SOUTH PERTH WA 6151
Western Australia
Website: www.pleawa.org.au

Design, typesetting and printing by:

Direction Design and Print
2/807 Marshall Road
Malaga
Western Australia 6090
www.directiondesign.com.au

Preface

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

The text provides the opportunity to learn the theoretical and practical operation of the Australian and other political and legal systems. Evidence, contemporary examples (in the last three years) and recent examples (in the last ten years), have been utilised to demonstrate principles and knowledge, and to model the importance of students applying their knowledge to particular contexts. At all times we have endeavoured to replicate the standards reasonably expected of a successful and perceptive 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 enhances and supports the content to create a visually appealing text.

Each chapter is supplemented by a summary and activities. Activities have been deliberately designed and scaffolded to reflect, in so far as possible, the assessment types and the Western Australian Certificate of Education (WACE) examination structure. Subsequently, each chapter's activities reflect the style, expected level of difficulty and number of questions found in the WACE examination. Furthermore, these activities will provide ample opportunity to review the principles and knowledge of the chapter as well as practice for the WACE examination.

The Political and Legal Educators Association of Western Australia recommends this textbook to both students and teachers of the Year 11 Politics and Law ATAR course, and the Year 12 Politics and Law GENERAL course in WA. The enthusiasm of the membership for this publication has been most welcome and we look forward to their feedback for further editions and future publications.

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CHAPTER 1

Democracy and rule of law

Syllabus points:

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

Democracy is a form of government in which people govern themselves. It originated in ancient Athens in the 5th century BCE. Its name is from the Greek words *demos*, which means 'people', and *kratos*, which means 'power'.

Almost everyone understands that 'majority rule' is a fundamental feature, an operating principle, of democracy. Majority rule is the idea that 'the will of the majority' of citizens should be reflected in government and law. In most democratic nations the right to vote and, in some cases participate formally in the government, is restricted to citizens. Citizens have entitlements and, indeed, obligations due to their belonging to a nation, and each nation decides the parameters of citizenship. Nations have defined, and will continue to define, who is granted citizenship as well as the entitlements enjoyed by their citizens.

In ancient Athens, **citizens** participated directly in their own government by voting in the *Ecclesia* (a citizens' assembly or a parliament) to decide on laws and make important decisions. Athenian democracy was a **direct democracy** because all citizens took a role in government. To qualify as a citizen, though, you had to be a free-born Athenian man. All women and the large numbers of foreigners and slaves were not entitled to be citizens. It was easy to find out what the will of the majority of citizens was because only eligible citizens could take part in the *Ekklesia*. Direct democracy worked in ancient Athens because the number of people with citizenship rights was very small.

Figure 1.1 — The Pnyx with the speaker›s platform, the meeting place of the people of Athens.
Source: CC BY-SA 3.0, <https://commons.wikimedia.org/w/index.php?curid=701621>

Representative democracy

Direct democracy is impractical in modern nations. In contemporary **representative democracies** such as Australia, which have millions of citizens, elections are used to select a small number of citizens to represent many thousands of others in a law making body.[1] Elections are the means by which representative democracies translate the will of the majority into parliaments and governments, and thus into laws.

Figure 1.2 — Pericles' funeral oration, 1877, depicting the Athenian politician, Pericles.
Source: Philipp Foltz, *Public Domain, <https://commons.wikimedia.org/w/index.php?curid=7725777>*

1 Following the 2016 federal election, each of the 150 members of the House of Representatives represents approximately 107,000 electors, and each of the 12 senators per state represents the people in their respective states.

A representative democracy needs a representative body to which its citizens elect members. This body governs on behalf of the people in their name and using powers given to it by the people. Parliaments, congresses and assemblies are common forms of representative bodies. Australia has parliaments at the national and state levels of government.

Elections give democratic authority to elected parliamentarians so they can make decisions for the benefit of the *demos*. See the section on parliamentary sovereignty below.

Parliaments perform a number of functions within a representative democracy. They:

- represent the people who elect them;
- make laws; and
- debate issues of national importance.

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

- make and break the government and hold it to account in between elections.

So, a representative democracy is a form of government in which citizens choose (by election) others to reflect their concerns and values in a representative law making assembly.

Majority rule is still a key operating principle of a representative democracy. However, the will of the majority is now expressed through the composition of the elected parliament rather than directly in every decision and law. The parliament will reflect, for a time until the next election, the will of the majority of voting citizens (called **electors**). The decisions and laws made by parliament will therefore embody majority rule.

> *Representative democracy is a form of government in which citizens choose (by election) others to reflect their concerns and values in a representative law making assembly.*

Because majority rule is so important to democracy it is absolutely essential that the voting systems used to choose representatives are fair and free from interference and voter intimidation. Further, the frequency and regularity of elections need to be such that the will of the majority is reasserted often enough that the system remains representative of the *demos*. A detailed study of elections and representation can be found in Unit 2.

Being a 'citizen' is a critical aspect of a representative democracy. Citizens have entitlements that enable them to participate in their government. These entitlements are political rights and political freedoms.

Majority rule — expressed through parliaments and governments elected by citizens with entitlements to political rights and freedoms allowing for political participation — are the key operating principles of liberal democracy. These four principles are discussed in detail below, but first, what is *liberal democracy* and who are *citizens*?

Liberal democracy

Australia is a liberal democracy. What does the adjective 'liberal' mean? How does it change the meaning of the noun 'democracy'?

A liberal democracy is a form of government in which a country's sovereignty is vested in its citizens — that is, *the people have the authority to govern themselves*. Citizens periodically delegate their sovereignty to representatives chosen through elections. These delegates (representatives) exercise the people's power on their behalf and for their benefit.

Further, a liberal democracy is not simply majority rule. It also includes respect for rights, especially the rights of minorities. Pure democracy could become a **tyranny of the majority** if majority rule is not moderated by respect for the political rights and freedoms of those who are not part of the majority. A majority may want to oppress an unpopular minority group. Liberal democracy is different from pure democracy because it respects and protects the rights of all citizens — especially the weak and defenceless — whether or not they are part of the majority. A democracy that does not protect its weak and vulnerable would be 'illiberal'.

Not all countries are liberal democracies. Unit 1 examines some non-democratic forms of government. Perceptive students will then be able to note that sovereignty in these nations can be vested in one person (absolute monarchy, dictatorship), an elite group (oligarchy, junta), in a single political party (one party state) or in religious clerics (theocracy).

Figure 1.3 — A slave child serving a Greek woman, 100 BC.
Source: I. Sailko, CC BY-SA 3.0, <https://commons.wikimedia.org/w/index.php?curid=11817147>
Source: History of citizenship, <https://en.wikipedia.org/wiki/History_of_citizenship>

There are many types of non-democratic systems of government, but they all share one characteristic — the authority to govern and exercise power is *not* vested in the people. In non-democracies, the people are subjugated[2] by the power of those in authority. They are **subjects**, not citizens. Subjects do not govern themselves.

2 To be subjugated means to be under domination or control.

Citizens

Citizenship entitles a person to certain rights and freedoms granted by their country. Citizenship can also impose obligations and responsibilities on a person. For example, many countries such as Singapore require compulsory military service from their citizens. Australia requires its citizens to vote — it is one of the few liberal democracies with compulsory voting.

Citizenship rights are not the same as human rights. Human rights are freedoms and entitlements that all human beings have. You do not need any other qualification apart from membership of the species *Homo sapiens* to be entitled to human rights. However, you have to qualify to be entitled to the political rights and freedoms of citizenship. You qualify for citizenship by birth, descent or by being naturalised (or formally adopted as, for example, Australian) to become a citizen of a country.

Australia is a nation state

The concept of the **nation state** is an important one that needs to be understood before examining the Australian system of government later in Unit 1.

Nation states are independent political units that possess:

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

Nation states have **sovereignty**, an important concept in this course. At the end of 2017, there were 195 nation states in the world.

Sovereignty is the 'authority to govern'. Nation states have the absolute right to govern within their territory and over their population without outside interference. Nation states cannot interfere in the governing of other states and will fiercely defend their own right to govern themselves. For example, in late 2017 then Prime Minister Malcolm Turnbull made a public comment about alleged foreign interference from China in Australian affairs. He noted that when China was founded in 1949 its leaders declared "the Chinese people have stood up". This was an assertion of Chinese sovereignty. Mr Turnbull went on to defend Australian sovereignty against alleged Chinese interference.

> *"Sovereignty is the 'authority to govern'."*

Sometimes nation states come together to form international organisations, with each nation state having representation in the organisation. This, though, does not override the sovereignty of that nation state. The United Nations (UN) is the most well-known example. Even international organisations like the UN cannot interfere with a nation state's authority to govern itself.

Who exercises a nation state's sovereign power is the critical question that determines whether a country is a democracy or not. In order to govern, nation states must possess **power**. Power is the ability to direct, coerce or influence others to behave in certain ways. The source of a nation state's power is **law**. Law is the most effective means of exerting power because it controls people's behaviour and is backed by the nation state's coercive force — its police and court systems. Law carries the weight of **sanction** — those who don't obey the law can be punished by the State. Law applies universally within a nation state's territory, to the entire population (including visitors) and can be enforced by the State.

Figure 1.4 — Commonwealth of Australia, including Australia's territorial claim in the Antarctic.
Source: Australia with AAT (orthographic projection).svg: Ssolbergj / derivative work Roke; CC BY-SA 3.0, <https://commons.wikimedia.org/w/index.php?curid=9397159>

All nation states possess governing **institutions** that make, enforce and interpret their laws. Nation states exercise power and govern through their governing institutions.

Institutions are political and legal bodies like parliaments, governments and courts. All the governing institutions of a nation state make up its political and legal **system of government**. Systems of government have component parts and processes arranged in an organisational structure that work together to achieve 'government'.

In summary, Australia is one of the world's 195 nation states. It possesses sovereignty and a system of government which exercises power through law over the territory and people of Australia.

Operating principles of liberal democracy

Systems are governed by 'operating principles'. Computer systems run by operational codes (called 'software') that instruct the machine on how to carry out calculations and processes. Transport systems have operational rules (like 'keep left on the road') governing the flow of vehicles or passengers.

To make any system work requires operating principles. Because it is a *system* of government, liberal democracy requires operating principles to make it work. There are four main operating principles needed to make liberal democratic systems of government work:

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

Majority rule

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

1. A legislature chosen by the people. Laws are made by a parliament composed of representatives chosen by the people. This ensures that laws reflect the values of the majority of people. Parliaments reflect the will of the majority in the laws it passes.
2. An executive chosen by the people. The executive, known as 'the government', executes (carries out) the laws and makes policies to implement them.

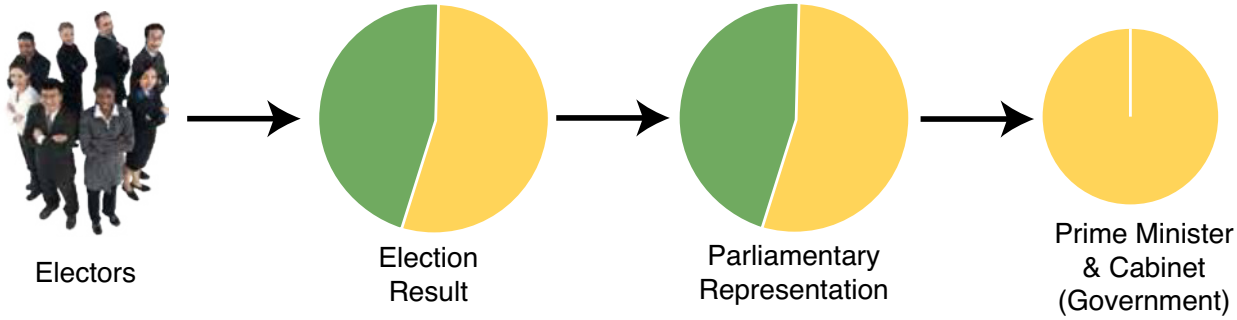
> *Liberal democracy is different from pure democracy because it respects and protects the rights of all citizens whether or not they are part of the majority.*

Many liberal democracies have similar ways of achieving majority rule in 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 (US) does the same — congressional elections allow citizens to use their voting rights to elect a representative law making congress.

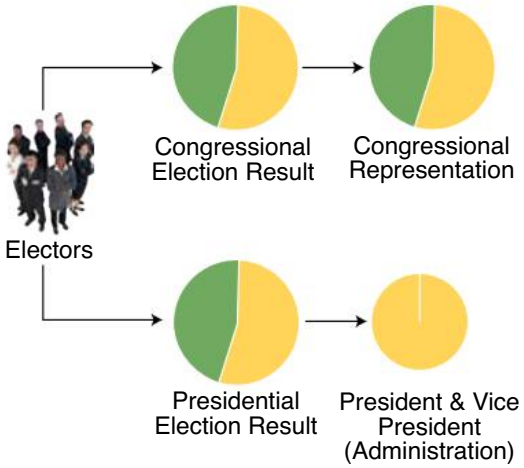
> *Power is the ability to direct, coerce or influence others to behave in certain ways.*

Australia achieves majority rule in its executive government by having its representative parliament determine government. The government in Australia is the political party or parties with a majority of seats in the lower house of parliament. The US has a very different system. Americans directly vote for their president and vice president who then choose a Cabinet of executive secretaries (called 'the Administration'). In both systems it is the will of the people that determines who wields the executive power to implement laws.

Changing the fundamental rules of a system of government — its **constitution** — must also reflect majority rule. Australians must vote YES to any proposed change to the *Commonwealth of Australia Constitution Act 1900* (the Constitution) in a special vote called a referendum. Referendums are a form of direct democracy where every citizen has a say on a particular issue. The US Constitution is also subject to the will of the people because its elected state and federal congresses must agree to constitutional amendments.



■ Figure 1.5 — Majority rule in Australia's parliamentary system of government. Electors only vote for parliament directly. They indirectly elect their government (led by the Prime Minister and Cabinet) through the parliament.
Source: Stephen King, 2018



■ Figure 1.6 — Majority rule in the US Congress and government (called 'the Administration'). There are two separate elections in the US system.
Source: Stephen King, 2018

Equality of political rights

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

In defining equality of political rights, Article 25 of the United Nations *International Covenant on Civil and Political Rights* states that every citizen has 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.*

> *Political rights enable political participation in government.*

As can be seen in Article 25(a), it is citizens' political right to vote that gives them the opportunity to participate by contributing to the composition of their parliament and to be represented in government and law making.

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

> *To be free means to be able to make choices without intimidation, coercion or pressure from those with power.*

It is an important feature of a liberal democracy that citizens have equality of political rights so that each citizen can enjoy the same opportunities to engage in political participation as every other citizen. 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, or power to influence an electoral outcome, as all other votes.

Political freedom

Political freedoms are entitlements people have that enable them to participate in their government. To be free means to be able to make choices without intimidation, coercion or pressure from those with power.

The *International Covenant on Civil and Political Rights* says the following concerning political freedoms:

Article 18

1. *Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his[3] 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.*

2. *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

1. *Everyone shall have the right to hold opinions without interference.*

2. *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,*

3 Note: While the gendered nature of the language is reflective of the time in which the Conventions were written, it should be read to cover everyone regardless of gender.

regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

Article 21

The right of peaceful assembly shall be recognized.

Article 22

1. *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.*

Note how Article 25 of the *International Covenant on Civil and Political Rights* says that political rights belong to citizens, but the political freedoms in Articles 18, 19, 21 and 22 belong to everyone.

In Australia everyone can think and believe what they wish. They can have opinions and they have the right to express these thoughts, beliefs and opinions freely through different forms of communication. In Australia this political freedom is broad, but not unlimited. People in Australia have an implied right to political communication, but not a right to free speech (as in the US). This means there are certain limits on freedoms about what is expressed and how people act — such as inciting racial vilification or hatred — that are contrary to broadly accepted norms.

People also have the right to come together and act collectively — to form a pressure group — for the purposes of political activity. Trade unions are an example of such a pressure group. People also collectively form political parties like the Liberal, Labor, Greens and One Nation parties. Pressure groups and political parties are very important ways in which people advocate for their political beliefs and interests, and seek to change law.

Political participation

Political participation occurs when people actively take part in their own government by putting to use their political rights and freedoms. Doing so enables them to influence law making and government decision making.

There is a myriad of ways for active citizens to engage in political participation. Voting in elections, learning about and debating issues with other people, joining pressure groups and political parties, writing to a member of parliament or the newspapers, publishing opinions, protesting, volunteering to hand out leaflets, donating to a cause and running for public office are all examples of political participation in a liberal democracy.

> *Political participation occurs when people actively take part in their own government by putting to use their political rights and freedoms.*

Additional principles of a liberal democracy

The rule of law

A critical feature of a liberal democracy is the **rule of law**. Law is the ultimate authority in any society. The rule of law's most important characteristic is that everyone, even those with political legal power to make and carry out the law, must be subject to law. This includes the highest officials — prime ministers, presidents, monarchs and so on.

Less obvious, but equally critical, is the requirement that all parts of the political system — its parliaments, courts, governments, police and so on — must also be subject to law.

All people, including those with wealth and power, and all organisations and corporations, must be subject to law.

Ultimately, the rule of law protects citizens from abuses of power. In a liberal democracy, through their elected representatives, citizens make their own laws. Through the rule of law, citizens can impose limits upon those in power.

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

The rule of law is dependent on some key design features in a representative liberal democratic system, which include separate and independent courts. Judges in courts apply the law in individual and specific cases. At times, the executive government itself may be a party in a case. At other times, very wealthy or powerful individuals or corporations may be parties to a case. It would be against the principles of liberal democracy if judges could be influenced by power or wealth to make decisions that favoured government, powerful people or companies.

■ Figure 1.7 — Frederick Dielman, Law, 1896. Mosaic representing both the judicial and legislative aspects of law. *Source: <https://www.loc.gov/jefftour/cm/cm-mos-n.html>, Public Domain, <https://commons.wikimedia.org/w/index.php?curid=6675908>*

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 is a brief overview of the relationship between law and the other forms of social control discussed so far. Students are encouraged to link this discussion to their understanding of the rule of law.

Universality of law

The rule of law exists because of the universality of law. It means that no one is above the law, even those who make law. This is the most well understood aspect of the rule of law.

The rule of law exists because laws override **customs and traditions**. In Australia, this may cause conflict between Aboriginal customary law, which is oral and based on centuries-old customs and traditions, and formal laws made in parliaments and carried out by state and federal executives. The relationship between customary law and formal law is controversial in modern Australia because many indigenous leaders assert that Aboriginal people never surrendered sovereignty in 1788. Some people regard Australia Day on the 26 January as 'Invasion Day' for this reason.

It also means that migrants from countries whose customs conflict with Australian values must modify them when they settle in Australia. Examples of customs still common in some parts of the world include female genital mutilation and child marriage. Migrants from countries where these practices still occur 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 is possible. It's the law.

The rule of law exists when laws are 'good' laws and reflect **morals**. They should be morally acceptable to the majority of citizens and reflect these moral truths. Moral values such as the prohibition against murder are often the basis of laws. The moral basis of law is why 'good' people obey the law even without consciously knowing it in detail. The moral principle of equality was the reason for the December 2017 amendments to the *Marriage Act 1961* (Cth) that made same-sex marriage lawful. Before the amendment there was a growing sense amongst Australians that the *Marriage Act* was wrong in a moral way as it legalised discrimination and inequality.

Today, many people regard the *Migration Act 1958* (Cth) as out of line with our moral obligation to treat asylum seekers and refugees within moral concepts such as human rights. Moral discomfort with existing law is a powerful force leading to changes in the law. The rule of law requires that law is adaptable.

The rule of law exists because laws override **rules**. Most sports regard on-field brawling as against the rules. If a brawl reaches a level in which serious injury is inflicted then the perpetrator may be charged with the crime of assault, no matter what the rules say. No group can make rules that are unlawful. There is no question about this and no exception can be made. The law is the law.

The rule of law exists because constitutions are superior law, which is also known as fundamental law. Constitutions create the law-making bodies of government (parliaments, courts and the executive). They define their **powers**. Constitutions establish the relationships between the parts of government — they separate the powers and set up checks and balances. No law

■ Figure 1.8 — Some people regard Australia Day on the 26 January as 'Invasion Day'.
Source: Matt Golding. *<https://twitter.com/goldingcartoons?lang=en>*

of parliament, no court decision nor executive policy can be unconstitutional. Fundamentally, there is supremacy of the law over all people, the government itself and any other form of social control.

Law should be known, clear, consistent and coherent

People subject to the law should have an opportunity to know a law exists before it is applied. It is for this reason that once a law is passed by parliaments and assented to by the executive it is published. In Australia this occurs through *Government Gazettes* online. Practically very few ordinary people would access these documents. Nevertheless, once proclaimed you are expected to comply with all law and any changes to the law. Claiming that you did not know of the law is not an excuse for not following the law.

Knowledge of the law is also the reason why laws should be made *in futuro* and not *ex post facto*. This means that the law should only apply after they were created and not to a time before the law existed. Enforcement of a law should start after it has been proclaimed. This prevents a person from being charged retrospectively for an act that was actually legal at the time they carried it out. This principle tries to limit the ability of the government to abuse their powers and unfairly prosecute individuals. The practice of passing laws that apply to the past is not prohibited in Australia, as it is in the US, but it is a rare occurrence.

Law should provide clarity for people to allow them to understand the types of behaviour that are acceptable and unacceptable in society. Law that is unclear or ambiguous can lead to uncertainty of law and to issues with the enforcement of law.

■ Figure 1.9 — Before the amendment there was a growing sense amongst Australians that the Marriage Act 1961 (Cth) was wrong in a moral way.
Source: Matt Golding. <*https://twitter.com/goldingcartoons?lang=en*>

Consistency in the application of law, to all people, is important to ensure the law is fair and equitable to all adults. Sometimes society will make some exceptions about the application of laws to small groups of people, such as children, who are not capable of fully understanding the law.

Methods of upholding the rule of law

The rule of law exists because the independence of the courts is entrenched in democratic constitutions. Courts must be free of pressure and interference from governments and others so they can adjudicate matters purely on the basis of law. **Judicial independence** guarantees that judges cannot be pressured by government or powerful people to make decisions in court that would apply the law unequally to some individuals or groups. The justices, judges and magistrates in the courts must be impartial and enjoy judicial discretion when making judgements and providing reasons for their decisions.

Perceptive students will note that the rule of law also exists because of the separation of powers. This democratic principle of splitting powers, to be discussed further below, protects the superiority of law over any competing notion of power.

Freedoms and equality before the law

The rule of law exists when the law protects citizens' equality and political rights and freedoms. Rights and freedoms enable participation. Through participation people can bring pressure on parliament and government, and exercise their legal rights to uphold their values.

Legal rights such as the presumption of innocence and the right to silence are important aspects of the rule of law because they guard against the arbitrary use of power against accused persons. The courts protect these rights through their trial processes and the common law.

Further, all people are treated equally before the law. They enjoy the same legal rights to access the legal system and are treated with equity in legal proceedings, without discrimination. This equity supports the upholding of legal rights and the attainment of both civil and criminal justice.

Historical and recent matters concerning the rule of law

Constitutions are the highest form of law. They cannot be breached under any circumstances, even when they are unjust or out of date. Before 1967, racism (a moral wrong) was constitutionally required by Section 51(xxvi) of the Australian Constitution which prevented the Commonwealth from making any laws for Aboriginal people. That particular moral wrong only ended when the words of the Constitution were changed by referendum. Despite the moral wrong, racial equality was unachievable in Australian while the Constitution remained unchanged. The law is the law — even when it is wrong — as the law is a more powerful influence on behaviour than morals.

Nations are judged on their compliance with the principle of rule of law. Notably, the World Justice Project annually reviews and surveys individuals and expert groups in countries on their perceptions of the rule of law in their nation.

Australia is regarded as one of the most successful nations in upholding the rule of law. In the *Rule of Law Index 2017–2018 Report,*[4] Australia was ranked tenth globally (out of 113 nations evaluated), second in our region (to New Zealand), with an overall score of 0.81 (out of 1). This result is based upon indicators about government power constraints, absence of corruption, open government, fundamental rights, order and security, enforcement, civil justice and criminal justice. Australia has remained relatively stable in its fulfilment of rule of law, showing an ongoing appreciation and respect for rule of law.

However, Australia, like all nations, is not perfect, and there are areas to improve. Some of these are caused by fundamental elements of our political and legal system, whereas others are reflections of contemporary tensions in our society on how power is used or abused. Throughout 2017 and 2018 Australia continued to face tensions regarding the accessibility and affordability of civil justice, issues of discrimination in legal justice and rights, as well as increased questions on corruption of legislators.

Some issues relate to the actions of the elected representatives themselves whilst in office, to the laws passed by parliaments, decisions of ministers or inefficiencies of legal institutions and processes.

4 World Justice Project, WJP Rule of Law Index 2017–2018, 2018, < https://worldjusticeproject.org/our-work/wjp-rule-law-index/wjp-rule-law-index-2017%E2%80%932018>

Australia has a sound record of ensuring supremacy or universality of the law. This has meant when individuals with power, wealth and status have broken the law they have been subject to normal legal proceedings. This has applied equally to politicians, judges and ministers. Former federal members of parliament, Senator Mary-Jo Fisher (Liberal) and Craig Thomson MHR (Labor/Independent), as well as former Western Australian Treasurer, Troy Buswell (Liberal), and Premier Brian Burke (Labor), have all been investigated, prosecuted and convicted through ordinary legal proceedings for their infractions, despite their power. Former Speaker of the House of Representatives, Peter Slipper MHR (Liberal/Independent), and former High Court Justice, Lionel Murphy, were convicted initially of the allegations against them, but their convictions were subsequently overturned on appeals through normal court proceedings. Former Federal Court Judge, Marcus Einfeld, was also convicted for his acts of perjury and perverting the course of justice over a $77 speeding fine, former NSW Judge, Roderick Howie, was convicted of drink driving, and former NSW Chief Stipendiary Magistrate, Murray Farquhar, was convicted of conspiracy to pervert the course of justice in 1985. All these examples demonstrate that individuals, regardless of their position, status and power, are equally subject to the law like every other person.

Section 44 of the Constitution sets strict citizenship requirements for parliamentarians. It is arguable that this section is out of date with current practices of citizenship around the world. It is certainly very inconvenient

■ Figure 1.10 — After the issues associated with the citizenship of Australian parliamentarians caused by Section 44 of the Constitution, there are many who argue it should change. *Source:* Matt Golding. *<https://twitter.com/goldingcartoons?lang=en>*

and prevents perhaps a third to a half of all Australian citizens from being elected to the parliament of our multicultural democracy. Many people do not know they are foreign citizens because the laws of other countries can affect their citizenship status. Ignorance of the law, even other countries' laws, is no excuse — the Constitution is fundamental law and it must be obeyed. It is for these reasons that because they failed to comply with the requirements of Section 44 of the Constitution, numerous members of the House of Representatives and the Senate since 2016 have had their election to the Commonwealth Parliament invalidated. Fundamentally, they were held accountable for not complying with this requirement.

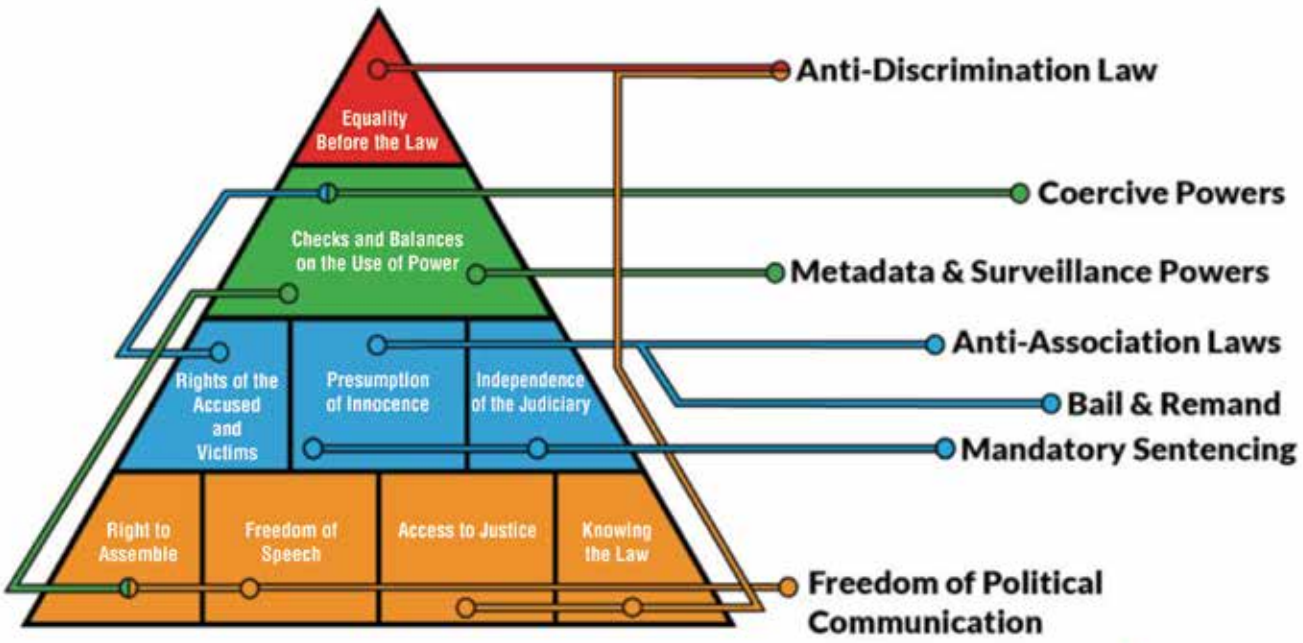
Neither parliament nor government can ignore the law. They also must comply with laws and also with the Constitution. It is for this reason that individuals or groups can challenge the validity of laws passed by parliament and decisions made by ministers, respectively. There are numerous examples of when this has occurred, including the *Australian Communist Party v Commonwealth (1951), Williams v Commonwealth (2012), Williams v Commonwealth (No.2) (2014), Graham v Minister for Immigration and Border Protection (2017), and Plaintiff M70 and Plaintiff M106 v Minister for Immigration and Citizenship (2011).* These demonstrate the government and its ministers being equally subject to following the law, just as individuals are, and if they act beyond the law or in contravention to the law they can be held accountable. This form of accountability through the courts is a great example of the existence and vibrancy of rule of law in Australia.

Students wishing to investigate recent issues may choose one or more of them and inquire into their implications for the rule of law in Australia. In Western Australia, for instance, mandatory sentencing laws have a significant impact upon judicial discretion of judges when determining sentencing of convicted offenders. Perceptive students will be able to describe the issues and the strengths or tensions identified to upholding the rule of law and its elements.

Separation of powers

The doctrine of the **separation of powers** is an essential feature of a liberal democracy. The separation of powers is the organisation of the powers of government in such a way that prevents the concentration of power in the hands of one leader or an elite group.

The separation of powers is based on the idea of dispersed power. If a society of citizens wishes to control the use of their government's powers then it needs to split the powers up and spread them throughout the political and legal system. No one part of the system should have too much power.



■ Figure 1.11 — Issues and the rule of law in Australia.
Source: Rule of Law Institute, <https://www.ruleoflaw.org.au/education/teaching-strategies/>

> *The separation of powers is the organisation of the powers of government in such a way that prevents the concentration of power.*

A government's main tool for governing is law. For law to work it must be:

- created;
- carried out or administered; and
- applied in ways that resolve specific disputes.

These three aspects of law are separated from each other in liberal democracies. They are concentrated in non-democratic or autocratic systems of government.

When powers are separated they can provide accountabilities, or check and balances, on each other.

- **Checks** are limits to power.
- **Balances** are an equivalence of different types of power.

Checks and balances are the result of an effective separation of powers. See Figure 1.12.

One of the first philosophers to think about the separation of powers was a French aristocrat, Baron de **Montesquieu**,[5] who sought asylum in Britain during the French Revolution. The France he fled had been ruled by an absolute monarch whose government had unlimited power. It used its powers to abuse the rights of the French people to such an extent that they rose up in revolution and overthrew their King. The King and the French aristocracy were publicly executed by guillotine in front of angry mobs of ordinary people. Royal government was replaced by a republic, which itself descended into a reign of terror.

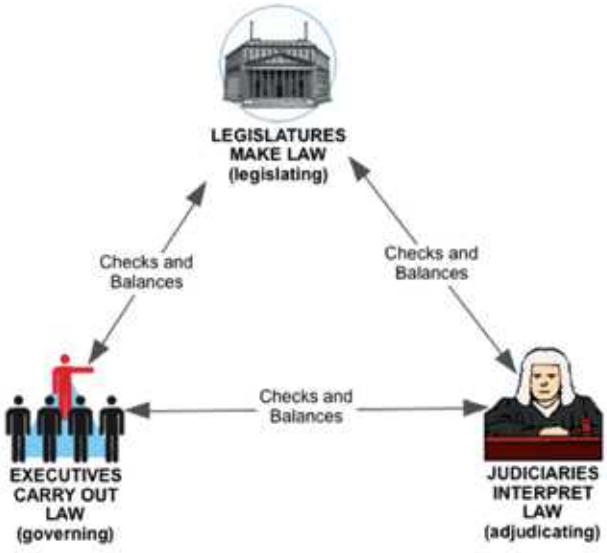


Figure 1.12 — The separation of powers. Placing the powers to make law, to carry out law and to interpret law into three separate institutions is a key feature of liberal democratic systems of government. Each institution has sufficient power to limit (check) and balance the powers of the other two. It is an effective way to limit the power of government.
Source: Stephen King, 2018

As a refugee in Britain, **Montesquieu** wondered how Britain had succeeded in limiting its government's power, where France had failed so catastrophically. Montesquieu observed that a key feature was the dispersal of power. The power to create law was held by a group of people in parliament[6] different from those who carried out the law.[7] Yet another group held the power to decide how law applied in specific cases.[8] No one in Britain's system of government seemed to have too much power. And, importantly, each group was able to limit the power of the other two.

He wrote a book, called *The Spirit of the Laws*, in which he clearly explained his observations that in Britain:

- **parliamentarians** create law;
- **ministers** administer, or carry out, the law; and
- **judges** decide on how the law applies in specific cases and make legally binding decisions.

The power to create law is called legislative power. The power to administer law is called executive power. The power to decide how law applies in specific cases is judicial power.

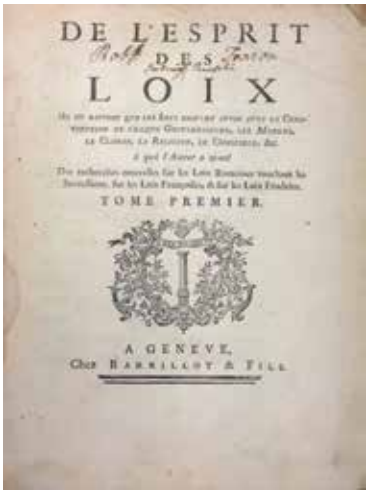


Figure 1.13 — The title page of volume 1 of Baron de Monstesquieu's The Spirit of the Laws.
Source: Smuconlaw. Own work; photographed from an original copy, Public Domain, <https://commons.wikimedia.org/w/index.php?curid=39705801>

5 His full name and title was Charles-Louis de Secondat, Baron de La Brède et de Montesquieu.

6 Members of the House of Commons, the lower house of the British Westminster Parliament.

7 A Cabinet of government ministers formed within, but functionally separate from, the parliament.

8 The Privy Council formed of 'Law Lords' — judges within the upper house, the House of Lords.

> *The power to create law is called legislative power. The power to administer law is called executive power. The power to decide how law applies in specific cases is judicial power.*

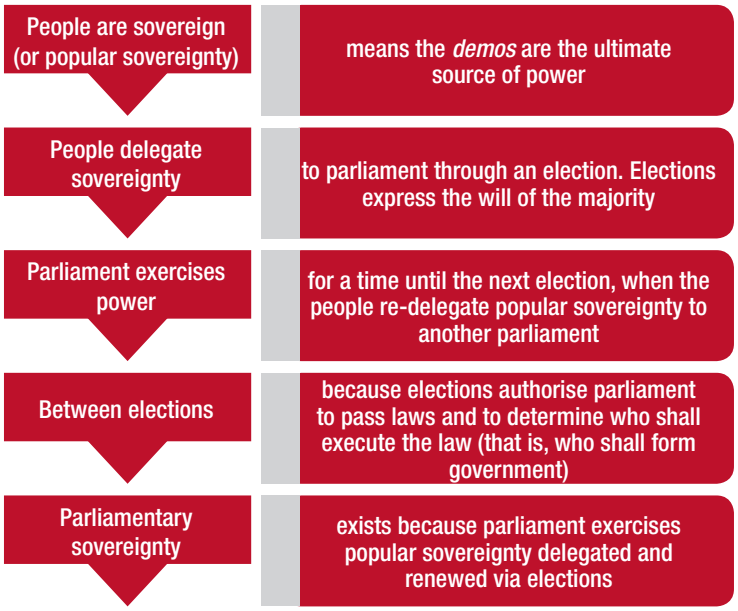
Legislative power — parliament

Legislatures make or create law. A legislature may be called 'parliament', 'congress', 'assembly' or some other term. Australian legislatures are called parliaments.

The key part of a representative democracy is its parliament as its legislature. This institution is directly elected by citizens and expresses majority rule. Citizens delegate their sovereignty to members of parliament.

Because parliament expresses the will of the majority and translates this into majority rule it has to be the most powerful institution in the system of government. Parliament is above the other parts of the system, namely the executive government and the courts. It has the supreme power to check the powers of other institutions.

Parliamentary sovereignty is the idea that the parliament is the most powerful part of a representative democracy. There is a logical sequence of thinking that helps us understand the concept of parliamentary sovereignty. Figure 1.14 illustrates the logical reasoning leading from popular sovereignty[9] to parliamentary sovereignty.



■ Figure 1.14 — Logical sequence from popular sovereignty to parliamentary sovereignty.
Source: Stephen King, 2018

Parliamentary sovereignty is a critical idea in systems based on the British Westminster political and legal system. Later, Unit 1 explains that the **Westminster system** places parliament in the central position in government because it is the only part "directly chosen by the people"[10] in a single parliamentary election.

In systems based on the US federal model, an executive president is elected separately and in addition to the congress. There are two separate elections. Popular sovereignty is divided between the congress and the president, which weakens the sovereignty of the congress.

Further, in federal systems the sovereignty of the national parliament may be limited by the rules of a constitution and by the division of sovereignty between the national parliament and state parliaments. Each level is only permitted to make laws in its own defined sphere.

> *Parliamentary sovereignty is the idea that the parliament is the most powerful part of a representative democracy.*

Australia is an American-style federation that operates as a British Westminster-style system, and so its national parliament has constitutional and federal limitations to its sovereignty. Unit 1 will examine the influence of British and American ideas on the Australian political and legal system.

Executive power — Cabinet and the public service

Executives administer or execute the law made by the legislature. An executive may be called a 'Cabinet', 'ministry' or an 'administration'. They contain ministers. Ministers are responsible for an area of government activity, such as defence or welfare. These areas of responsibility are called **portfolios**. They are large because they also contain government employees who are needed to administer laws. These include public servants who work for the government.

Australia has both cabinet government and a public service.

9 'Popular' means 'of the people'.

10 Sections 7 and 24 of the Constitution use this phrase specifically.

■ Figure 1.15 — The second Turnbull ministry, following the 2016 election.
Source: ©Commonwealth of Australia, 2016, <http://www.dpmc.gov.au/sites/default/files/slider/ministry-%20swearing-in-19-july-2019.jpg>, and CC BY 4.0, <https://commons.wikimedia.org/w/index.php?curid=50344518>

> *Judges have judicial power, the power to make legally binding decisions when interpreting law.*

Judicial power — courts and judges

Judiciaries resolve disputes by interpreting law in specific cases. A justice system contains judges and courts. Judges have judicial power, the power to make legally binding decisions when interpreting law. Courts are arranged in a ranking from lower courts, which deal with minor disputes, to higher courts, which deal with more serious or complex disputes. This is referred to as a court hierarchy.

Australia has many courts and judges in both federal and state court hierarchies.

A key element of both the rule of law and the separation of powers is the complete independence of the judiciary from both the parliament and the executive government.

Judges are appointed by the executive government, but cannot be dismissed by it. They can only be dismissed by parliament for 'proved misbehaviour or incapacity'.[11] These arrangements make judges extremely secure in their role and free from interference or pressure by the executive government or the parliament.

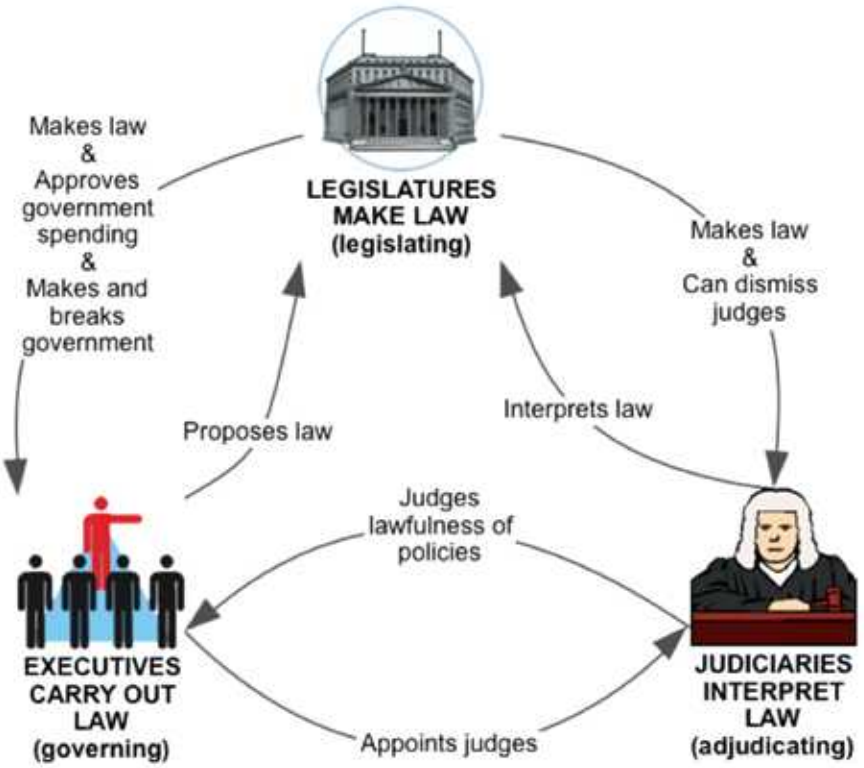
Checks and balances

Legislatures, executives and judiciaries possess different power in relation to the law. Each one checks the power of all arms of government and has an internal structure and procedures for keeping itself accountable. Figure 1.16 shows how each branch or 'arm' of government relates to the others.

Within each branch there are further checks and balances.

- Within parliament, the two houses check and balance each other, and each chamber has a presiding officer[12] and rules[13] they must follow.
- Within the executive, Cabinet conventions (unwritten rules) keep ministers accountable.
- Within the judiciary, higher courts keep lower courts in a court hierarchy accountable through the appeals process.

Such strong limitations to the powers of each arm of government would not be possible without a strong separation of powers.



■ Figure 1.16 — The checks and balances between each of the branches of government in Australia.

11 Section 72 of the Constitution.

12 In Australia, the Speaker of the House of Representatives and the President of the Senate.

13 Each house of parliament has its own Standing Orders or procedural rules that manage the work of the house.

Summary

- Democracy is a form of government in which the *demos* are sovereign and govern themselves. Citizens may take part directly in a direct democracy or they may elect representatives in a representative democracy. All modern democracies are representative democracies.
- Representative democracy is a form of government in which citizens elect representatives to govern on their behalf. There is a representative assembly (a parliament) with law making powers. Parliament exercises the people's sovereignty to make laws supported by the majority of citizens.
- Democracy must be moderated by liberalism so that a tyranny of the majority does not emerge and threaten the liberties of minorities.
- Liberal democracy is a form of government in which the liberal values of respect for individual rights and freedoms temper majority rule.
- Liberal democracy depends upon four key operating principles. These principles are:
  - majority rule;
  - equality of political rights;
  - political freedoms; and
  - political participation.
- Citizens are entitled to political rights enabling political participation. Everyone, including non-citizens, is entitled to political freedoms that also enable political participation.
- The rule of law is an essential feature of the democracy. The elements of the rule of law are:
  - individual and government power that are subject to law;
  - law that is known, clear, consistent and coherent;
  - an independent and impartial judiciary; and
  - freedoms and equality before the law.
- The separation of powers is an essential feature of democracy. Power is distributed between three branches of government:
  - a legislative branch that makes laws;
  - an executive branch that carries out laws; and
  - a judiciary that interprets laws.

  The powers of each branch check and balance the powers of the other two, and each has internal processes and structures that keep themselves accountable.
- Judicial independence is the strict separation of the courts from the parliament and the government. Judicial independence ensures impartial interpretation of laws.
- Parliamentary sovereignty is the concept of the parliament exercising the people's sovereignty. Parliamentary sovereignty derives from direct election by the people.

Activities

Short answer

1a) Explain what is meant by the term 'democracy'.

1b) Distinguish between the terms 'direct democracy' and 'representative democracy'.

1c) Discuss the significance of the term 'sovereignty' as it applies to democratic political systems. Use examples to support your answer.

2a) Outline **two** essential elements of a 'liberal democracy'.

2b) Outline **three** ways Australian citizens can exercise their political freedoms to participate in government.

2c) Compare the features of a 'democracy' to those of a 'liberal democracy'.

3a) Explain what is meant by the term 'rule of law'.

3b) Outline **three** elements that ensure the rule of law is upheld in a liberal democratic system.

3c) "The 'rule of law' fails to evaluate the 'justness' of the written law. Instead, it insists on upholding the law." Discuss.

Source Analysis

Read the following paragraph and respond to the questions that follow:

On 8 December 2017 then Prime Minister, the Hon Malcolm Turnbull MP, asked the Parliamentary Joint Committee on Intelligence and Security to inquire into, and report on, the National Security Legislation Amendment (Espionage and Foreign Interference) Bill 2017. The Committee was tasked with examining whether the bill contravened Section 49 of the Commonwealth Constitution (Australia) which protects the processes of parliament from being questioned or impeached outside of parliament, thus protecting parliamentary privilege. The bill was allegedly introduced into parliament in response to former Senator Sam Dastyari's donations scandal. Concerns were raised that the bill, if successfully introduced into law, could force members of parliament to disclose confidential meetings to the Department of Home Affairs. Consequence of not doing so could include gaol time. David Elder, the Clerk of the House of Representatives, entered a submission to the Committee in which he highlighted his concerns that the bill may have implications for the separation of powers which enshrines the independence of the legislature. Mr Elder argued that parliamentary communications should be protected under the principle of parliamentary privilege. Both David Elder and Richard Pye, Clerk of the Senate, made submissions to the Committee, an unprecedented situation.

4a) Define Montesquieu's principle of the 'separation of powers'.

4b) With reference to the source, explain **two** arguments that the National Security Legislation Amendment (Espionage and Foreign Interference) Bill 2017 does not adhere to the principles of the separation of powers.

4c) Explain how the **three** functions of government are separated in Australia. Use examples to support your answer.

4d) Evaluate the suggestion that parliamentary sovereignty undermines the application of the separation of powers.

Essay response

5) Analyse to what extent Australia upholds 'good government' and 'liberal democracy'.

6) Evaluate the extent to which 'separation of powers' is applied in Australia.

Investigation and discussion

7) 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, or power to influence an electoral outcome, as all other votes. Malapportionment exists when 'one vote one value' is not uniformly applied.

   7a) Investigate and record the malapportionment that exists in the House of Representatives for the electorates of Canberra (ACT), Solomon (NT) and any electorate in Tasmania. (Examine the electoral enrolment data for each electorate through the 'electoral divisions' section of the Australian Electoral Commission website by analysing the latest election data.)

   7b) Discuss the advantages and disadvantages of malapportionment.

8) Investigate at least **one** 'real world' example of Australian's exercising each of their political freedoms:

   8a) freedom of conscience;

   8b) freedom of information;

   8c) freedom of political 'speech';

   8d) freedom of assembly and association; and

   8e) freedom of media/press.

9) In 2015 the law relating to the access of telecommunications data (known as metadata) was changed. In teams, investigate the changes that were made to the law and prepare a debate on the topic: 'That the mandatory retention of metadata is an example of the rule of law being upheld because it is the government's responsibility to enforce the law'.

10) Research Australia's use of the rule of law, using:

   10a) an example where a politician or judge personally has been subject to legal proceedings; and

   10b) an example where the government or parliament was subject to the law (through a High Court decision); and

   10c) a specific issue, such as constitutional provisions for people of any race (such as Indigenous peoples) under Section 51 (xxvi) or the recent crisis surrounding Section 44 of the Constitution, to evaluate the extent to which the rule of law is upheld in Australia.

   10d) compare the 'rule **by** law' principle with what is practised in the People's Republic of China or a non-democratic system.

Australia's system of government

Syllabus points:

- **Structure of the political and legal system in Australia**
- **Roles of the legislative, executive and judicial branches of government**
- **Essential to the understanding of democracy and the rule of law are the division of powers, responsible government, constitutionalism, federalism and judicial independence**

All nation states have territory, a population and a system of government. Governments can take many forms, but they all have some elements in common. They all make laws. They all carry out or implement laws. They all have ways of resolving disputes according to laws. Some govern small or homogenous nation states, others must govern large and diverse nation states.

> *Australia's political and legal system is a product of our British history, colonial settlement, geography and our peoples' desires.*

A nation state establishes a form of government to suit its territory and its population. This choice can be influenced by such factors as history and geography. It can evolve slowly over time. It can also be designed from scratch to solve a particular problem, such as when a new nation state needs to establish its form of government.

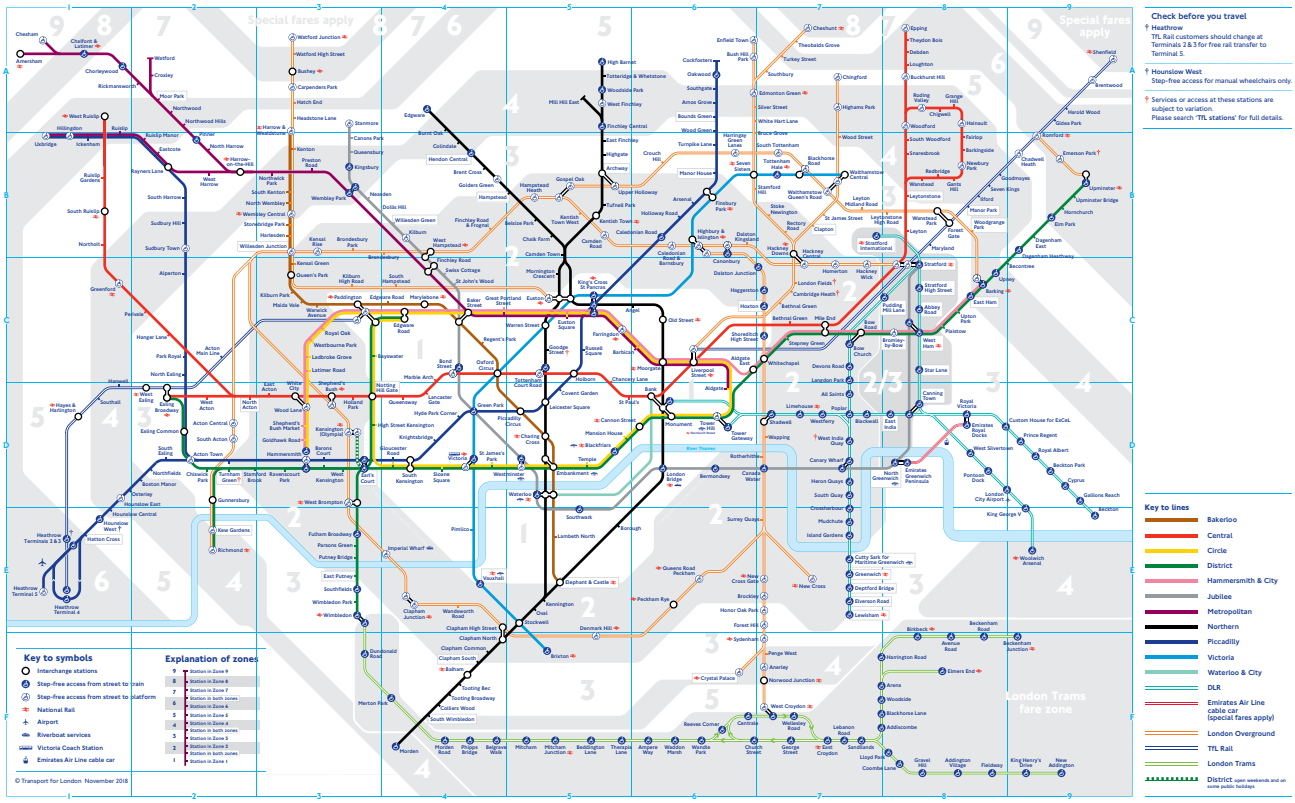
Australia's political and legal system is a product of all these factors — our British history, our history of colonial settlement, our challenging geography and our peoples' hopes and desires.

A system is composed of:

- components — the parts that comprise the system. In political systems, these parts are institutions;
- processes — the operations that make the system run; and
- an organisation/structure — an arrangement of the components and processes, and how they relate to one another.

We can think this through using the transport system as an example:

- trains and buses are components of an urban transport system;
- timetables, staffing rosters and collecting fares are processes that make the system run; and
- a network organisation or structure, with nodes (stations) and links (rail or road), is the typical organisational structure of an urban transport system.



■ Figure 2.1 — The London Tube is an example of a complex system.
Source: The Tube Map, WP:NFCC#4, Fair use, <https://en.wikipedia.org/w/index.php?curid=46817649> and <http://content.tfl.gov.uk/standard-tube-map.pdf>

Systems of government

The purpose of a political and legal system is to govern a nation state or a regional state within a nation. Governing in a liberal democracy involves making and carrying out laws and resolving disputes according to law. Governing is achieved when laws provide a framework within which citizens can interact peacefully with one another, pursue what makes them happy and reach their potential without other people or groups inhibiting their lives. Governing regulates the basics of human life in collective societies — the interactions of citizens in ways that enable each to live without harm caused by their fellow citizens. Citizens' interactions may be interpersonal or between associations of people, such as corporations. Governing regulates the conduct of business, sets standards of acceptable behaviour and provides mechanisms for the peaceful resolution of disputes arising out of any of these interactions.

A liberal democratic political and legal system is composed of the following:

- institutions:
  - the components of government; that is, parliaments, governments, courts and the public service; and
  - if the liberal democracy is organised as a federation, regional governments with their own institutions of government.
- processes:
  - constitutional laws and rules;
  - a legislative process for making laws;
  - chains of accountability that ensure governments carry out laws according to the rule of law;
  - trial procedures for resolving disputes and protecting rights according to law; and
  - fair electoral systems for electing public officials.
- organisation/structure:
  - an elected law making assembly — a legislature — with one or two houses;
  - accountable, responsible and elected government — an executive;
  - an independent court system — a judicature or judiciary;
  - a separation of powers between the legislative, executive and judicial powers, with checks and balances between each;
  - a politically neutral permanent public service;
  - a federal division of government; and
  - representative government.

Recall that a liberal democracy can be achieved in different ways. The United Kingdom and New Zealand are **unitary** systems and only have national governments. They may have regional governments, but their powers are granted to them by the national government. Australia is organised as a **federal** system. This means Australia has one national government

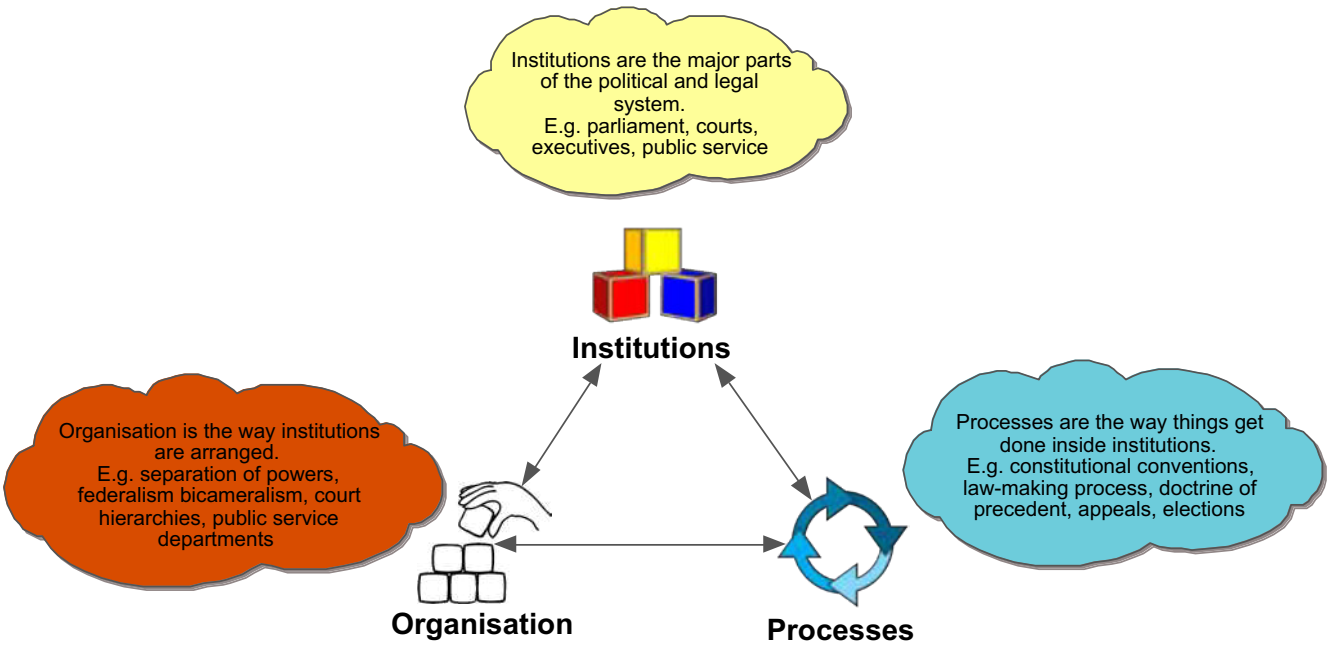


Figure 2.2 — Key characteristics of liberal democracy.
Source: Stephen King, 2018

and regional governments called state governments, whose powers are guaranteed by the *Commonwealth of Australia Constitution Act 1900* (the Constitution) and not granted by the national government.

There are also parliaments for the Northern Territory (NT) and the Australian Capital Territory (ACT). The territory legislatures get their powers from the Commonwealth and don't have the same autonomous status as state parliaments.

The Australian political and legal system

Australia is a representative democracy with a constitutional monarchy organised as a federation with a responsible parliamentary government.

The main elements of this definition are:

- representative democracy;
- constitutional monarchy;
- responsible parliamentary government; and
- federation.

Australia, in common with all liberal democracies, also has an:

- independent judiciary.

Australia's legislature and representative democracy

We learned that liberal democracy is a form of government in which the will of the majority of citizens is expressed in government and law, and in which the rights of minorities are respected and protected.

We have also learned that direct democracy — the direct political participation of all citizens in government — is impractical in the modern world of large nation states. Representative democracy is the solution to the problem of having very large numbers of citizens involved in self-government, and is built on the idea that citizens choose others to represent them in government and law making.

The most important institution in a system of representative democracy is a 'representative assembly' in which all the chosen representatives gather together to re-present the views, values and concerns of those citizens who chose them. These assemblies are also legislatures which make laws that will reflect the views, values and concerns of those citizens who chose the assembly. In Australia, the 'representative legislative assembly' is called parliament.

The most important process in a system of representative democracy is elections. Elections allow a large number of citizens to choose a small number of other citizens to represent them in government and law making. Elections also permit citizens to delegate or entrust their sovereign right to govern themselves to their representatives for the period of time until the next election.

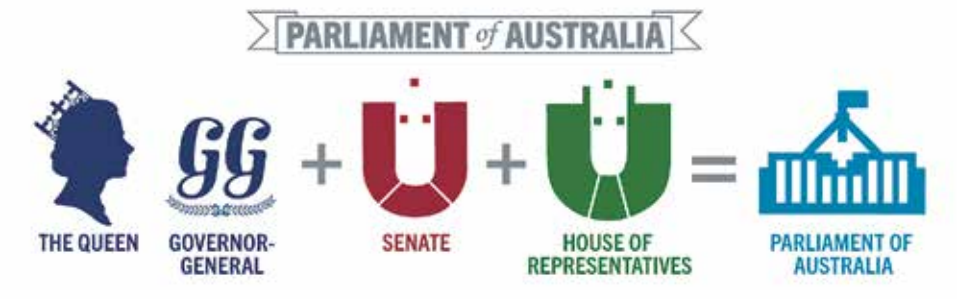
> *Australia is a representative democracy with a constitutional monarchy organised as a federation with a responsible parliamentary government.*

Elections in a liberal representative democracy must be free of intimidation, fair in how they translate votes into seats in parliament, regular and enable the widest number of citizens to participate (vote).

Electoral systems are studied in depth later in Unit 2.

The organisation or structure of the Commonwealth Parliament has three parts:

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



■ Figure 2.3 — Structure of the Commonwealth Parliament.
Source: Parliament of Australia, Cat no. 0101, Parliamentary Education Office, <www.peo.gov.au> and <https://www.peo.gov.au/image-library/parliament-of-australia/214.html>

The Crown

The **Crown** is a formal part of the parliament because of Australia's history as a British colony. Royal powers are theoretically large, but practically limited to granting Royal Assent (agreement) to laws, issuing writs for elections and certain ceremonial duties.

All Australian parliaments, including the state and territory parliaments, include the Crown.

In terms of representative government, because queens and kings cannot be elected in Australia, there is no opportunity for political participation of Australian citizens in choosing the monarch.

See the section about a constitutional monarchy below for more details.

Two houses of parliament

Bicameralism is a feature of most Australian parliaments. All parliaments except Queensland, the NT and the ACT are bicameral. This means they all have two houses of parliament. The parliaments of Queensland, NT and ACT have only one house, which makes them unicameral.

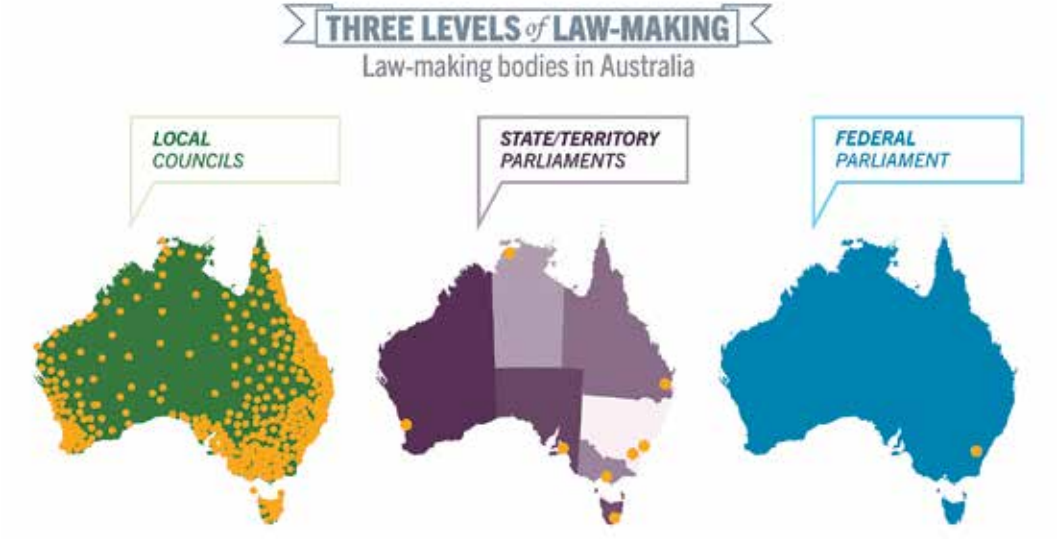
The House of Representatives is known as the **people's house** because it is directly elected by the entire body of enrolled electors aged 18 years or older. Its members are elected by Australian citizens in the electorates in which they live. There are many of these electorates — 151 for the 2019 federal election. Electorates are geographical areas with approximately the same number of voting age citizens living in each one (~107, 000 +/- 10%). Members serve for a maximum of three years per term.

The Senate is known as the **states' house**. Australia is a federation and, therefore, the role of the upper house is to represent the interests of the six states at the Commonwealth level of government. The Senate is elected by citizens in each state. Each original state has an equal number of senators, currently 12 per state. The ACT and the NT also have two Senators each, bringing the total number of Senators to 76. Senators serve for a maximum six-year term typically commencing on 1 July following the election.

Australian constitutional monarchy

Monarchy is a form of government in which political and legal power is inherited by one person (*mono*=one, *arkhia*=rule). *It is one of the oldest forms of government and, until modern times, one of the most common. For most of the history of monarchies the power of the king, queen or emperor was not limited by any law, making monarchical power absolute.* **Absolute monarchy** is incompatible with a liberal democracy because the rule of law does not apply to the ruler and the people are subject to his or her power with none of the entitlements of citizenship and, subsequently, do not possess political rights and freedoms. Subjects of an absolute monarchy have no opportunities for political participation.

Many absolute monarchies were abolished, some by violent revolution, following the Enlightenment. The Enlightenment — beginning roughly in the late 1600s and running through to the early 1800s — was an era characterised by radical new ways of thinking about almost everything, including how government should be organised and the roles of rulers and citizens in society. The French Revolution is a famous example of Enlightenment-inspired political change. The Enlightenment ushered



■ Figure 2.4 — Australia's federal system.
Source: Three levels of law-making in Australia, Cat no. 0700, Parliamentary Education Office, <www.peo.gov.au> and <Creative Commons Attribution-NonCommercial-NoDerivs 3.0 Unported License. Parliamentary Education Office>

in the modern era, including the era of liberal democratic government.

An alternative to 'revolutionary' change is 'evolutionary' change. **Constitutionalism** is an Enlightenment idea that power should be limited. Faced with the demands for increased democracy, some monarchies evolved from absolute monarchy into a form of monarchy that was subject to law which limited its power. Laws that limit the power of government, including a monarchy, are called 'constitutions'. These laws can take the form of written constitutions. Or, they may be unwritten rules called 'conventions,' which are customary practices and traditions that act to limit the power of a monarch.

> *The Queen, Governor-General and Federal Executive Council are all institutions of Australia's constitutional monarchy.*

The adjective 'constitutional' can be used to describe the noun 'monarchy' if the power of a monarch is limited by law or by conventions, written or unwritten.

The main institution of the Australian constitutional monarchy is the monarchy itself — the Crown, passed from generation to generation though a royal family.

Australia is a constitutional monarchy because of historical connections to Britain. The British monarchy is also the Australian monarchy. A Governor-General, representing the Crown, exercises the roles and powers of the monarch in Australia. This makes the office of the **Governor-General** an institution of the Australia's constitutional monarchy.

Australia's written constitution makes the Crown the 'executive power' in Australia and creates the office of the Governor-General as the representative of the Crown. It also creates a council of ministers advising the Governor-General, called the **Federal Executive Council** (EXCO). EXCO is another institution of the constitutional monarchy in Australia.

The Crown is also one of the three parts of parliament.

Constitutional rules — largely unwritten conventions that govern the use of royal powers — are the processes limiting the power of kings and queens. These conventions evolved during a long struggle for power between English kings and queens and the English Parliament.

Figure 2.5 — Coronation portrait of Elizabeth II, June 1953
Source: Sir Herbert James Gunn, Coronation Portrait of Queen Elizabeth II of the United Kingdom, c 1953, Public Domain, <https://commons.wikimedia.org/wiki/File:Queen_Elizabeth_II_Coronation_Portrait_Herbert_James_Gunn.jpg>

Following the major historical events of the English Civil War, a period of republican government, the restoration of the Monarchy and the English Bill of Rights, the Monarchy was finally brought under the rule of law and a constitutional monarchy was established in Britain.

The United Kingdom was a constitutional monarchy before it colonised Australia. When Australian colonies were ready for self-government, commencing with New South Wales (NSW) in 1850 and ending with Western Australia (WA) in 1890, they simply adopted the system of a constitutional monarchy. When the six colonies federated in 1901 the new national government adopted the tried and tested model of the UK constitutional monarchy.

In short, the conventions which brings the monarchy under the rule of law include:

- royal power must only be exercised on the advice of ministers who are responsible to the elected parliament. An example is the power to appoint minsters once a prime minister has recommended his or her Cabinet;
- the monarch always assents to laws passed by the parliament;
- the parliamentary executive (the prime minister and Cabinet) may exercise the royal **prerogative powers** of the monarch. Prerogative powers are those the executive may use without parliamentary approval. An example is declaring war.

The Australian monarch is determined by British laws of succession. Recently, the British parliament changed its *Act of Settlement 1701* that previously enshrined primogeniture — the inheritance of the crown by the eldest male heir

in the royal family. Now, through the Succession to the Crown Act 2013, the crown is inherited by the eldest child of the reigning monarch upon their death or abdication. It is interesting to note that because Australia's constitutional monarchy is the British monarchy, Australia has no power to decide the laws governing who will be Australia's head of state.

The constitutional monarchy is the **formal executive**. It is 'above politics and under the law'. The monarch and Governor-General have no role in policy making or proposing laws. Their role is strictly formal, and includes giving Royal Assent to bills to make them law, appointing ministers on advice of prime ministers and conducting ceremonial duties such as the opening of parliament and meeting foreign heads of state.

Currently, the Queen of Australia is the **head of state**. 'Queen of Australia' is her proper title when we refer to her in relation to Australia's head of state. The Queen and her successors will always live in Britain. Buckingham Palace is both their London residence and seat of office.

The Governor-General may also be regarded as Australia's Head of State. The Governor-General lives in Canberra at Government House, which is the official residence and seat of office. The Constitution does not contain the words 'head of state', and it is the Governor-General who performs the duties associated with that role.

Buckingham Palace and Government House both have support staff provided by the Australian Government. In the case of the Governor-General, the Office of the Secretary of the Governor-General is a small government department staffed by public servants who support the Governor-General in his or her constitutional, community and ceremonial roles.

EXCO is part of the structure of Australia's constitutional monarchy. EXCO is the link between the formal executive (the Crown), which is above politics, and the parliamentary executive (the Cabinet), which is the real power within the executive arm of government, where politics and policy is carried out. Cabinet may be regarded as the **political executive** or 'real' executive because it wields genuine power.

See the section on responsible parliamentary government for more detail on the Cabinet.

Constitutional monarchy is compatible with Australian liberal democracy because royal power is limited and governed by law. A critical point to note is that the rule of law applies to the monarchy. The powers of the Queen of Australia and her Australian representative, the Governor-General, are subject to Australian constitutional law, statutes and unwritten constitutional conventions. Constitutional monarchy permits citizenship, with all the political rights and freedoms listed in the previous chapter. These rights and freedoms enable Australian citizens to engage in political participation.

Australia's executive and responsible parliamentary government

■ Figure 2.6 — The British Houses of Parliament are situated within the Palace of Westminster, in London.
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>

When people talk about the **government** they are generally referring to the executive arm of government. In Australia this is usually referred to using the name of the **head of government** who leads the executive. In 2018, the Turnbull Government was the executive arm of the Australian political and legal system, and the McGowan Government was the executive arm of the Western Australian Government, a state government.

There are different ways to organise the executive arm of a liberal democracy. For example, the United States of America (the US) has a presidential executive which is completely separate from the other two arms of the US Government — its Congress and

> *'Responsible' means that the executive is directly drawn from, and accountable to, the parliament.*

Supreme Court. We will learn more about the US political and legal system and the contributions it has made to the Australian constitutional design later in this Unit.

We know that Australia was heavily influenced by Britain in the design of its political and legal system. One of the most significant of these influences is the form of executive government Australia adopted for its state and national levels of government.

'Responsible' and 'parliamentary' describe two different aspects of the Australian executive. Each requires some explanation.

Responsible government

Used in the context of the phrase 'responsible parliamentary government', the word 'responsible' means that the executive is directly drawn from, and accountable to, the parliament; that is, it is responsible to parliament.

Australian citizens elect a parliament of representatives. Parliamentarians' roles are to legislate to create laws, to debate matters of public importance and to represent the people in their electorates and states. In parliaments modelled on the British parliament,[1] parliamentarians also have the role of questioning and scrutinising the government every sitting day of the parliament between elections. They do this through a variety of parliamentary procedures such as Question Time and through parliamentary committees that examine aspects of the executive's performance and spending.

Through these procedures the parliament is able to hold individual government ministers accountable for their portfolio performance and their personal conduct. If a minister is incompetent in managing their portfolio responsibilities or is personally or politically corrupt the parliament may hold them accountable through a motion of censure. This is the Westminster convention of **individual ministerial responsibility** (IMR), that is, the minister is responsible to parliament.

Furthermore, the parliament may hold the entire ministry responsible for the operations of the government as a whole. If a government is incompetent or corrupt the parliament may hold them accountable through a motion of no confidence. This is called the Westminster convention of collective ministerial responsibility (CMR), that is, the whole government is responsible to parliament.

Finally, all government spending must be authorised by law. **Money bills,** called appropriations bills, are introduced into parliament by the executive so it can access funds. These bills must pass the parliament before the government has the legal right to access public money. Governments require money for the administration of the laws and to carry out their policies. Parliaments can amend or even reject money bills, thus imposing financial controls over executive activity.

The Westminster conventions of individual and collective ministerial responsibility, together with scrutiny of government activity and spending by parliamentary committees, the

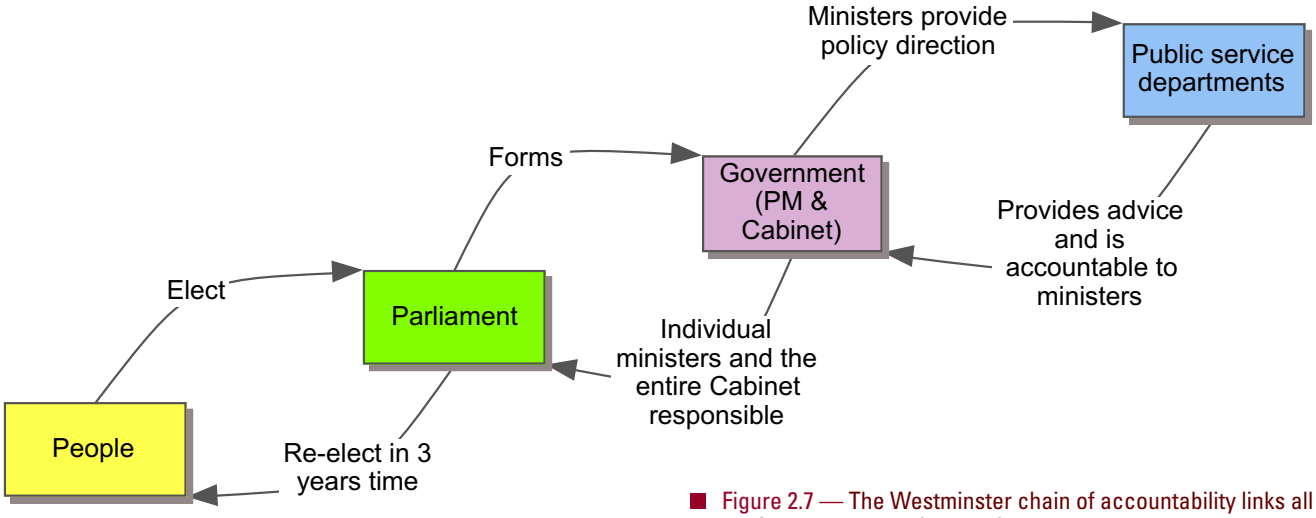


Figure 2.7 — The Westminster chain of accountability links all parts of government to the people.
Source: Stephen King, 2018

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

ability to question ministers in parliament and to control government spending, provide tools with which to hold the executive accountable to parliament. In these ways the government is answerable and responsible to the parliament and, through it, to Australian electors.

Perceptive students will observe that there is a **chain of accountability** leading from government, through parliament to citizens.

Dismissal from office is the ultimate sanction a parliament can impose on a minister or an entire government.

Parliamentary government

The term 'parliamentary government' refers to the location and formation of the executive arm of government within the political and legal system.

In short, a parliamentary government is located *within* the legislature. There is a *fusion* of the legislative and executive arms of government, rather than a strict physical separation as is the case with presidential executives such as that of the US.

'Parliamentary government' means that members of the government must also be members of the parliament. There is still a separation of powers. Members of the executive have different functions related to the administration of laws in addition to those of ordinary members of parliament. However, the separation is weak because the same people are part of two arms of government. In short, 'ministers must be members'. See Figures 2.12 and 2.13 for a visual explanation of the structural and functional organisation of the Australian political and legal system.

> *'Parliamentary government' means that members of the government must also be members of the parliament.*

Parliamentary government is often referred to as the 'Westminster system' because it originated in Britain through the historical struggle between royalist and parliamentary forces. Gradually, the royal powers of government were brought under the control of parliament. A subset of parliamentarians, known as 'Ministers of the Crown', came to exercise the powers of the monarchy. As constitutional monarchy became established in Britain, the powers of the monarchy came to be used only upon the

Figure 2.8 — Queen Victoria convened her first Privy Council on the day of her accession in 1837.
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>

> *'Responsible parliamentary government' is the formation of the executive within the parliament and its constant accountability to the parliament.*

advice of these ministers who were responsible to parliament. Minsters would meet separately from other members, and their discussions held in secret, in a room located in the Palace of Westminster known as the 'cabinet room'. This is where the term 'Cabinet' originates.

Historically, early English Cabinet meetings were chaired by the king or queen, but over time the active participation of the monarch was reduced. A minister from amongst the group of Ministers of the Crown took over the leading role of the monarch. This first minister came to be known as the 'prime minister' and the form of parliamentary executive government, led by a prime minister with a ceremonial constitutional monarchy we recognise today, eventually emerged. The Westminster system has been adopted by many countries that were once part of the British Empire including, of course, Australia.

Therefore, 'responsible parliamentary government' is the formation of the executive within the parliament and its constant accountability to the parliament.

Components of responsible parliamentary government

The main institution, or component, of responsible parliamentary government is the Cabinet. The Westminster idea of Cabinet

emerged through the historical struggle between the English Monarchy trying to preserve its absolute power and a parliament seeking to bring executive power under the law. The English Parliament won this struggle. Executive power was transferred from the monarchy to a group of ministers drawn from the parliament. The monarchy became subject to the rule of law through the operation of Westminster conventions governing the use of royal powers.

> *Cabinet, which may be the most powerful institution in Australia's political and legal system, is not based upon law, but upon convention.*

Cabinet can be defined as a committee of the executive composed of ministers, led by the prime minister, that is drawn from and responsible to the parliament.

Discerning students will note that the operations of Cabinet are not grounded in written constitutional law, rather they are governed by the unwritten Westminster conventions of responsible government which have emerged throughout the turbulent history outlined above. This is interesting because it means that Cabinet, which may be the most powerful institution in Australia's political and legal system, is not based upon law, but upon convention.

Westminster conventions are flexible because they are unwritten and, therefore, they can change over time as new customs and traditions emerge. Flexibility can be seen in changes made to the Commonwealth Government's Cabinet over the years. For example, in modern times, Cabinet has expanded in size to about 30 ministers (this excludes the assistant ministers in the outer ministry) due to the increasing range of government activity. It has become impractical to have meetings with so many ministers present. Prime Minister Gough Whitlam (1972–1975) changed the Cabinet conventions by splitting his Cabinet into an 'inner Cabinet' of senior ministers and an 'outer Cabinet' of junior ministers. The 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 to be discussed. A split Cabinet and co-opting junior ministers are new Australian conventions.

Even today, different prime ministers structure their Cabinets in different ways. They can do this because of the flexibility of convention. Some prime ministers are quite authoritative, others more consultative. The leadership style of a prime minister can have a big influence on the way a particular Cabinet works. Students are encouraged to use their political and legal inquiry skills to investigate the Cabinets of Kevin Rudd, Julia Gillard, Tony Abbott, Malcolm Turnbull and Scott Morrison. Prime Ministers Rudd and Abbott were quite authoritative. Prime Ministers Gillard and Turnbull were more consultative.

The **'ministry'** is used to describe the entire group of all ministers. The term 'government' also describes the committee of the executive, that is, Cabinet and the ministry. Usually, the name of the prime minister is used, as in the 'Turnbull Government', when describing a particular executive. The terms 'Cabinet', 'ministry' and 'government' are almost interchangeable. However, 'parliament' is not interchangeable with any of these executive-based terms.

Responsible parliamentary government operates almost exclusively according to unwritten conventions. Chapter Two of the Constitution, which establishes the Commonwealth Executive, says nothing about the reality of executive power.

Figure 2.9 — The first Abbott Ministry.
Source: Quentin Bryce with the newly sworn in Abbott Ministry, 2013, CC BY 3.0 au, <https://commons.wikimedia.org/w/index.php?curid=44707235> and <https://en.wikipedia.org/wiki/Abbott_Ministry#/media/File:Quentin_Bryce_with_the_newly_sworn_in_Abbott_Ministry_cropped.jp>

What are these **Westminster conventions of responsible parliamentary government**?

Making and breaking the government

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

Parties, or coalitions of parties and other members, in the House of Representatives who can command a majority of its seats will form the government and distribute the ministerial portfolios among their senior members in both houses. The leader of the successful party will become the 'head of government', or prime minister. The prime minister chairs Cabinet meetings and, as such, will be involved in making decisions concerning the administration of law. So long as the prime minister and his or her ministers continue to enjoy majority support in the House of Representatives they are said to 'have the confidence of the House' and will continue in government.

If the government should lose the confidence of the house it is expected to resign. The house may move motions of no confidence in the government and, should one pass with a majority of members of the House of Representatives voting in support of the motion, the government will have been dismissed by the parliament. In this way the House may 'break a government'.

Cabinet secrecy

Recall that ministers are members of parliament. However, the separation of powers requires that they be separate from other members of parliament who are not in the ministry. One of the conventions which separates them as a 'committee of the executive' from ordinary members of the legislature is Cabinet secrecy, sometimes referred to as Cabinet confidentiality.

Cabinet meets regularly and frequently. Its meetings are held in perhaps the most secure room in Australia's Parliament House. The Cabinet Room has no windows, is sound proof and is regularly checked for listening devices to ensure its security. In addition to this physical security, the records of Cabinet meetings are protected by law for 30 years. It is a criminal offence to leak information from Cabinet or to make records of its discussions public.

Cabinet secrecy enables the executive to address issues facing the nation, debate policy, deal with crises, allocate resources through the budget and plan political strategy. Discussions in Cabinet can be both robust and forthright. There is often argument and disagreement, as would be expected in any committee meeting. It is essential, therefore, to preserve the secrecy of these meetings for several reasons, including:

- ministers need to know that they can speak freely about any issue;
- issues of national importance may be discussed;
- strategic discussions about resource allocations in the budget and about political matters form a vital part of consideration for the executive; and
- it preserves the unity of government.

Each of the above reasons means that a frank discussion is needed so that ideas may be tested through argument and debate. If ministers knew that what they said in Cabinet could be reported in the media or to the parliament they may not feel as free to say what they really think. Such restrictions on speech would hinder the business of governing.

■ Figure 2.10 — Cabinet secrecy is considered to be a lynch pin of responsible government. Leaks of information interfere with the ability of the government to present a united front.
Source: Alan Moir, Sydney Morning Herald, <https://www.smh.com.au/content/dam/images/g/l/z/w/o/w/image.related.articleLeadwide.620x349.glzj6p.png/1451984638097.jpg>

Cabinet solidarity

Another Westminster convention concerning the operation of Cabinet is Cabinet solidarity.

Once Cabinet reaches a decision the convention of Cabinet solidarity requires that every member of the Cabinet, including those who argued against the decision in the secrecy of its meetings, must publicly support it. In essence, ministers may disagree as much as they like *within* Cabinet, *but once outside* the Cabinet Room, they are expected to support a decision.

The convention of Cabinet solidarity further requires that if a minister cannot publicly support a Cabinet decision he or she must resign from Cabinet and return to the parliament as an 'ordinary' member (they are said to 'return to the backbench').

So, as a Cabinet minister you may fiercely argue your point of view, help Cabinet reach a decision and support the decision in public or resign if you cannot. This is so for two reasons:

- first, the doctrine of the separation of powers requires ministers to be separate from ordinary members of parliament. The conventions of Cabinet secrecy and Cabinet solidarity establish a strict functional separation between the two classes of members of parliament — those who are ministers and those who are not; and
- second, 'government' is a not a collective noun. The word refers to a singular entity — that is, the executive arm or branch of the Australian political system. However, we have seen that the Cabinet is really a committee of 30 executive officials, often with different opinions on what the government should do. Cabinet solidarity ensures that a diverse group of ministers 'speaks with one voice' — the voice of 'government'. The executive must be united and Cabinet solidarity ensures it is.

Figure 2.11 — Wayne Swan resigned from his position in the Ministry to return to the backbench following the return of Kevin Rudd to the leadership in June 2013.
Source: US Department of the Treasury, Australian Treasurer Wayne Swan, 2009, <https://en.wikipedia.org/wiki/Wayne_Swan#/media/File:Treasurer_Wayne_Swan,_2009,_crop.jp>

The executive is complex. It has three distinct elements in a Westminster system:

1. a formal constitutional executive — the monarch and Governor-General;
2. a real political executive — Cabinet led by the prime minister; and
3. an administrative executive — a large public service organisation of government workers.

Constitutional or formal executive

The formal part of the executive is created by Chapter Two of the Constitution and may be referred to as the **constitutional executive**. It includes the constitutional monarch and their Australian representative, the Governor-General.

Included here is EXCO, which comprises the Governor-General and ministers, and is the link between them.

The constitutional executive should be above politics and does not exercise real power except in exceptional circumstances when parliamentary government cannot function. An example would be if an election resulted in a hung parliament which was unable to form a government, in which case the Governor-General may call a second election without advice from a prime minister.

Real or political executive

The ministry and Cabinet are the real power within the executive. They are drawn from, and responsible to, the parliament. They are democratically elected through an electoral contest with other parties seeking to form government in parliament by winning a majority of seats in the lower house. Having won this contest, they have democratic legitimacy, something the constitutional executive lacks.

The real or political executive is not above politics, rather it is immersed in the battle of politics and ideas. It wields real power through the conventions of responsible government. Cabinet conventions, outlined above, determine its organisation, how it operates and the limits on its power.

Administrative executive or public service

The business of government is enormous. Government spending generates approximately one quarter of all economic activity in Australia. This represents an immense amount of work. When we list some of the activities of government, the scope and scale of executive activity becomes apparent.

The information in Table 2.1 is published by the *Australian Public Service Commission* and outlines the types of government agencies and departments that together make up the Australian Public Service. The list is organised by the type and size of the various public service agencies.

Type	Description	Examples
Policy	Organisations involved in the development of public policy.	• Australian Law Reform Commission • Climate Change Authority
Smaller operational	Organisations with <1,000 employees involved in the implementation of public policy.	• Australian Electoral Commission • Administrative Appeals Tribunal
Larger operational	Organisations with >1,000 employees involved in the implementation of public policy.	• Australian Taxation Office • Department of Immigration and Border Protection
Regulatory	Organisations involved in regulation and inspection.	• Clean Energy Regulator • Australian Securities and Investment Commission
Specialist	Organisations providing specialist support to government.	• Commonwealth Grants Commission • Australian National Audit Office

Table 2.1 — Types of Australian public service organisations.
Source: Australian Public Service Commission, APS agencies — size and function, <https://stateoftheservice.apsc.gov.au/learn-more/aps-agencies-size-and-function>

These agencies, and many more, carry out the administration of the laws. They employ many thousands of government workers, many of whom make their careers in the public service. Such employees become highly trained within their area of expertise.

The public service has the following characteristics.

- It is apolitical. This means it is politically neutral and will serve any elected government regardless of which political party forms the parliamentary government;
- It is expert. Public servants may develop skills and expertise over an entire career. They know the business of administration, often more so that the ministers they serve who come and go with elections and Cabinet reshuffles;
- Many positions are permanent. Public servants do not automatically lose their jobs when a government is voted out of office and a new government takes over. Permanency preserves expertise over time, allowing it to accumulate. It provides security of employment for officials so they will invest their careers in public service. This removes any fear they may have from ministers who may disagree with their advice;
- It provides frank and fearless advice to ministers and Cabinet based upon its wealth of expertise;
- It is organised as a bureaucracy, which means:
  - it comprises departments and agencies, each within the portfolio responsibility of a minister;
  - it has different levels, from junior officials to more senior officials — it is hierarchical; and
  - each job or role within the department has specific duties for which the government worker in the role receives training until they become expert.

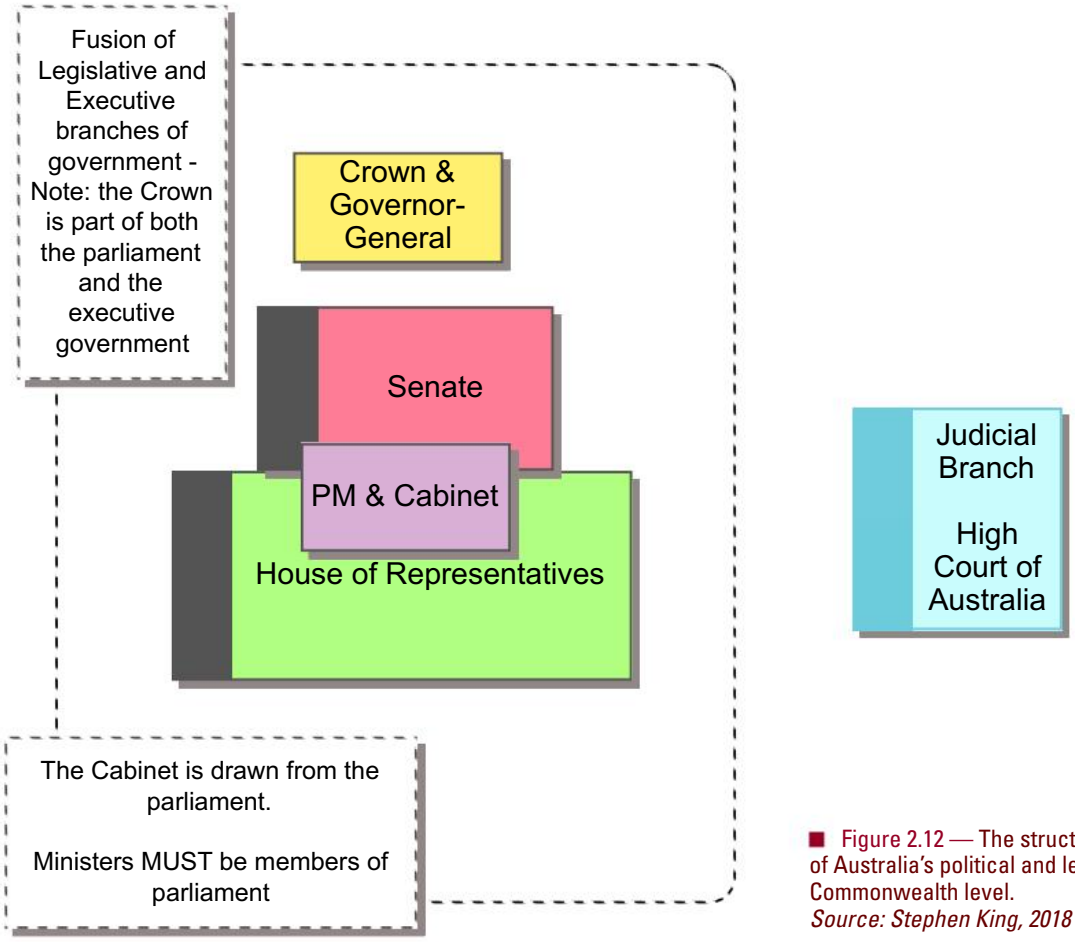
All public service departments and agencies are answerable to a minister in Cabinet or in the wider ministry. This relationship (department to minister) links the public service to the Australian people and adds a link in the 'chain of accountability'.

We can now see that the chain of accountability runs from public servants through ministers to the parliament and finally to the people. (See Figure 2.7)

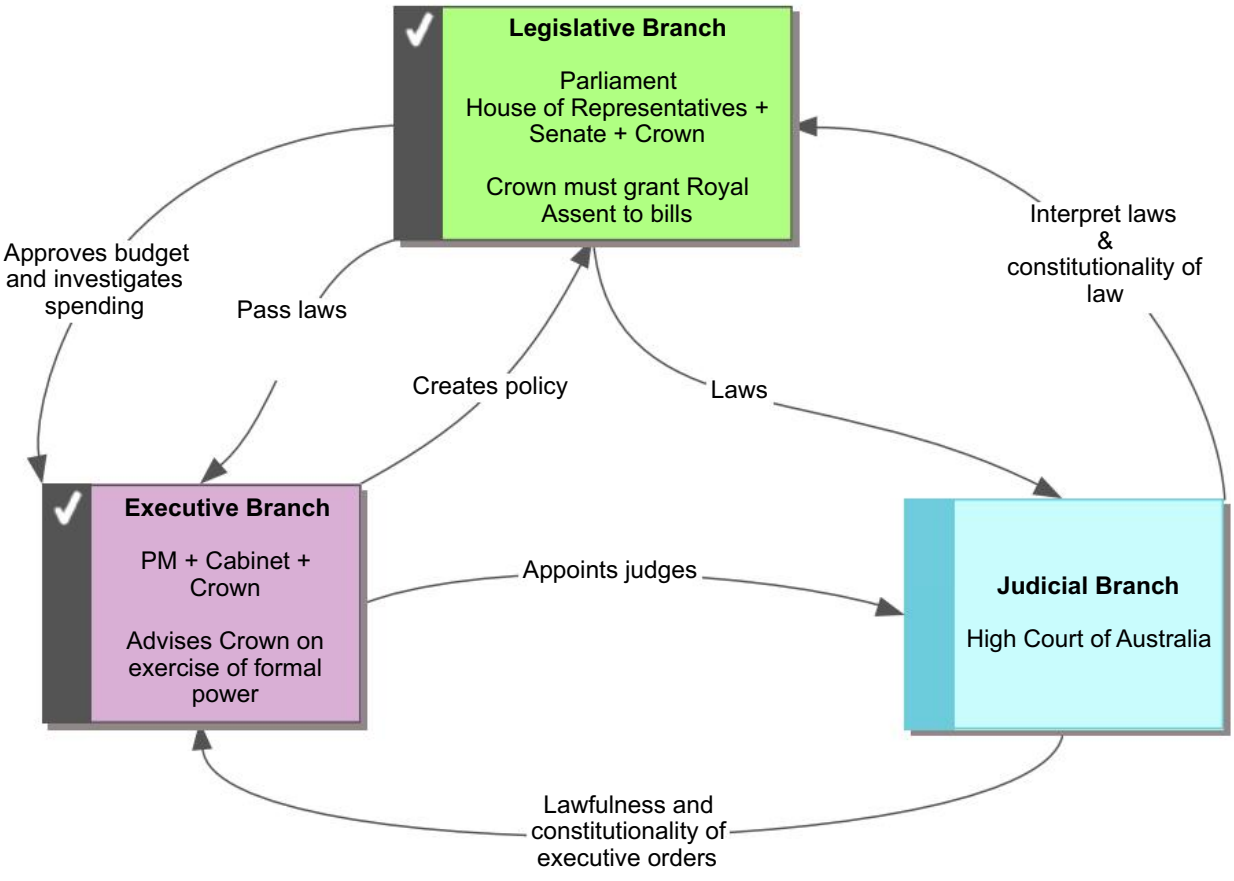
The most important things to note in the **structural** organisation (See Figure 2.12) are:

- the 'fusion' between the legislative and executive branches of government, with the Crown being common between them, and executive ministers also being members of parliament; and
- the strict separation of the judicial branch from the other two arms of government.

Note that despite the structural fusion between the legislative and executive branches (which share some personnel in common) they function separately and thus are able to check and balance each other. The Westminster system's unwritten constitutional conventions enable this **functional** separation. (See Figure 2.13)



■ Figure 2.12 — The structural organisation of Australia's political and legal system at the Commonwealth level.
Source: Stephen King, 2018

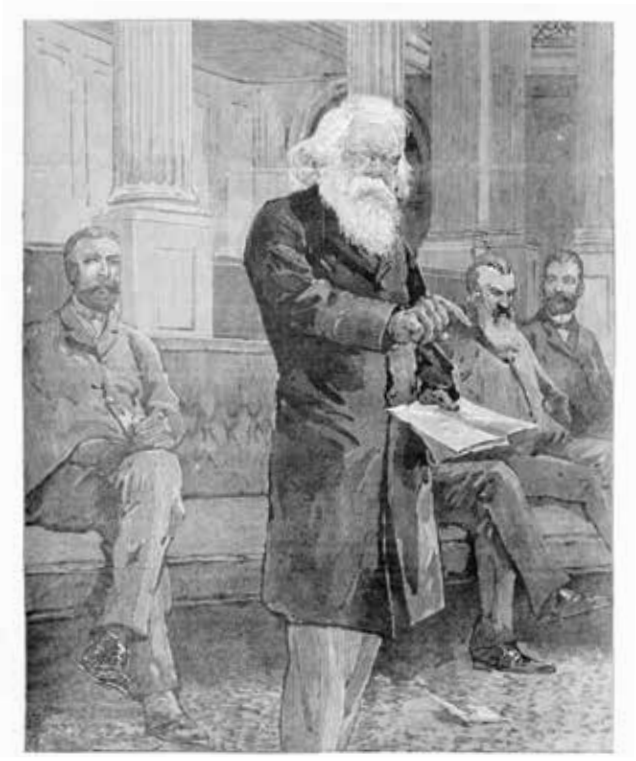


■ Figure 2.13 — The functional organisation of the Australian political and legal system.
Source: Stephen King, 2018

Australian federalism

The oldest existing 'modern' federation is the US. The American War of Independence was fought against a British colonial government that did not want to grant political rights to its American subjects. After their victory in the war, the American colonies faced the dilemma of designing a system of government that united the colonies yet preserved their separate identities and newly won independence. The solution was to divide the new nation's hard-won sovereignty between a new national government and the separate state governments in each of the former colonies. This was done through the 1776 *Articles of Confederation and Perpetual Union.*

Australia faced a similar dilemma in the 1890s. The Australian colonial leaders (often referred to as the 'Founding Fathers') who provided the momentum for Australian federation — several of whom were Premiers of the six self-governing Australian colonies — met to solve the problem of bringing the six colonies together in one new nation. Australia had, like their American cousins, won the right to self-government from Britain — albeit by negotiation with a less belligerent Britain rather than by war. Like the Americans, Australia's colonial leaders sought to preserve their own powers while simultaneously creating a national government to govern the new Commonwealth of Australia. They were



■ Figure 2.14 — Henry Parkes, the Father of federation, speaks at a conference in 1890.
Source: The Federation Conference in Melbourne — Sir Henry Parkes moving the first resolution, <http://www.wikiwand.com/en/Henry_Parkes>

> *Federalism is the division of a nation's sovereignty between one national and two or more regional governments.*

inspired by the American idea of federalism and could observe it working well in both its American cradle and its neighbour, Canada, which had adopted this system in 1868 to solve its own problem of uniting provinces into one Canadian nation.

So, what is federalism? Federalism is the division of a nation's sovereignty between one national and two or more regional governments. It is the alternative to a unitary state in which sovereignty is undivided. Unitary political and legal systems have no regional governments; all powers are held within one national government.

The main institutions of Australian federalism are the:

- Commonwealth Government at the national level; and
- state governments at the regional level.

Each level has its own separation of powers with legislatures, executives and judiciaries in each level:

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

Federal institutions — Cooperation between the two levels of government

Because there are two levels of government there needs to be ways to link them together so they can cooperate with each other and coordinate their activities. There are nine governments in Australia, not including the many local governments — one national government, six state governments and two territory governments that need to talk to each other and work together.

A lack of cooperation and coordination between all of these governments would lead to inefficiency, with much duplication and unnecessary spending. There are many

institutions through which the national and regional levels of government interact. Here are a few:

- The Council of Australian Governments (COAG) where the prime minister, state premiers, the chief ministers of the two territories and the President of the Australian Local Government Association meet to deal with issues of national importance and to ensure policy cooperation.
- The Commonwealth Grants Commission (CGC), which transfers money from the Commonwealth (which collects more tax than it needs) to the states (which must spend more than they can collect in tax). These transfers help fund state services such as health and education.
- Ministerial Councils, where federal and state ministers with overlapping areas of responsibility meet.
- The High Court of Australia, which resolves disputes between the Commonwealth and state levels and between state governments. The High Court of Australia must sometimes decide what the Constitution means when hearing cases involving which level of government has a particular power.

> *"In Australia, the federal balance of power is not static ... it is cooperative at times and coercive at other times."*

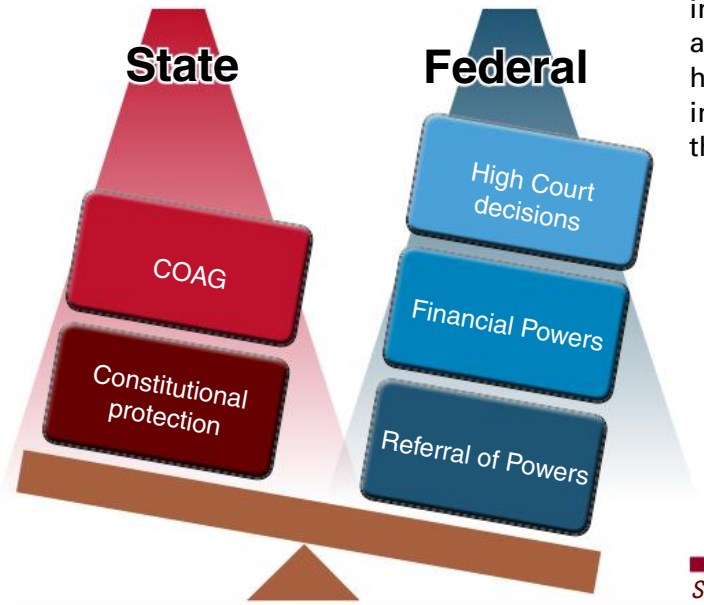


Figure 2.15 — Sources of federal imbalance.
Source: Nicol Davis, 2018

Federal balance of power — Power relationships between the two levels of government

Because federal systems divide power by locating it in two levels of government there will be a federal balance of power between them. This balance of power can take one of three forms:

1. The national government is more powerful than the regional governments — this is called coercive federalism;
2. Both levels have about the same amount of power — this is called dual, cooperative or coordinate federalism; or
3. The regional governments have more power than the national government — this is called confederation.

In Australia, the balance between the two main federal institutions — the national and regional governments — is cooperative at times and coercive at other times. In other words, the federal balance of power is not static; it can change. High Court cases where the Court must decide the meaning of the Constitution can alter the federal balance of power. Constitutional referendums can change the balance of power because they can change the wording of the Constitution itself. States can even voluntarily transfer their powers (referral of powers is authorised by Section 51(xxxvii)) to the Commonwealth, which can change the ratio of powers between the two levels.

Money matters, too. The Commonwealth is relatively rich compared to the states, and this can increase its power over them. This has been called fiscal federalism, which is a form of coercive federalism.

Federalism operates within and through the institutional and power relationships described above. We have seen that Australian federalism has a number of institutions, called federal institutions. Each federal institution operates through a number of processes.

Council of Australian Governments

COAG usually meets twice a year. It has focussed on cooperation and coordination between the Commonwealth and the states. COAG can also respond to significant issues that neither government has the power to do alone. In more recent times cooperation on issues of national security as well as domestic violence has been a focus.

Why is it necessary for the heads of all Australian executive governments — national and state — to meet?

The reason is because each level of government has some powers, but lack others. An example was the need for the two levels of government to cooperate in order to reform the river of the Murray-Darling Basin. The Howard Government needed the agreement of the four Basin states (Queensland, NSW, Victoria and South Australia) and the ACT before it could implement its policy. This is because state power to access waterways is guaranteed by Section 100 of the Constitution, yet the national leadership needed to manage basin water resources in the national interest can only come from Canberra, that is, the Commonwealth Government.

New terror laws introduced after the 11 September 2001 attacks in the US are another example. States have power over crimes. Terrorism is a crime, but a national plan is needed to combat it. The laws resulted from cooperation between state and Commonwealth governments.

Commonwealth Grants Commission

Governments need revenue to administer laws. This is generally raised through income tax and other forms of taxation. For example, the Commonwealth and the states have taxation powers granted to them by Section 51(ii) of the Constitution. Constitutional powers to raise revenues are called **financial powers**.

■ Figure 2.16 — COAG cooperated to introduce new terror laws after the attacks on the Twin Towers on 11 September 2001.
Source: Robert J. Fisch, United Airlines Flight 175 hits the South Tower during the September 11 attacks of 2001 in New York City, Flickr user, TheMachineStops, derivative work, 2001, UA_Flight_175_hits_WTC_south_tower_9-11.jpeg, CC BY-SA 2.0, <https://commons.wikimedia.org/w/index.php?curid=11786300> and <https://en.wikipedia.org/wiki/Terrorism#/media/File:UA_Flight_175_hits_WTC_south_tower_9-11_edit.jpeg>

It was noted above that the Commonwealth is rich and the states are relatively poor in terms of the amount of revenue they can raise. This is the result of many factors which will be addressed in depth in Unit 3 of the Year 12 course. At least one major factor influencing government revenue has been the way the High Court has interpreted the financial powers specified in the Constitution in various cases.

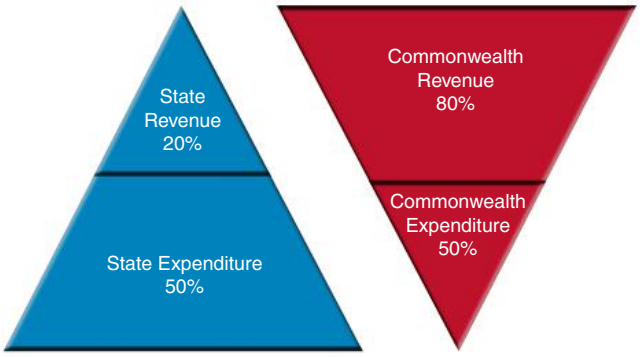
The result is an imbalance in the revenue that each level of government can raise and the amount it must spend in order to administer its laws. Because federalism is a vertical division of powers between a national and regional governments, this imbalance is called a **vertical fiscal imbalance**, or **VFI** for short. Australia has the largest VFI of all federal nations in the world. The Founding Fathers knew that this would be the case and included Section 96 in the Constitution to provide a means for the Commonwealth to make grants of money to the states so they could administer education, health and other state powers. This is the role of the Commonwealth Grants Commission.

Transfer payments from the Commonwealth to the states can be made under Section 96 of the Constitution, often referred to as the **grants power**. Transfer payments even out the fiscal imbalance. Section 96 says, "the Parliament [of the Commonwealth] may grant financial assistance to any State on such terms and conditions as the Parliament thinks fit".

The High Court of Australia

States and the Commonwealth can disagree about who exercises powers, the extent of powers and so on. Because power is divided and shared by a written constitution there can be disputes about what the Constitution actually means. As a written document it is open to various interpretations depending on the perspective of the reader.

Courts resolve legal disputes, and a constitutional dispute is a legal depute. So, federations need a constitutional court. The High Court serves this function in Australia. Its rulings on the meaning of the Constitution have had a profound effect on Australian federalism.



■ Figure 2.17 — Vertical fiscal imbalance.
Source: Nicol Davis, 2018

Geographical organisation

National federal governments may be located in a special region. Geographically, this makes the national capital a separate region that is not part of any state. It may also create a legally or symbolically distinct region reserved for national government. In Australia, this special region is the ACT, which is home to Australia's capital city, Canberra. The capital city of the US, Washington DC, is located in the special region of the District of Columbia (DC).

> *Any power not specified and enumerated is automatically a state power.*

The ACT houses the institutions of the national government — the national parliament, government and courts. It is also home to the federal public service, with the head offices of many federal public service departments located in the national capital.

The regional governments are located within a major city within the region. In both the US and Australia, these are the state capitals. Here we find the institutions of state government — state parliaments, governments, courts and public services. Perth in WA and Melbourne in Victoria are examples.

Organisation of powers

In a federal system of government, each level of government must govern only using powers allocated to it. The mechanism for distributing powers between the levels of government is a constitution. In Australia, the Constitution divides and allocates government power in three ways.

First, powers that can only be exercised by the Commonwealth Government are specified (written) and enumerated (numbered) in the Constitution. These are called **exclusive powers** and relate to matters that are national in nature. Examples of exclusive powers are the power to make agreements with other countries, called the external affairs power in Section 51(xxix), and the power to defend the nation, called the defence power in Section 51(vi).

■ Figure 2.18 — Australia's Commonwealth Parliament is located in Canberra.
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>

Second, the Constitution also specifies and enumerates powers that are essential to both levels of government. These are called **concurrent powers** and can be exercised by both the Commonwealth and the states. These are in Section 51, with taxation, Section 51(ii), being an example.

Third, regional (state) powers are unspecified (not written). 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 nature. As noted, the residual powers are not specified in writing. However, the power of states to make laws is found in Chapter Five of the Constitution, which preserves state legislative power.

The next chapter explains these powers more fully.

Australia's judiciary

In a liberal democracy the judicature or judiciary is the arm of government which makes legally binding decisions to resolve disputes about the meaning of law in particular situations. The judiciary enforces the rights of the parties to a case.

The judiciary exercises **judicial power**. Its decisions are law. Its decisions can create new law and can alter the meaning of existing law. Judicial power is thus the power to make or alter law by interpreting law in specific cases.

The judiciary is fundamental to the rule of law. Its role is to apply the law without fear or favour to any party in a case. The judiciary is blind to who the parties are. Parties in a court case may be ordinary citizens, powerful governments, wealthy corporations, foreign companies or famous people. It does not matter to a court. Equality before the law is an essential part of the rule of law, and a judiciary that is independent and free from the influence of power or wealth is essential to the rule of law. An independent judiciary is a guarantee against the influence of wealth and power.

The major institution of the judiciary is the **court**. Courts are places where judges and magistrates hear cases brought before them by parties who in are dispute with each other over questions of law and rights.

The main process by which courts find the truth and apply the law is the **case**. Cases are brought to court by parties in dispute about rights or law. In seeking to resolve disputes the judiciary must find the truth and then apply the law.

Court cases operate under the procedures and processes of the adversarial trial system and the common law. Both of these originate from Britain and are part of the heritage of Australia's legal system.

Adversarial trial — Discovering the truth

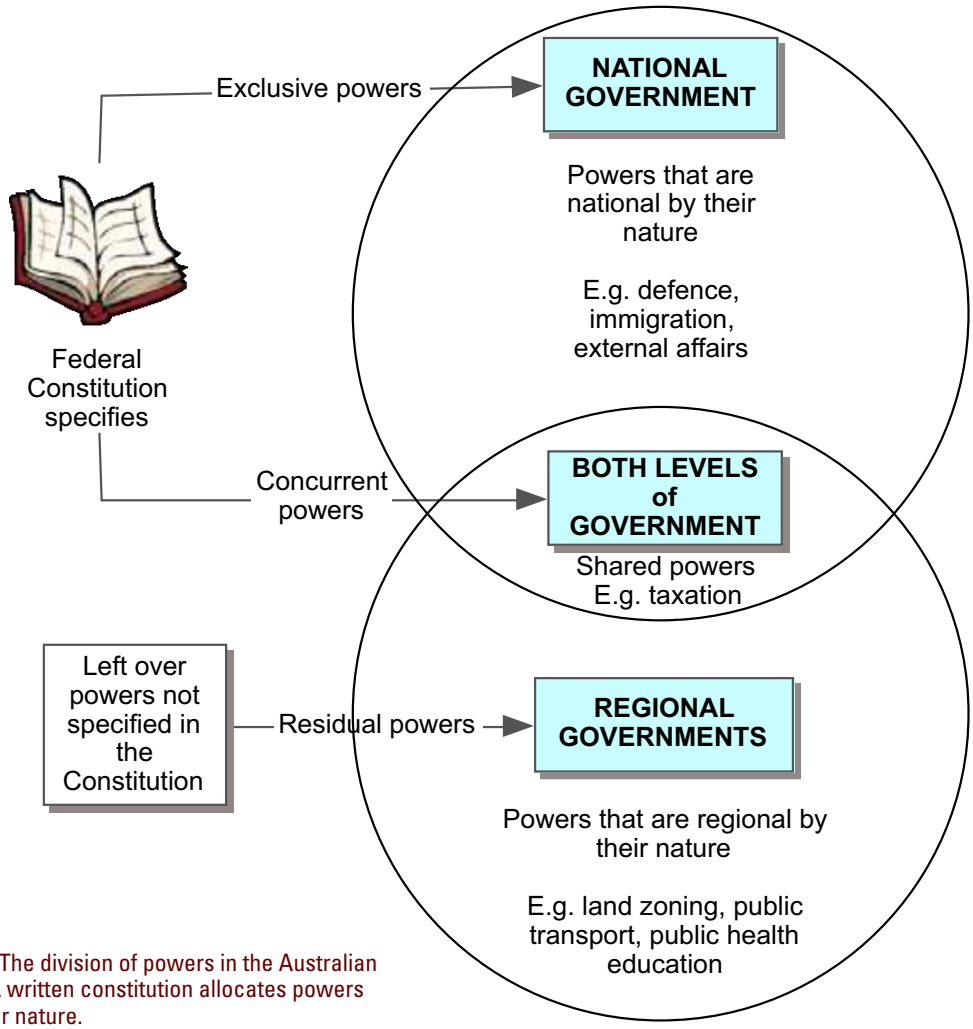
Parties in court cases are adversaries. They are in contest with each. The key roles of the court are to ensure fairness, find the truth and apply law to resolve legal disputes.

How best to find the truth? The assumption behind the adversarial trial is that competition and contest between the parties reveals the truth. Each party seeks the best evidence and works hard to make convincing legal arguments. In presenting quality evidence and convincing argument before an independent judge, the truth will be revealed.

The processes of adversarial trial are covered in detail later in Unit 1.

Common law

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



■ Figure 2.19 — The division of powers in the Australian federal system. A written constitution allocates powers depending on their nature.
Source: Stephen King, 2018

Figure 2.20 — The High Court of Australia, the nation's highest court.
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>

England and, later, in Britain and its colonies and former colonies. In each case the judges record the reasons for their decisions; this is referred to as their judgment.

The decisions of judges in cases are law. The law that judges create in this way is called judge-made law, case law or common law.

When a judge hears a new case, they are guided by the past decisions of previous judges in cases that are similar to the case being heard. Sometimes judges are required to follow a past decision, sometimes they may only be guided by it. It depends on the rank of the judge and the court in which the case is being heard.

> *Jurisdiction can be both geographical and legal.*

Common law develops incrementally on a case by case basis. New situations that come to court can result in new common law as judges make decisions where no previous law exists. Common law is evolutionary.

The **doctrine of precedent** governs the way common law evolves and is applied in courts.

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

The judiciary is organised into a hierarchy of courts. A hierarchy is a structure of seniority created by ranking from greatest to least. A court hierarchy is a ranked organisation of courts from the most powerful superior courts, through middle ranked intermediate courts, to lower ranked inferior courts.

Courts have **jurisdiction**. *Juris* means 'law' and *diction* means 'to speak' — so 'jurisdiction' literally means 'where the law speaks'. Jurisdiction can be both geographical and legal.

Geographical jurisdiction

Because 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 — the state or territory — in which 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 to hear and decide cases. Some courts, such as the Supreme and District Courts of Western Australia, have a general jurisdiction and can hear criminal, civil and administrative law cases. Some have specialist jurisdictions, like the Family Court of Australia, which can only hear cases regarding family law. There are a great many specialist courts such as the Perth Drug Court, the Children's Court of Western Australia and the

Court of Appeal Division of the Supreme Court of Western Australia.

Legal jurisdictions are also based on the severity or importance of the dispute a court seeks to resolve. 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, but with a maximum sentence of less than 20 years. Assault cases will likely start in the District Court. Minor summary offences, such as traffic infringements, littering and so on, will be heard in the Magistrates Court. Simple offences are dealt with quickly and do not generally have a custodial (prison) sentence.

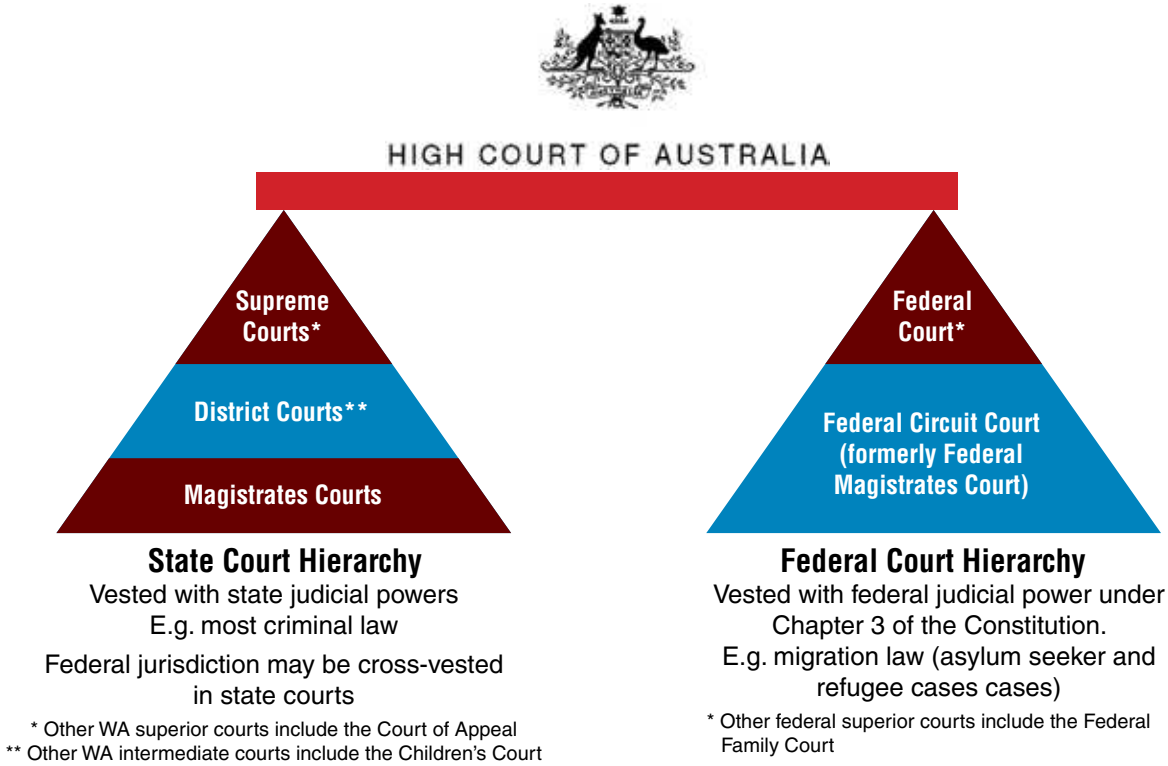
Figure 2.21 illustrates the federal and state court hierarchies in Australia. At the apex of both types of hierarchy is the High Court of Australia. The High Court is a federal superior court, but it is also the final court of appeal from all courts, including state and territory courts. It therefore unifies the Australian system of court hierarchies. Any decision made in the High Court is final and binding on all courts in Australia regardless of their geographical jurisdiction — federal or state/territory.

Conclusion

Australia is a country founded upon a history of gradual independence from Britain. Much of its political and legal system is based on British institutions like parliament, Cabinet government and common law.

These institutions perform the separate roles of law making, carrying out the law and interpreting the law. They are supposed to be separate, although the legislative and executive arms are fused by the British tradition of including the constitutional monarchy in both the parliament and the executive. The courts are entirely separate, adopting a US constitutional practice. All the arms of government check and balance each other, thereby fulfilling the democratic doctrine of the separation of powers. The rule of law is guaranteed by democratic process and an independent judiciary.

Australia's federalism further divides powers between a national and six regional governments. The division of powers is achieved by a written constitution based on the US practice of dividing powers exclusively, concurrently or residually between the two levels of government. All Australian governments are based on British Westminster institutions, processes and structural organisation. Having a written constitution necessitates a constitutional court — the High Court of Australia.



■ Figure 2.21 — Australia's state and federal court hierarchies
Source: Stephen King, 2018

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 it has the Queen of Australia, 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 system of trial.
- At the regional level it has the Queen, represented by six state Governors as heads of state. It has executive governments led by Premiers as head of government and Cabinets of minsters 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 system of trial.
- The Commonwealth and states are created by, and their sovereignty enshrined in, the Australian Constitution. The Constitution splits the legislative, executive and judicial powers of the nation between these two levels of government. Legislative powers are allocated exclusively, concurrently or residually to each level by the Constitution.
- There are two territories with the same political and legal systems as the states, granted by self-government acts of the Commonwealth Parliament, but without sovereignty enshrined in the Constitution.
- All parts of the Australian political and legal system are comprised of institutions that run according to established processes and are organised in certain structures.
- The major process of representative democracy is elections. Elections enable citizens to choose representatives who become legislators in a representative assembly called parliament. Parliaments make laws through a legislative process that represents electors' interests and is accountable to them.
- The major processes of constitutional monarchy are the unwritten constitutional conventions that limit the powers of the Crown and place them, in reality, in the hands of a Cabinet of ministers answerable to the representative parliament.
- The Cabinet, in turn, is governed by conventions like Cabinet secrecy and solidarity that ensure a collective of ministers can act as a single government.
- The judiciary is organised into a hierarchy which operates through the common law and the adversarial trial system. The doctrine of precedent is the major process through which common law evolves over time.

Activities

Short answer

1a) Define the term 'representative democracy' as it applies to the Commonwealth of Australia.

1b) Outline **three** key features of Australia's 'representative democracy'.

1c) Discuss **one** advantage and **one** disadvantage of Australia's bicameral parliament. Use examples to support your answer.

2a) Explain 'responsible parliamentary government' as it applies in the Commonwealth of Australia.

2b) Distinguish between the conventions of 'individual ministerial responsibility' (IMR) and 'collective ministerial responsibility' (CMR).

2c) Analyse the components and implications of the 'Westminster chain of accountability'.

3a) Explain the term 'federalism' as it applies in Australia.

3b) Outline the **three** forms that a federal balance of power can take.

3c) Compare how **two** federal institutions work to allow federal and state governments to interact.

Source analysis

Read the section 'Administrative executive or public service' to respond to the following:

4a) Explain why the 'public service' is often described as the administrative executive.

4b) Explain **two** characteristics of the 'public service'.

4c) Discuss why defining the 'real' executive in Australia is a challenging task.

4d) Evaluate the extent to which the Constitution accurately explains the roles and powers of the executive.

Essay response

5) Discuss to what extent the Constitution explains Australia's federal system.

6) "Courts should not be able to create common law because this is the responsibility of the democratically elected parliament". Discuss.

Investigation and discussion

7) Between 1962 and 1972 around 41,000 Australians served in Vietnam. During this time, the US used Agent Orange (a chemical weapon) to clear thick jungle. In August 1985 the Cabinet discussed the final report prepared by the Royal Commission on the Use and Effects of Chemical Agents on Australian Personnel in Vietnam. Released Cabinet documents highlighted the various responses to the report suggested by Cabinet members. However, due to the convention of Cabinet secrecy these documents were only released to the public in 2011.

   7a) Investigate the case of Agent Orange and one other example which demonstrates a significant issue discussed by Cabinet that the public was not made aware of until the release of Cabinet papers 20 years later.

   7b) Discuss the advantages and disadvantages of the principle of Cabinet secrecy.

Australia's blended Constitution

Syllabus points:

- **Key influences on the structure of the political and legal system in Australia**
  - **– the Westminster system of government**
  - **– English Common Law**
  - **– the US federal system**
  - **– the Canadian federal system**
  - **– the Swiss referendum process**
- **Essential to the understanding of democracy and the rule of law are the separation of powers, division of powers, representative government, responsible government and federalism.**

After perhaps 60,000 years or more of Aboriginal kinship with the great southern continent, new forms of government were brought to Australia by its European colonisers in 1788.

Indigenous forms of governance organised amongst 700 language groups[1] and 500 clan groups or nations,[2] and based on a profound connection to the land through customary law, would suffer near extinction. European colonisation brought disease, frontier wars and the loss of ancestral lands and culture. This effectively decimated the original inhabitants of Australia.

Despite the shock of colonisation, the great diversity of indigenous Australian cultures has endured, survived, adapted and grown increasingly resilient. Aboriginal cultures enrich modern Australia and may yet provide knowledge and skills that could aid the management of Australia's fragile ecosystems and help the country adapt to climate change. Nevertheless, the dispossession suffered by the Aboriginal nations of Australia remains a potent political, legal and moral issue that Australia's political and legal systems still struggle to deal with adequately.

First colonised by Britain in 1788, Australia's European history began at a time when Enlightenment ideas were sweeping through Europe. Radical political ideas like the 'separation of powers' and 'inalienable rights' were being incorporated into the newly independent United States of America's (US's) system of government at almost the same time.

Figure 3.1 — Indigenous tribes had their own system of governance and law before the arrival of Europeans in 1788. *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>*

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

2 Australian Government, <http://www.australia.gov.au/about-australia/our-country/our-people>.

From difficult beginnings as a penal colony based on punishment and retribution, the initial settlement at Sydney Cove grew. Other new colonies were also founded around the fringes of the continent. These infant colonies grew into thriving settlements that continued to develop.

The Australian colonies expanded rapidly. Some developed faster than others, but all eventually reached a level of maturity sufficient to allow them to begin agitating mother England for more independence in running their own affairs. Self-government was granted and the colonies grew into political maturity as separate political entities scattered around their great southern land.

As time passed, the colonies began to form closer relationships with each other. They grew closer and became increasingly attracted to the idea of a formal union that would bring them together to face a world that was becoming both more threatening and yet full of new opportunities. They sought to become 'one union composed of equal partners' to face the world together.

Prominent members of the colonial governments throughout the land proposed a political union of all six Australian colonies. The proposal developed by these 'Founding Fathers' would be based on another kind of union — marriage. The Founding Fathers proposed a constitutional 'marriage' based on uniting very different political and legal ideas.

Australia's Founding Fathers would become the celebrants who would marry New World and Old World constitutional ideas to create a new political and legal union for Australia as it sought its independence from its British parent. An old British tradition that many brides still follow stems from the saying 'something old, something new, something borrowed and something blue'. In the case of the emerging Australian political and legal system, the Founding Fathers created:

- something old from our Old World parent, Britain;
- something new from our New World cousin, the US;
- something borrowed from Switzerland and Canada; and
- something blue? The constitutional blues!

All marriages will involve compromise to some extent, and we do not always get exactly what we want. In order to enjoy the benefits of a union, compromises have to be made. In the case of the Australian constitutional 'marriage'

there were some unforeseen consequences that led to difficult patches in Australia's political system, including a full-blown constitutional crisis in 1975. Australia is still faced with issues resulting from the combination of different political and legal ideas that had not originally been designed to seamlessly blend together.

Figure 3.2 — The Australian federation was a 'marriage' between the British, American, Canadian and Swiss systems of government.
Source: Edmund Leighton, Signing the register, 1920, <https://en.wikipedia.org/wiki/Wedding#/media/File:Edmund_Blair_Leighton_-_signing_the_register.jpg> and <http://www.illusionsgallery.com/Signing-register.html>, Public Domain, <https://commons.wikimedia.org/w/index.php?curid=3105024>

Growing pains: Colonial autocracy to limited democracy — 1788–1890

Australia's very early European history was distinctly undemocratic. The first governors, beginning with Captain Arthur Phillip, were autocrats, ruling the infant society without limits to their powers except those imposed by the distant British Parliament, to which they were answerable.

The early governors needed to do the three things any government must: legislate new law, carry out the law and adjudicate disputes. The first governors made the law by **decree**. They carried out the law through command of a detachment of British soldiers stationed in the colony of New South Wales (NSW). Courts were like military tribunals with army or navy officers acting as judges. There were no citizens, no representative bodies, no rule of law, no separation of powers and few constitutional limits to power.

After the initial convict period, the Australian colonies became economically prosperous due to the growth of agriculture, especially from 1820 onward. The Blue Mountains were crossed and vast new lands were opened up for cropping and wool farming.

By 1823 both the population and the business of government had grown. NSW governors appointed a Legislative Council to advise them. As the Council's members were not elected, it was not a representative legislature. Further, the governor was not responsible to the Council for the government of the colony. Free settlers and ex-convicts, some of whom had become quite wealthy, made up an increasing proportion of the population.

From 1843, the governor appointed one third of the NSW Legislative Council. The remaining two thirds were elected members. Only wealthy land owing men could vote. This was the first

Figure 3.3 — Governor Phillip was able to act as an autocrat with close to absolute power.
Source: Arthur Phillip, Dr. Blofeld, original uploader, at English Wikipedia, <http://www.findagrave.com/cgi-bin/fg.cgi?GRid=10517906&page=gr, Public Domain>; <https://commons.wikimedia.org/w/index.php?curid=5317178> and <https://en.wikipedia.org/wiki/Arthur_Phillip#/media/File:ArthurPhilip.jpg>

partially representative legislature in Australia. The Council had to agree to a law before it could be proclaimed. However, the governors were still not responsible to the Council and thus it could not hold the executive to account in the way a Westminster parliament can.

Almost from the start, Australia was considered to be the 'lucky country' with its agricultural expansion coinciding with Britain's industrial revolution. Britain's new textile factories were hungry for wool and her Australian colonies grew rich on exports of high quality fleece to Britain. Subsequently, a new class of colonist emerged — a wealthy agricultural 'colonial aristocracy' — who wanted a greater voice in government.

With new land opened up for agriculture, other discoveries took place and minerals such as gold were found in great abundance. Gold rushes swelled both the populations and wealth of the colonies. Cities grew rapidly. By

■ Figure 3.4 — Charles Doudiet, Swearing allegiance to the Southern Cross, 1854, Art Gallery of Ballarat.
Source: en:Charles Doudiet - en:Image:Doudiet Swearing allegiance to the Southern Cross.jpg, Public Domain, <https://commons.wikimedia.org/w/index.php?curid=4983773> and <https://en.wikipedia.org/wiki/Eureka_Rebellion#/media/File:Doudiet_Swearing_allegiance_to_the_Southern_Cross.jpg>

the 1850s Melbourne was one of the largest and richest cities in the world.

The nation's increased wealth and rapidly growing colonies resulted in people identifying with a strong sense of being 'Australians' and, as such, the colonies began to seek more autonomy from Britain. Like their US cousins before them, Australian colonists began demanding a say in their own government and how their taxes were to be spent. Demands for more democracy resulted in rebellions on the gold fields, the most famous being the Eureka Stockade incident in 1854. Perhaps having learned from its disastrous war against her American colonies, Britain agreed to the granting of self-government to the Australian colonies.

Self-government came to NSW in 1856 when Britain granted responsible government to the colony. The first Cabinet of five ministers was led by the first democratically elected Premier, Stuart Alexander Donaldson. The Donaldson Government was formed by and responsible to a newly created Legislative Assembly — a lower house. The existing Legislative Council become the upper house. The Westminster system, with its 'responsible parliamentary government' and 'bicameralism', was thus established in Australia.

Between 1856 and 1890 all six Australian colonies achieved responsible government with bicameral legislatures.

Factors influencing federation

By the 1890s the world that the Australian colonies inhabited was rapidly changing. Gone were the days when NSW and the other colonies were separated from the rest of world by the 'tyranny of distance'.

A new concern confronted the Australian colonies, namely that of defence. Britain's naval power in the Indian and Pacific Oceans, which had always provided a protective guarantee to the colonies, was no longer unchallenged. The rapid rise of German power in New Guinea and Russian naval activity in the Pacific now threatened the security of the Australian colonies.

Other concerns such as inter-colonial trade preoccupied the minds of businessmen and brought pressure from these businesses on government to free up trade. During the 19th century the colonies expanded rapidly and began trading with each other as well as with Britain. The overland transport systems — roads and rail — began to link up, making communication quicker and trade increasingly more efficient between them. This gave rise to problems of economic integration. Some, led by NSW, favoured free trade between the colonies. Victoria sought to protect its new manufacturing industries from inter-colonial competition and put restrictive trade barriers — such as excise taxes, customs duties and tariffs — on traded goods.

Another widespread concern was the fear of Asian immigration. The gold rushes had led to large scale immigration to Australia from China and other non-European countries. This influx of migrants threatened 'white Australia'.

■ Figure 3.5 — This 1886 cartoon "depicts the anti-Chinese sentiment that was one of the driving forces behind the push for federation".
Source: Unknown artist, The Bulletin, 1886, <https://en.wikipedia.org/wiki/Federation_of_Australia#/media/File:1886_Anti-Chinese_Cartoon_from_Australia.jpg> and <https://commons.wikimedia.org/w/index.php?curid=28543111>

Race was a hot-button issue during these times. Terrible racially motivated crimes were committed on the gold fields. Race based laws, such as the NSW *Influx of Chinese Restriction Act 1881*, were passed by colonial parliaments discriminating against Asian migrants. But some colonies, like South Australia, had less restrictive immigration laws, allowing immigrants to enter one colony and then travel overland to others. Such policies created friction between the colonies.

Australian culture began to take on its own distinctive individuality, as highlighted in the stories of Henry Lawson, the poetry of Banjo Paterson and the paintings of the Heidelberg School artists. Much of the population was by now Australian born. Although still fiercely loyal to Britain and living in separate colonies with their own regional characteristics, many colonists had developed a sense of common Australian identity. New media, such as *The Bulletin* magazine, promoted a distinctly Australian vision.

■ Figure 3.6 — Arthur Streeton, At Templestowe, 1889.
Source: <https://en.wikipedia.org/wiki/Heidelberg_School#/media/File:Arthur_Streeton_-_At_Templestowe_-_Google_Art_Project.jpg>

Defence, economic integration, immigration and identity were the four key forces pushing the colonies together. Leaders across the continent believed that some form of political union that brought them together would be the answer to address these issues.

The pathway to federation[3]

The following timeline outlines the major stages on Australia's pathway to federation.

1846: The idea of uniting the six colonies into one new political entity had grown from as early as 1846, but there was no real urgency pushing the idea forward. The name 'Commonwealth of Australia' was first proposed in this year.

1863: The first of 83 Intercolonial Conferences was held. Issues of mutual colonial concern were discussed. Intercolonial Conferences would continue for 40 years.

1871: The Australian Natives Association and, later, the Australasian Federation League were formed as pressure groups to lobby the colonial parliaments for political union. They were composed of Australian born white men.

1883: The Federation Council was formed, but NSW refused to join, preventing any real progress towards political unification of the colonies.

1889: NSW Premier, Sir Henry Parkes, called for a "great national government for Australia".[4] He became known as the 'Father of Federation'.

1890: The Australasian Federation Conference held in Melbourne led to a decision to draft a constitution that would unite the six colonies.

1891: The National Australasian Convention was held in Sydney. The name 'Commonwealth of Australia' was approved and a draft constitution written. However, there was no power within the colonies to make the constitution law. For that to happen, they would have to convince Britain.

1893: The Corowa Conference was held. This was the first time the people of the colonies become actively involved, and federation became a 'popular' issue. Before now, federation had been an issue of concern mainly to colonial politicians and businesses. The Australasian Federation League advocated for the election of delegates to a new constitutional convention.

1895: Colonial Premiers met in Hobart and most agreed to send delegates to a National Constitutional Convention.

3 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>.

4 Parliamentary Education Office, A great national government for all Australians: The Federation Conventions, < https://www.peo.gov.au/learning/closer-look/federation-cl/federation-conventions.html>.

1897: Two constitutional conventions were held, one in Adelaide and one in Sydney. The draft of the Constitution was settled and it was agreed that it be put to a vote by the Australian people as a referendum in each colony.

1898: A third constitutional convention was held, this time in Melbourne. The draft constitution was amended again. The first referenda were held, and Tasmania, South Australia and Victoria agreed to federation under the new constitution. The NSW referendum vote did not succeed.

1899: The Premiers met again to change the proposed constitution to address the concerns of Queensland and NSW. Both these states voted YES in referenda in this year.

Only **Western Australia** had not held its referendum vote. Its remoteness from the other colonies and huge size made WA's referendum a slow process. There was much opposition from WA farmers to federation. However, the presence of large numbers of Victorian and New South Welsh miners on the Goldfields eventually resulted in a YES vote in WA.

1900: The British Parliament passed the Commonwealth of Australia Constitution Act 1900 (the Constitution). The proposed Constitution was written as a bill to be passed by the British Parliament. It was sent to Britain by steam ship. Queen Victoria's Royal Assent was witnessed by Australian delegates. Three months later, the **WA** 'yes' vote was finally achieved.

Students are encouraged to read the Preamble to the Constitution, which makes some special provisions for WA because of the delayed referendum and the fact that it had not agreed to federate with the other colonies before the *Commonwealth of Australia Constitution Act 1900* was passed.

1901: On 1 January, the Commonwealth of Australia was proclaimed at Centennial Park in Sydney. A quarter of a million people attended. There were parades in all major cities and towns. The construction of Federation arches became a common sight throughout the new nation. They were erected by the public, pressure groups and others to celebrate the birth of the nation. The British Lord Hopetoun was the first Governor-General and Sir Edmund Barton was Australia's first Prime Minister.

■ Figure 3.7 — "The Sydney Town Hall illuminated in celebratory lights and fireworks marking the Inauguration of the Commonwealth of Australia, 1901. The sign reads One people, one destiny".
Source: W A Gullick, State Library of New South Wales, 1901, <https://en.wikipedia.org/wiki/Federation_of_Australia#/media/File:Town_Hall,_Sydney,_Inauguration_of_Australian_Commonwealth.jpg>

What was discussed at all these conferences, conventions and meetings? How did they get all the colonies to agree to give up some of their newly won power and place themselves within a larger political union, subject to a new constitution and bound forever in partnership with a new national government? What was eventually written in the Constitution?

The creation of a federation was intended as a mechanism to address a number of problems facing the colonies in the latter part of the 19th century: defence, economic integration, immigration and identity.

At its heart, the problem was how to create one nation state that could address the concerns that drove the federation movement, while also preserving the geographically and legally separate powers, laws and identities of the existing colonies. In other words, how to achieve unity while preserving diversity at the same time.

The Westminster system from Britain

Some things were known and were readily agreed to early on in the constitutional conventions that led to the creation of the Constitution. These constitutional ideas were in operation in both the colonies and the mother country, Britain, and so were already very familiar and trusted.

Two of these were that the new nation would be a constitutional monarchy, and that its parliament and government would be Westminster in style.

Figure 3.8 — "St Edward's Crown, the Crown of England, which weighs nearly five pounds, the Orb of solid gold, the Sceptre with the Cross, Sceptre with the Dove, and the Ring". *Source: 'Crown Jewels', Illustrated, December 1952, p 14, <https://en.wikipedia.org/wiki/Crown_Jewels_of_the_United_Kingdom#/media/File:Crown_Jewels.jpg> and < https://commons.wikimedia.org/w/index.php?curid=64590096>*

Constitutional monarchy

The Crown

The British Crown was the head of state of each of the colonies and it was natural that it should also be Australia's head of state.

The Governor-General

The colonies had been governed by British appointed governors since 1788 when Captain Arthur Phillip first raised the British flag over Sydney Cove. Since then there had been many governors in each of the colonies. Naturally, their powers had slowly been reduced from the near autocracy of early governors to the constitutionally constrained powers of the late 19th century governors who mostly followed the advice of the colonies' elected parliaments established since 1856.

The colonies became **original states** within the new nation and they retained their governors and responsible governments. The new national government would have a Governor-General to act as the Crown's representative in Australia.

Following British and colonial practice, the new Governor-General:

- formed part of the new Commonwealth Parliament (codified in Chapter 1, Section 1 of the Constitution); and
- by convention, acted on the advice of ministers drawn from and accountable to the Commonwealth Parliament.

The specification of the Governor-General as part of the parliament, along with the House of Representatives and the Senate in Section 1 of the Constitution, creates one form of constitutional fusion of the executive and legislative branches of government that is a defining characteristic of the Westminster system of responsible government.

A bicameral parliament

An Australian legislature composed of two houses is a British inheritance. The British Parliament has a lower house called the House of Commons and an upper house called the House of Lords.

The House of Commons is very powerful. The House of Commons is elected and has democratic authority because it is the chief institution of British representative democracy. It is the house in which the executive government is formed and which holds the government responsible and accountable.

By contrast, the House of Lords is weak and is a house based on both inheritance and appointment, not election. It thus has no democratic authority and that is why it is weak.

The House of Commons has features that directly influenced the design of the Australian House of Representatives. It is elected, it represents the people, it is the house where government is formed and held to account, and it passes laws. The Australian House of Representatives performs all four of these functions. It is modelled almost exactly on the House of Commons.

The House of Lords, though, did not inspire the Australian Senate. An aristocratic house, the House of Lords is a relic from an earlier age. Australia's Founding Fathers did not wish to

Figure 3.9 — House of Commons, United Kingdom. *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>*

emulate its function in their new nation. Recall that Enlightenment ideas were very much a part of 19th century constitutional principles. The principles of inherited power reflected in the House of Lords were no longer appropriate or desirable. Instead, the Australian Senate is based on the US upper house.

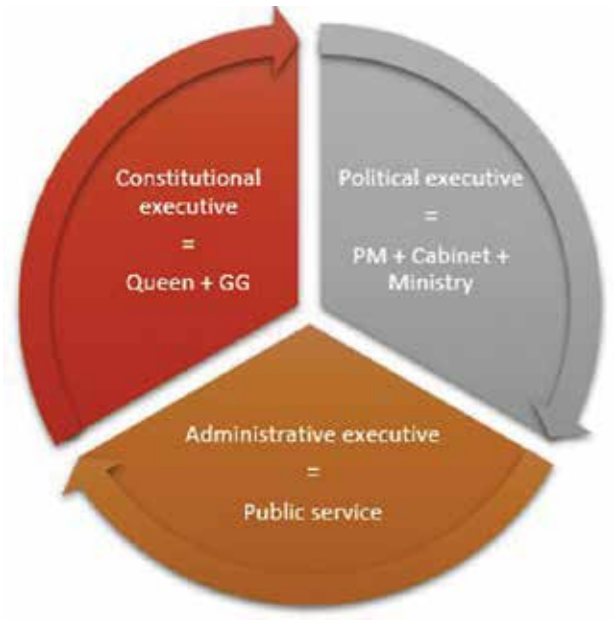
Responsible parliamentary government

Another feature that was already operating and trusted in the colonies was the form of executive government.

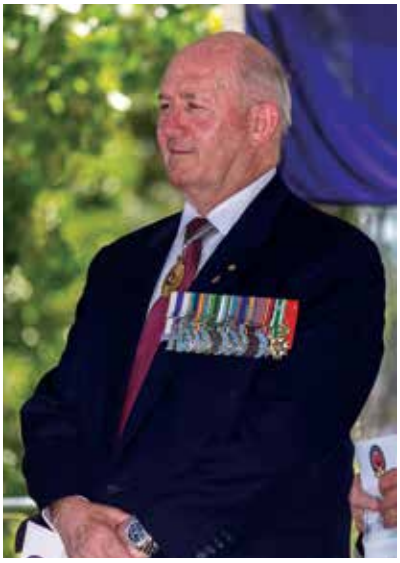
It was assumed and therefore barely written into the Constitution that the new national executive would follow established British and colonial practice, and be formed of three related parts:

1. a formal constitutional executive — the Crown and the Governor-General, codified in Section 61 of the Constitution and bound by Westminster constitutional conventions which are unstated in the Constitution;
2. a real or political executive — consisting of a Prime Minister and Cabinet drawn from and responsible to the lower house of parliament — the House of Representatives — and not mentioned in the Constitution, apart from Section 64 which requires that ministers be members of parliament; and
3. an administrative executive — a politically neutral public service to implement the laws.

Note that the Crown and Governor-General are part of the executive as well as the legislature. Sections 1 and 61 of the Constitution create the parliament and the government respectively with the Crown being part of both. Perceptive students will note that this is another indication



■ Figure 3.10 — The three different 'types' of executive. *Source: Nicol Davis*



■ Figure 3.11 — Australia's 26th Governor-General, Sir Peter Cosgrove AK MC. *Source: Cosgrove at the centenary of the Kangaroo March launch in 2013, Bidgee, CC BY-SA 3.0 au, <https://commons.wikimedia.org/w/index.php?curid=30057729> and <https://en.wikipedia.org/wiki/Peter_Cosgrove#/media/File:General_Peter_Cosgrove_AC_MC_(Ret%27d)_at_the_Centenary_of_the_Kangaroo_March_launch.jpg>*

> *One of the most central parts of the new Australian political and legal system was left entirely to unwritten Westminster conventions.*

of the fused executive/legislature that is a key Westminster characteristic.

Westminster conventions

The existence and operation of one of the most central parts of the new Australian political and legal system was left entirely to unwritten Westminster conventions. All the rules governing the Australian executive are inherited from Britain.

Chapter Two of the Constitution specifies certain powers of the Governor-General as part of the executive government. In reality the powers of the Governor-General, despite being written in the Constitution, the highest law in Australia, are not real. By convention and following British tradition, the Governor-General only exercises these powers on advice from the Prime Minister or a minister. This follows British practice, with the Queen acting only on ministerial advice.

The Constitution does not mention the Cabinet or the Prime Minister as part of executive government. **Section 64**, though, refers to Ministers of State and the Federal Executive Council (EXCO), and requires them to be members of parliament. This, in effect, is the constitutional equivalent to the Cabinet and Prime Minister. Section 64 creates the second form of constitutional fusion of the executive and legislative branches of government that is a defining characteristic of the Westminster system of responsible government.

Making and breaking the government

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 must have the support of the majority of members in the House of Representatives. In recent Commonwealth Parliaments that means at least 76 of the Members of the House of Representatives must support the government on confidence and supply. Confidence is demonstrated by the house either not moving no-confidence motions or defeating them if they are moved. Supply is the successful passage of money bills (also called appropriations bills) through the house. Executives cannot govern without confidence and supply, and must resign if they fail to obtain either.

> *"The most important convention is that the executive government must have the confidence of the lower house."*

Westminster convention reinforces that government is formed in the House of Representatives and is responsible to this lower chamber. However, governments must be able to get supply approved through 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. If a government can not persuade the Senate to pass supply, then it faces significant challenges in continuing to govern. This is a quirk of the combination of Westminster conventions and the significant powers given to the Senate (inspired by US influence).

The Westminster conventions of individual and collective ministerial responsibility are also part of the unwritten constitutional conventions inherited from Britain.

Legislative powers of the Governor-General

Recall that the Governor-General is part of the parliament. All parts of the parliament must be involved in law making. This means that a bill cannot become law without the consent of the Governor-General.

There are three essential stages, each being related to the three parts of the parliament, for a bill to become law. It must:

1. first pass through one house of parliament, usually the House of Representatives;
2. pass through the other house in exactly the same form; and
3. be agreed to by the Governor-General, referred to as Royal Assent.

Granting Royal Assent is governed by Westminster convention. Section 58 of the Constitution allows the Governor-General to assent to a bill, withhold assent or reserve a bill for the Queen's decision — which really means the British Parliament's decision. These powers to refuse or refer a proposed law reflect the early days of federation when Australia was a dominion within the British Empire. It was to allow the British Parliament to override an Australian law if the mother country thought it appropriate to do so.

Today, the specific Section 58 powers to refuse assent and reserve a bill are **fictional powers**; they do not exist in reality, especially now that Australia is fully sovereign and independent from Britain. These outdated powers are overridden by Westminster convention that dictates the Governor-General always gives Royal Assent.

The Governor-General may query a bill. There are cases in which the Governor-General has detected spelling or grammatical errors in a bill and referred it back to parliament, but these are minor, rare and have no effect on the meaning of the bill. A Governor-General has never refused to sign a bill into law.

Executive powers of the Governor-General

Some of the Governor-General's executive powers are the power to:

- dissolve the parliament (Section 28);
- prorogue the parliament (Section 5);
- issue writs for an election (Section 28);
- appoint ministers (Section 64);
- dismiss ministers (Section 64); and
- appoint judges to federal courts (Section 72).

All of the above powers are used by the Governor-General, but only on advice from a Cabinet minister who is responsible to the elected parliament. We call these powers **formal powers**.

The Westminster constitutional conventions infer that the formal powers only be used on advice from the parliamentary executive (that is, the Cabinet or ministry). The conventions are what bring these potentially autocratic royal powers under democratic control. The Constitution formalises the unwritten relationship in Section 62 by creating EXCO, the forum in which the Governor-General and ministers meet regularly to exchange advice.

Reserve powers of the Governor-General

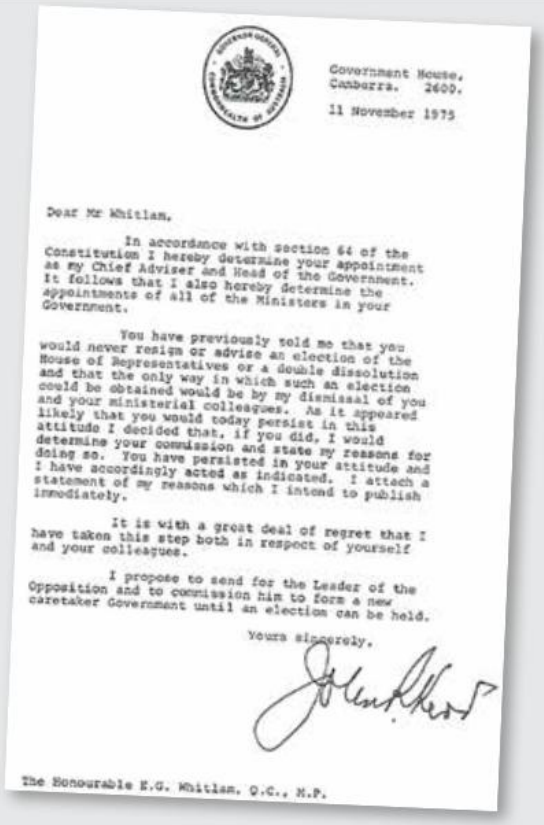
The Governor-General has formal and fictional powers as expressed in the Constitution– respectively those used on advice and those never used.

Some powers may be used in emergency situations when normal government cannot function or a crisis exists. These are the **reserve powers**.

Reserve powers are specified in the Constitution and may be the same as some formal powers. The difference is that they are used at the discretion of the Governor-General and not on any advice from the parliamentary government. An example is Section 64, which may be used to dismiss ministers and a government if a constitutional crisis is preventing it from governing.

Such an event occurred in 1975 when Governor-General Sir John Kerr used the reserve powers to dismiss the government of Labor Prime Minister Gough Whitlam. He did this because his government could not pass money bills (supply) through the parliament and was thus incapable of governing. Arguably, this is the type of crisis that the reserve powers are designed to resolve. The use of these reserve powers was controversial at the time.

To many people the existence of the reserve powers makes the Governor-General more powerful than the Queen. In Britain, the Queen has no constitutionally specified power to sack a government, but the Governor-General does in Australia. This unusual 'side-effect' is a consequence of compromises made in the design of Australia's political and legal system — in this case, the need to adopt a written constitution to achieve political union as a federation.



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 3.12 — Letter from Governor-General Sir John Kerr to then Prime Minister Gough Whitlam.
Source: Published with permission from <http://australianpolitics.com/> and <http://whitlamdismissal.com/1975/11/11/kerr-letter-of-dismissal.html>

The Whitlam Dismissal was the most controversial event in the history of Australia's Constitution and is covered in detail in Unit 3 of this course.

Other powers of the Governor-General

Section 68 makes the Governor-General the Commander in Chief of the Australian defence forces. This is a fictional power and not exercised in reality. Governors-General review troops on parade and perform other ceremonial duties such as awarding medals and so on, but these do not reflect the use of real power.

The English Common Law

English Common Law has a very long history dating back to the Norman Conquest of England in 1066 AD.

Arriving with the First Fleet in 1788, the English Common Law was a major influence on the formation of Australia's legal system. Also referred to as judge-made law or case law, in essence it is the process by which judges create new law when they decide cases in court. Made

in increments, case by case, it allows the law to evolve to meet new circumstances within society, filling in gaps that are not covered by the laws that parliament creates. The new precedents created through this process are then used in future similar cases.

■ Figure 3.13 — "The Middlesex Guildhall houses the Supreme Court of the United Kingdom and Judicial Committee of the Privy Council".
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>

Other principles and processes adopted from the United Kingdom

Bicameralism

Bicameralism is when a country's legislative branch is broken into two chambers or houses. This literally means that all proposed bills must go through both houses to become law. The advantage of a bicameral system is that it allows for greater scrutiny of legislation and, thus, enhances democracy.

Australia adopted the two house system from the Westminster system with the role of the House of Representatives similar to that of the House of Commons. That is, they both propose and debate legislation and ultimately are accountable to the people.

The two chamber system in the United Kingdom (UK) and Australia echo diverse forms of representation and also work as a system of checks on proposed legislation. The House of Lords was originally designed to curb the powers of the King. Bicamerialism in the UK also distinguished between the representation of the common people compared to the nobility and clergy. This is distinguished in Australia with both the House of Representatives and Senate chambers being directly chosen by the people, with the Senate designed as a states' house, where all original states would have equal representation as outlined in Section 7 of the Constitution. This was to prevent the less densely populated states from being dominated by the more populated states.

All bills which pass through the lower house must also do so in the upper house. While a majority of legislation passes through both houses with bipartisan support in Australia, there are examples where both houses can use their powers to block or amend legislation. In Australia, this power was demonstrated in March 2015, when the Senate voted against the Turnbull Government's Higher Education and Research Reform Bill 2014 by 34 to 30. This was the second time the Senate failed to pass the legislation, the first proposal by the Abbott Government being defeated in December 2014. The proposed legislation would have allowed universities to set their own fees for undergraduate courses. This caused concern that the financial cost of university education would become 'Americanised' and decrease 'equity'. The government was unable to convince crossbenchers Senators Ricky Muir, Glenn Lazarus, Nick Xenophon, Zhenya Wang and Jacqui Lambie to support the bill.

Australia's Constitution empowers the Senate to scrutinize legislation and act as a house of review. Government bills, therefore, do not always pass in the Senate as they are subject to negotiation with the opposition and the crossbenchers. In this case, the government failed to persuade a majority of the Senate to pass the bill, even when the Education Minister, Christopher Pyne, negated his prior threat to remove $150 million in research funding unless the Senate passed the bill. In 2017, the government officially shelved this plan.

In comparison, the House of Lords has far less power than the Australian Senate. Limitations exist on the power of the House of Lords to block and delay bills, especially money bills. While prior to 1911 these limitations were based on unwritten conventions, they are now constitutional. In terms of money bills, in the UK the Speaker can determine the nature of a money bill if it is only concerned with national taxation, public money or loans. If this is the case, then the bill is submitted to the House of Lords, but does not need to be passed. It will become law a month after being introduced in the House of Lords.

Constitutionalism

Constitutionalism is the idea that the power of a government should be limited through a written or unwritten constitution. The purpose of constitutionalism is to limit the potential abuse of power by all arms of government

and, thus, enhance the democratic exercise of power by those in government.

The UK is a constitutional monarchy and has an unwritten constitution. This means it is not codified in a single document, unlike the US or Australia. Instead, the UK functions under a series of laws, conventions, customs and practices.

Conventions and laws of parliament are the most crucial aspect of the practice of constitutionalism in the UK and an approach that Australia adopted in part. The Australian colonies, which became states after federation, rely upon unwritten constitutions to define and regulate the power of government. This exists through a combination of important laws and constitutional conventions which outline the key institutions, roles and powers of each arm of government as well as the compositions of parliaments. Some laws place further limits by requiring the citizens of a state to vote to alter these key elements of their system of government. Therefore, despite not having a formal written constitution, the powers of the institutions are defined and, thus, limited.

Representative government

Australia adopted the UK's system of representative government — where the people elect others to represent them. In other words, they delegate power to their member of parliament enabling them to act on their behalf, including, but not limited to, by voting for or against bills. Whilst the members in Australia's House of Representative and Senate, and the UK's House of Commons are elected by the people, it must also be noted that members in the House of Lords are not.

Whilst unelected, the House of Lords has been going through a process of democratisation to develop its representativeness. In 2000, a House of Lords Appointment Commission was established to select and recommend individuals as non-party political life peers to the House of Lords. This commission is independent of the UK Government, however, the Prime Minister approves the members and then they are appointed formally by the Queen. It can be argued that since these members are appointed and not elected their capacity to truly represent the people, as intended in representative government, is imperfect.

In both the UK and Australia, the political party (or parties) that gains the majority of seats in the lower house forms the government. In this way it can be seen to be representative as the government is formed in the house that was directly chosen by the people.

In the UK, since 2011, their election date is set on the first Thursday in May every five years. In Australia, the House of Representatives may sit for a maximum of three years, or less at the discretion of the prime minister who may call an election. In both systems, if an individual member or the government fails to perform, the people may vote them out of office.

This was evident in the Australian 2013 and 2016 federal elections. In 2013, the Australian Labor Party lost government to the Liberal-National Coalition (the Coalition) led by Tony Abbott, which increased its seats from 55 prior to the election to 90 seats. In the 2016 double dissolution election, whilst the Coalition maintained government, they lost a significant amount of seats, down from 90 to 76. It was during this election that House of Representatives members Peter Slipper and Craig Thomson both lost their seats due to controversies. The electorates they represented decided to vote for other candidates. Through elections the people were able to re-delegate their sovereignty to both individuals and government to re-present their views. Further, because this was the first double dissolution election for three decades, this directly impacted the representative nature of our parliament, in the House of Representatives and in the Senate.

Majority rule of the lower house has generally led to executive control of the lower house. Whilst typically the government enjoys a majority it is not always the case. When the 45th Parliament sat they appointed the Honourable Tony Smith MHR as the Speaker on 30 August 2016. As the Speaker does not deliberatively vote on motions or bills before the house, the government, now with 75 votes on the floor of the house, effectively lost its majority. The issues of the low majority were highlighted on 1 September 2016, when the Coalition lost a vote in the house — the first time for a majority party since 1962. Three ministers, Peter Dutton, Michael Keenan and Christian Porter, left parliament before the end of the adjournment debate, effectively giving the opposition the numbers to push through votes. The Speaker, Tony Smith, used his casting vote to side with the opposition, the Australian Labor party, and allow debate to continue on the Royal Commission on the banking sector. Parliament was eventually adjourned once the ministers returned to the chamber and the government regained its control of the house.

The United States federal system

Britain could not offer solutions to some of the problems facing the Founding Fathers in their quest to create a political union out of the six Australian colonies.

One way to achieve political union would be to abolish the colonies altogether and have one national Australian government. This type of nation state is a called a **unitary state**. Its chief feature is a single government for the whole country, with all the nation state's sovereignty vested in and exercised by one government. The new nation could have been one Australian territory, one Australian people, one Australian government.

Britain has a unitary political system. Having adopted so much from the British already, why not just copy Britain completely to solve the problem of the political union of the six Australian colonies, too?

One reason was colonial power and rivalry. Recall that the colonies had been granted self-government about 40 years previously, in 1856. This was not long before constitutional conventions of the 1890s that were responsible for the drafting of the Constitution. The Founding Fathers themselves were mostly colonial politicians with political power. They were not about to surrender their hard won powers to a new national government and then vote themselves out of existence. Some of the reasons for federation in the first place — a desire to enhance intercolonial trade and protection from outside threats — validated the need for national government, but did not support a proposition to abolish regional government.

The colonial politicians driving the process for political union certainly did not envision their own extinction by being absorbed into a larger political entity. They saw a national government providing security and smoothing the way for their own regional development. For colonial leaders, the idea of political union was more about protecting regional interests in a fast changing world than about a patriotic push to embrace 'Australia'. For the people, more practical concerns and a unique identity from Britain were of importance.

Another perhaps more sensible reason was that Australia was just too large to govern effectively from one central place. Very large countries, like Australia, have great geographical and climatic diversity. Australia is an entire continent with a tropical north, temperate south, arid centre and vast productive grasslands. Such regional differences give rise to different types of economies, some agricultural, others more industrial. Some problems may be unique to some regions while not affecting others.

Furthermore, the patterns of colonial settlement around widely spaced harbours and rivers had led to the development of large colonial capital cities located on coasts and surrounded by their own farming hinterlands. The speed of communication in the 1890s was as fast as a steamship or an unreliable telegraph signal. When measured by communication time rather than distance, Australia was a much larger country in the 1890s than it is today. The colonies were like islands of colonial settlement surrounded by deserts and oceans, separated by enormous distances and virtually independent from each other.

Figure 3.14 — The US Constitution.
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>

A single government would be inadequate for such a huge, diverse country and its scattered populations. Good governments listen and respond to those they govern. They need to be 'close to the people', especially in times when communications are slow. The colonial Founding Fathers feared a distant national government may risk ignoring the regions' unique needs.

To summarise, the colonies were protective of their hard won self-government and relatively independent of each other, yet drawn (or pushed) together by

the need for economic cooperation and joint security. Their constitutional problem was how to unite six colonies into one national union while preserving regional sovereignty and government over their scattered territories and populations.

To restate the problem: 'how do you create a new national government by converting the six colonies into states, while preserving the power and integrity of regional governments?'

Federalism

Fortunately, Australia's New World cousin, the US, had faced and solved the same problem just over 100 years before.

Having won their sovereignty from Britain in the War of Independence (1775–1783), the thirteen American colonies wanted to unite into one American nation for their joint or common-wealth, while preserving their own identities and governments within it.

Their solution was federalism, and the following outlines how it was developed.

First: Divide sovereignty geographically

The political genius of the US Founding Fathers was to divide sovereignty geographically. They drafted a Constitution for the US that achieved two essential things. It:

- created one national (or federal) government; and
- preserved the colonies' constitutions and converted the colonies into a number of states with their own regional governments.

Second: Allocate the powers of government

When a constitution creates two levels of government a new problem arises. Decisions must be made about which level of government governs over which areas of responsibility. This will be decided by the nature of the power.

Some powers are national by their nature. Defence, immigration and external affairs are such powers. These will be allocated to the national level of government and the states will not be able to make laws on these.

Some powers are necessary for all governments. Taxation is an example. All governments must be able to tax and spend. However, all governments are limited by constitutions on exactly how they do this.

Some powers are 'local by their nature'. Land use zoning, urban planning, public transport and roads are examples of regional powers. State governments are closer to the people whose lives are directly affected by these powers. The national level of government does not make laws in these areas.

A 'federal constitution' must allocate these powers to each level of government. They may be given exclusively to the national government, they may be shared concurrently between national and state governments, and they may be left to the states (residual powers).

Having first created two levels of government, the US Constitution then performed a second essential task. It geographically divided the legislative, financial, judicial and other powers of government based on the nature of the powers. It did this by specifically allocating some powers to the national government, some to both, and left the rest to the state governments.

The authors of the US Constitution **specified** the exclusive and concurrent powers in the written constitution. The residual powers were not written in the US Constitution; they were **unspecified**. This meant that anything not specified in writing was automatically a state power. The idea of unspecified powers was a clever solution to the problem of trying to create a complete list of all powers. Any attempt to list all powers (an exhaustive list) would inevitably result in some power being left off the list or a new power emerging from technological or social change. Then the dilemma would be, 'which level of government should get this new power?'

Each level of government was free to make laws in its own areas of responsibility as outlined by the US Constitution. Each level was protected from interference from the other in its areas of sovereignty.

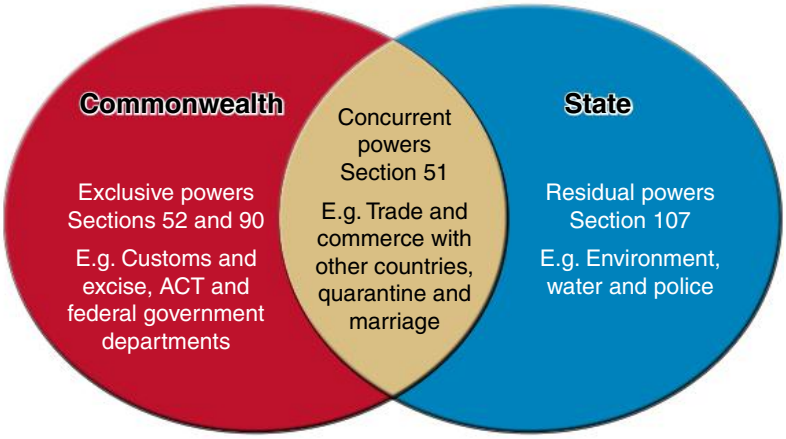


Figure 3.15 — The federal division of powers.
Source: Political and Legal Educators Association of Western Australia

The US Constitution created one American nation and many regional states; one American people and many regional peoples; one American government and many state governments. One United States of America.

Finally: Link the two levels together

When there are two levels of government there will be a relationship between them.

There are two ways to look at intergovernmental relationships within a federation:

1. the **balance of powers** between the two levels; and
2. the **federal institutions** that link them together and enable cooperation between them.

Federal balance of powers

The federal balance of powers is the ratio of power between the two levels of government within a federation.

The ratio of powers within a federation can be affected by:

- the way a federal constitution allocates powers;
- changes made to the constitution over time;
- how particular powers change or evolve over time; and
- how the meaning of the constitution is interpreted by the constitutional court.

At this stage, it is enough to realise that the ratio or balance of powers within a federation changes because it is not static; it is dynamic. Perceptive students will note that unitary systems do not have a balance of powers because all the powers are held by one level of government. A balance of powers was another of the 'side-effects' the Australian Founding Fathers had to deal with when considering whether to adopt the US federal system into the new Australian political and legal system.

Federal institutions — Intergovernmental links

It is essential for the governments in a federated nation to be able to talk to each other and solve common problems.

Federal institutions link the two levels together in different ways.

- A constitutional court resolve disputes about the meaning of the constitution as well as disputes between the states or between the national level of government and the states. Because a federal constitution is a written document it may be open to different interpretations. A constitutional court is essential to hear and settle constitutional cases and those between the different governments.
- The heads of governments (national plus state) meet to discuss and resolve issues between their governments. Representatives from each level meet to enable cooperation and the efficiency of government in their own areas of responsibility.
- It is impossible to exactly match the taxing capacities with the spending needs of each level of government. Inevitably, one level will collect more tax than it needs and the other will need to spend more than it collects. This 'fiscal imbalance' needs a grants commission to transfer money from the level with surplus revenues to the level with deficits.

US and Australia — Constitutional cousins

Australia's Founding Fathers were so impressed by the US federal solution that they copied it faithfully into the design of Australia's Constitution. To use a modern expression: the structure and ideas that make the US Constitution a federal constitution were virtually 'copied and pasted' into the Constitution.

Institutions of Government		United States Constitution	Australian Constitution
National government	National legislature *Lower house* *Upper house* *Powers*	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*
	Federal executive	Article 2 *President*	Chapter 2 *Governor-General*
	Federal judiciary	Article 3 *Supreme Court*	Chapter 3 *High Court*
State governments	State constitutions and powers	Article 4	Chapter 5
Constitutional court		*Supreme Court*	*High Court*

Table 3. 1 — Comparison of the federal constitutions of the US and Australia.

Other principles and processes adopted from the United States of America

Written constitution

The Founding Fathers made a conscious decision to adopt a written constitution. A written constitution is a codified document, where the principles, powers and processes of a political and legal system are set out in a single document or Act. A written constitution allows for the distinction between constitutional law and statutes.

A written constitution is the result of the efforts of a group of people, usually elected, and systematic. With an unwritten constitution, the structures of the government have been developed over time. It is not as definite as it consists of a culmination of many statutes and conventions.

Both written constitutions in the US and Australia took form when their states agreed to join together, or federate, and to form a central government. A written constitution was necessary to stipulate the institutions, powers and relationship between the national level of government and the states. Australia's Constitution is similar to that of the US in that it details the elements and process of the legislative, executive and judicial branches of the Commonwealth Government.

The obvious difference of the separation of powers between these two constitutions is that Australia's executive is drawn from its legislative branch, while in America they are two distinct branches. Another difference is that in Australia, the Governor-General will appoint High Court Justices, while in the US Supreme Court Justices are nominated by the President and then confirmed by the US Senate.

Constitutional court

Article Three of the US Constitution vests judicial power in one Supreme Court and several inferior courts. Legislation was later passed by Congress to form the US Supreme Court. In the formation of Australia's judicial branch, the Constitution duplicated elements of the US Constitution, empowering the High Court of Australia through Chapter Three.

Both the US and Australian courts' power includes the right to interpret their respective constitutions. This role as a constitutional interpreter is necessary to ensure that disputes between the different levels of government and also between the different arms of government are resolved. The constitutional courts provide the meaning to words, phrases and sections of their constitution. These decisions set the understanding of the power relationships in their country and also the rights protections for their citizens. The decisions of the constitutional courts are extremely difficult to overturn, which makes their role critical to the functioning of a political and legal system that seeks to uphold the principles of rule of law and liberal democracy.

Both constitutional courts are presided over by Justices. In America, Justices have life tenure with no forced retirement age. Since 1977, after a successful referendum, Australian federal judges are subject to forced retirement at the age of 70.

A recent example of the High Court utilising its power to interpret the constitution is the *Williams v Commonwealth (No.1) (2012)* case, otherwise known as the Chaplaincy case. In 2006, the Howard Government introduced the National School Chaplaincy Programme (NSCP) via Section 61 of the Constitution.

Executive power — Section 61 states that "The executive power of the Commonwealth is vested in the Queen and is exercisable by the Governor-General as the Queen's representative, and extends to the execution and maintenance of this Constitution, and of the laws of the Commonwealth".

The funding of the NSCP was challenged by Ron Williams, a father of six children from Queensland. Mr Williams won the challenge as the High Court determined that the use of Section 61 did not give the government the power to fund the program when the parliament could reasonably authorise expenditure. The plaintiff also argued that the NSCP breached Section 116 — through which the Commonwealth is unable to legislate for religion — but the court did not agree with this proposition. This court action led to new law making by the parliament.

An example of the US Supreme Court utilising their constitutional interpretation powers is the landmark case of the *District of Columbia v. Heller (2008).* This case focused on the Second Amendment of the US Constitution, which gives people the right to possess firearms.

The Second Amendment of the US Constitution states that "A well regulated militia, being necessary to the security of a free state, the right of the people to keep and bear arms, shall not be infringed".

It was questioned whether an individual right to hold arms was valid when not in the militia. The Supreme Court, in a five to four outcome, ruled that the Second Amendment does allow people to hold firearms in the home for purposes such as self-defense. This judgment also overruled a District of Columbia law that banned anyone not in law enforcement from owning handguns.

The law also provided that any lawfully owned guns must be disassembled, unloaded and appropriately stored when not being used. It was deemed that these legal requirements were unconstitutional. The Second Amendment was interpreted to be upheld and the rights of the people to bear arms were enforced.

Other constitutional ideas

Canadian 'Washminster' system

Australia has a second New World cousin besides the US — one even more closely related to us — Canada.

Canada was a 'settler society' composed of colonies in a huge continental land mass and with the same Old World British heritage as Australia's colonies. Its history is more like Australia's in that it did not fight a war with Britain to gain its independence. It arrived at its constitutional arrangements by negotiation and by borrowing ideas from other countries, much like Australia.

Canada adopted Britain's Westminster system of government and English Common Law. It also adopted American federalism to unite its colonies into provinces within a single Canadian nation. It has a constitutional court and federal institutions. Importantly, what Canada demonstrated and proved to Australia's Founding Fathers was this — it is possible to blend the Westminster system with the Washingtonian federalism and get a workable and successful hybrid of British and US constitutional ideas.

Canada created the world's first **Wash-Minster hybrid** form of government AND it did so in 1868. The Canadian Washminster system was the exact solution that Australia's Founding Fathers sought, and its successful operation for 32 years before Australia federated was proof that it worked. Canada was both a model to copy and an experiment that worked. Canada gave Australia's Founding Fathers faith and confidence in their vision, and the courage to develop their own Washminster system for Australia.

■ Figure 3.16 — Australia's system of government is a combination of the federalism of Washington and the parliamentary Westminster system, that is, a Washminster mutation. *Source: Adapted from Makarenko Andrey, Laundry, the Noun Project, <https://thenounproject.com/search/?q=washing%20machine&i=1304053>*

	Institution	Notes
WASH	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
MINISTER	Constitutional monarchy with the Queen incorporated into the Commonwealth Parliament	The Commonwealth Parliament has three parts — the Queen, 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.

Swiss referenda process

Switzerland is a representative democracy with the Federal Assembly (the equivalent of our parliament) as its legislature. However, the Swiss also have over 100 years of experience with referenda, a mechanism that can be used to change laws made by the Federal Assembly or make changes to the national constitution. A referendum is a direct vote by the people on a particular question.

Referenda are used at the national, regional and local levels of government in Switzerland. They are a unique feature of Swiss democracy and enhance popular participation in government.

The referendum was an attractive feature of the Swiss political system and Australia's Founding Fathers, who valued democracy so strongly, decided that they would put the proposed constitution to the people of each colony as a referendum, asking them to approve its adoption. Australia was born from an act of direct democracy. Australia is a country that was voted into existence by its own people.

Having created the Constitution and a nation through an act of direct democracy, the Founding Fathers went further and chose referenda as the way to make formal changes to the Constitution. If any future governments wanted to change the Constitution they would need the approval of the people.

The procedure for constitutional change is codified in Section 128 of the Constitution — its final section. It requires two forms of majority to change the wording of the Constitution:

1. a majority of all Australian voters — a 'democratic majority'; and
2. a majority of voters in a majority of states — a 'federal majority' that would require at least four of the six states to agree to the change.

The requirement of both a democratic and a federal majority is referred to as a **double majority**.

■ Figure 3.17 — Section 128 outlines the process by which the Australian Constitution can be changed.
Source: Parliamentary Education Office, <www.peo.gov>

Australia's Washminster hybrid

Marrying the US's 'Washington' with Britain's 'Westminster' has produced a 'Washminster hybrid' form of government in Australia that is much like Canada's system.

Hybridising often results in a 'best of both worlds' result. For example, farmers used to hybridise the horse and the donkey to produce a mule. A mule combines the great strength of the horse with the endurance of the donkey. Mules are very useful farm animals, better than a horse or donkey for almost all the tasks a beast of burden does on a farm.

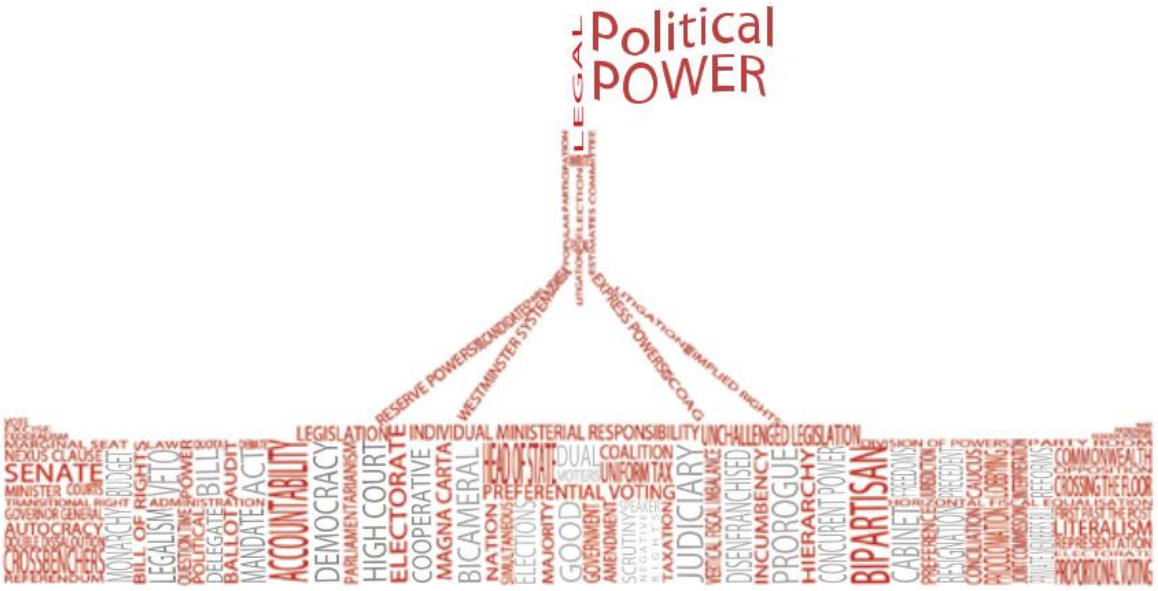
But hybridising carries costs. In the case of the mule, the farmer cannot breed two mules to produce a baby mule. Mules are sterile, they cannot reproduce themselves. The cost of hybridisation for the farmer is that horses and donkeys must still be kept for breeding purposes — a cost to the farm.

The Washminster hybrid created a great 'best of both worlds' solution to the problem of uniting the six colonies within a federation while preserving the Westminster system and constitutional monarchy. Unforeseen problems would cause enormous 'constitutional blues' in 1975 and minor constitutional issues along the way.

The constitutional blues in Washminster systems are mainly caused by:

- a US inspired written constitution clashing with unwritten Westminster conventions concerning the real powers of the Governor-General;
- a US style upper house with co-equal power to the lower house of government blocking money bills and bringing on a crisis of government — something Britain's weak House of Lords cannot do; and
- the absolute parliamentary sovereignty of a Westminster style legislature being compromised by the limits of a written constitution and the division of powers between the Commonwealth and state parliaments.

These are areas in which the Washminster hybrid, which is brilliant most of the time, does not always work. Students will learn much more about these constitutional blues in Unit 3 where the Whitlam Dismissal and the roles and powers of the Governor-General are studied in depth.



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 separate 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 designing a new constitutional arrangement. It would need to create 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 power in executive officials, called ministers, drawn from the elected parliament.
- Australian federalism was adopted and adapted from the US model of dividing sovereign powers exclusively, concurrently and residually between national and state governments. Federalism required a written constitution to create the institutions of national government, preserve state governments and then divide legislative and financial powers between them. The written constitution required a constitutional court, called the High Court, to settle disputes about how the fundamental law should be interpreted. Federalism also needs institutions that link the two levels of government, enabling cooperation and coordination between Australian governments.
- Canada had adopted a very similar blend of the Westminster and Washington systems some decades before Australia's federation. It provided both a model and a degree of confidence that a 'Washminster hybrid' could work.
- Swiss direct democracy and referenda were adopted as the method for formally changing the Constitution in Australia.

Activities

Short answer

1a) Explain who the term 'Founding Fathers' refers to in the context of Australian federation.

1b) Outline **three** challenges the Founding Fathers had to overcome to achieve federation.

1c) With reference to the colonial concerns driving the federation movement, discuss the extent to which **two** of these continue to be issues for the Commonwealth Government.

2a) Outline **two** 'Westminster conventions' as they apply to executive government in Australia.

2b) With reference to the Constitution, explain what fuses Australia's legislative and executive bodies.

2c) Discuss **one** strength and **one** weakness of the executive powers of the Governor-General.

3a) Explain what is meant by the term 'common law' as it refers to the English influence on Australia's legal system.

3b) Outline the **three** ways that federal institutions are linked together.

3c) Discuss the impact that the 'division of powers' between the Commonwealth Parliament and the state parliaments has on Australia's law making.

Source analysis

Read the section 'Other constitutional ideas' to respond to the following:

4a) Explain the term 'Washminster system' as it applies in the Commonwealth of Australia.

4b) Using the source, explain the procedures for constitutional change as outlined in Section 128 of the Constitution.

4c) Compare the federal division of powers in the US Constitution with that outlined in the Constitution.

4d) Assess the extent to which the Constitution is a unique document.

Essay response

5) 'Constitutional monarchy, referring to the roles and powers of both the Queen and the Governor-General, clearly describes the structure and powers of Australia's political institutions'. Evaluate the validity of this claim.

6) Evaluate the impact of each of the external influences on the Australian political and legal system.

Investigation and discussion

7) Panel discussion: Choose one Founding Father to research. Consider his perspectives on the federation movement in the late 19th century. Prepare notes so that you can respond to a question and take part in a panel discussion on the development of the Constitution.

8) Investigate the suffragette movement in Australia in the late 19th and early 20th centuries. What impact did this movement have on the writing of the Constitution?

9) Investigate the Canadian Washminster System and compare this with Australia's system of federation.

Democracy and autocracy

Syllabus points:

- **Structures and processes of:**
  - **– one democratic political and legal system**
  - **– one non-democratic political and legal system**
- **Essential to the understanding of democracy and the rule of law are the separation of powers doctrine, constitutionalism and judicial independence.**

It is often remembered that former British Prime Minister Sir Winston Churchill said, "many forms of Government have been tried, and will be tried in this world of sin and woe. No one pretends that democracy is perfect or all-wise. 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 deliver government.

Government can be 'good', it can be 'bad' and sometimes it can be 'ugly'. While this is a cliché, it can help describe the structures, processes and outcomes of governments around the world.

Classifying government

Using terms like good, bad and ugly is intended to help students quickly assess governments. It is not a formal classification.

'Good' government

Much has been learnt about democracy. It is characterised by certain principles that operate to ensure majority rule, equality of political rights, citizen participation and respect for freedoms. Democracies can also be different from each other, but they all have certain features in common. These common characteristics are all intended to produce a political and legal system based on the idea of constitutionalism.

> *Constitutions limit power by defining power and distributing it throughout the political and legal system.*

The powers of a democratic government are limited in different ways. Powers are separated into different institutions. The rule of law operates through an independent judiciary that treats all individuals equally under the law. There are free and fair elections that occur regularly enough to reassert majority rule and keep the government accountable to the people. Constitutions, whether comprised of written documents or unwritten conventions, limit power by defining power and distributing it throughout the political and legal system. Checks and balances exist between the different institutions of power within the system. Procedures and processes are fair, open and transparent.

Numerous countries can be used to demonstrate the existence of a democratic system of government, the operation of constitutionalism and those elements suggested above. Australia, New Zealand, Canada and the United Kingdom all qualify. However, each shares a common heritage and practice. The United States of America (US), despite its settlement by the British, has created and implemented a non-Westminster political and legal system. The US system and its principles will be examined later in this chapter as a case study.

'Bad' government

Not all governments are democratic. Throughout most of history, governments have ruled without constitutional limits to their power. Rule by law, rather than rule of law, has been a defining characteristic. The rule of men, not law, has been

■ Figure 4.1 — In 2018, the Chinese National People's Congress passed legislation that abolished presidential term limits, enabling Xi Jinping to rule indefinitely.
Source: MattGolding Cartoons, <https://twitter.com/goldingcartoons?lang=en>

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>.

the usual practice. Rule by one or an elite few, rather than majority rule, has been the norm. Power has been concentrated and unchecked, rather than separated and balanced. Indeed, for most of human history, governments have been anything but democratic. Throughout the contemporary world there are still many governments that fit this classification.

> *Rule by law, rather than rule of law, has been a defining characteristic of bad government.*

Authoritarian government can appear to be good on the surface. However, the reality can be anything but. Later in the chapter, China's political and legal system will provide a valuable case study of a non-democratic government to contrast with that of the US. Some describe its form of government as 'responsive authoritarianism'[2] — a kind of autocratic non-democracy that claims to respond to the Chinese people's desire for liberation and prosperity. It will be seen, however, that China's government is only responsive to certain issues and circumstances and usually only when its survival depends on adapting to changing values in Chinese society.

■ Figure 4.2 — North Korea is an example of 'ugly' government.
Source: Alan Moir, <https://www.moir.com.au/> and <https://twitter.com/globalcartoons/status/908722606903263236>

'Ugly' government

The actions and/or inactions of some governments are truly atrocious. They do not even pretend to respond to the wishes of their people. Some do not care about providing the most basic of human rights or needs such as food and water.

North Korea could be used as an example of an 'ugly' government in the modern world. Its leader, Kim Jong Un, rules a closed society popularly referred to as 'the hermit kingdom' because all forms of communication between its people and the outside world are banned. North Koreans are at a constant risk of arrest for many kinds of offences. Punishments are pitiless, arbitrary and include torture. An accused person's family can be punished for up to three generations for the wrongs of their relative, ensnaring vast numbers of innocent people in the government's brutal grasp. Large concentration camps populated with North Korean 'criminals' exist around the country.

North Korea's people live very austere lives while its rulers live in luxury and spend vast sums of the nation's limited wealth developing nuclear weapons and missiles. Its million strong army gets most of the country's resources. Power is absolutely in the hands of one man, Kim Jong Un. Kim Jong Un is the son of Kim Jong Il who was the son of the country's founder, Kim Il Sung. While North Korea is virtually an absolute monarchy where power has been transferred by inheritance for three generations, its official name, the Democratic Peoples' Republic of Korea, suggests the opposite.

This chapter will not examine an 'ugly' autocracy like North Korea, mainly because it is so obviously non-democratic. However, students are encouraged to investigate any non-democratic political and legal system, including North Korea if they wish. A perceptive student is one who examines various systems of government to analyse how governments operate — in theory and practice — to develop a more sophisticated understanding of democratic and non-democratic government in the world.

Historically, rule was autocratic

Absolute monarchy has been the most common form of government since the emergence of the first agricultural civilisations in the ancient Middle East, Egypt and China. Starting about 10,000 years ago farming massively increased food production. As soon as societies were able to accumulate wealth in the form of agricultural surpluses populations expanded. Settlements such as villages, towns and cities grew and were concentrated around rivers, making control of people and food surpluses easier. Societies developed social complexity in the form of class structures based on a social pyramid.

2 Heurlin, Christopher, 2016, Responsive authoritarianism in China. Land, protests, and policy making, Cambridge University Press.

Figure 4.3 — Qin Shi Huang, the first emperor of China, who claimed the Mandate of Heaven to rule over his kingdom.
Source: Unknown, Qin Shi Huang, the first Emperor of China, 1850, <https://en.wikipedia.org/wiki/Qin_Shi_Huang#/media/File:Qinshihuang.jpg>; and Yuan, Zhongyi, China's terracotta army and the First Emperor's mausoleum: the art and culture of Qin Shihuang's underground palace, Paramus, New Jersey: Homa & Sekey Books, 2010. Public Domain, <https://commons.wikimedia.org/w/index.php?curid=364539> and <https://en.wikipedia.org/wiki/Qin_Shi_Huang#/media/File:Qinshihuang.jpg>

At the bottom of these agricultural civilisations' social pyramids were peasant farmers who produced most of the wealth in the form of food surpluses. Above were other classes that were fed by these surpluses and could devote time to other non-agricultural activities such as religious ritual, arts and craft, trading, administering the lands and collecting taxes. At the top of these social pyramids were rulers who acquired their power to rule through inheritance. There was no concept of rights or citizenship in these early societies. Kingship was often regarded as 'divine', with God being the authority from which a monarchy obtained the right to govern. Some early absolute monarchies even regarded the king, queen or emperor as a god. For example, Egyptian pharaohs were regarded as god kings who had personal relationships with the gods and were responsible for the Nile River floods that were essential to the desert civilisation.

Ancient Athens, a Greek city state, was the first significant civilisation in history governed by its own people. It used direct democracy to give power to its citizens. It is not surprising that Athens' rise to great power status within the ancient world coincided with its democratic experiment. 'Good' government can unleash a society's potential and Athens underwent a flowering of intellectual, artistic and cultural greatness that laid the foundations for the modern Western world's heritage, including Australia's.

After the fall of Athenian democracy and the city's incorporation into the Roman Empire, democracy effectively vanished from the earth for 2,000 years. 'Bad' authoritarian government reasserted itself and suppressed the potential of people for millennia. Despite Rome's achievements, it is also remembered for the brutality of civilisation, its use of power to crush opponents and the almost constant civil wars between powerful military men who fought for the title of Roman Emperor.

> *"Democracy re-emerged during the European Enlightenment, yet democracy was not the dominant form of government until the late 20th century."*

Rome collapsed in part due to a lack of effective government and warring by powerful groups within the Empire. Post-Roman Europe descended into its Dark Age which lasted more than 1,000 years. Many kingdoms suffered absolute rule by kings, many of whom ran very 'bad' governments based on feudalism that prolonged the Dark Ages of Europe. The lives of ordinary people were hard, miserable and short. Serfdom, a form of slavery in which peasants were bonded to the land owned by lords, was common. There was certainly no concept of citizenship, rights for ordinary people or democracy.

Democracy re-emerged during the European Enlightenment in its new form as representative democracy. Even then, it was quite rare and fragile. Democracy took root in Britain after a long struggle, including a civil war between royalists and parliament. Government of the people, for the people and by the people ('good' government) became established in Western Europe and North America after enlightenment inspired revolutions in Britain's American colonies and France. There were frequent wars, including two world wars in the 20th century. But still, democracy was not the dominant form of government in the world until the late 20th century.

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.[3]

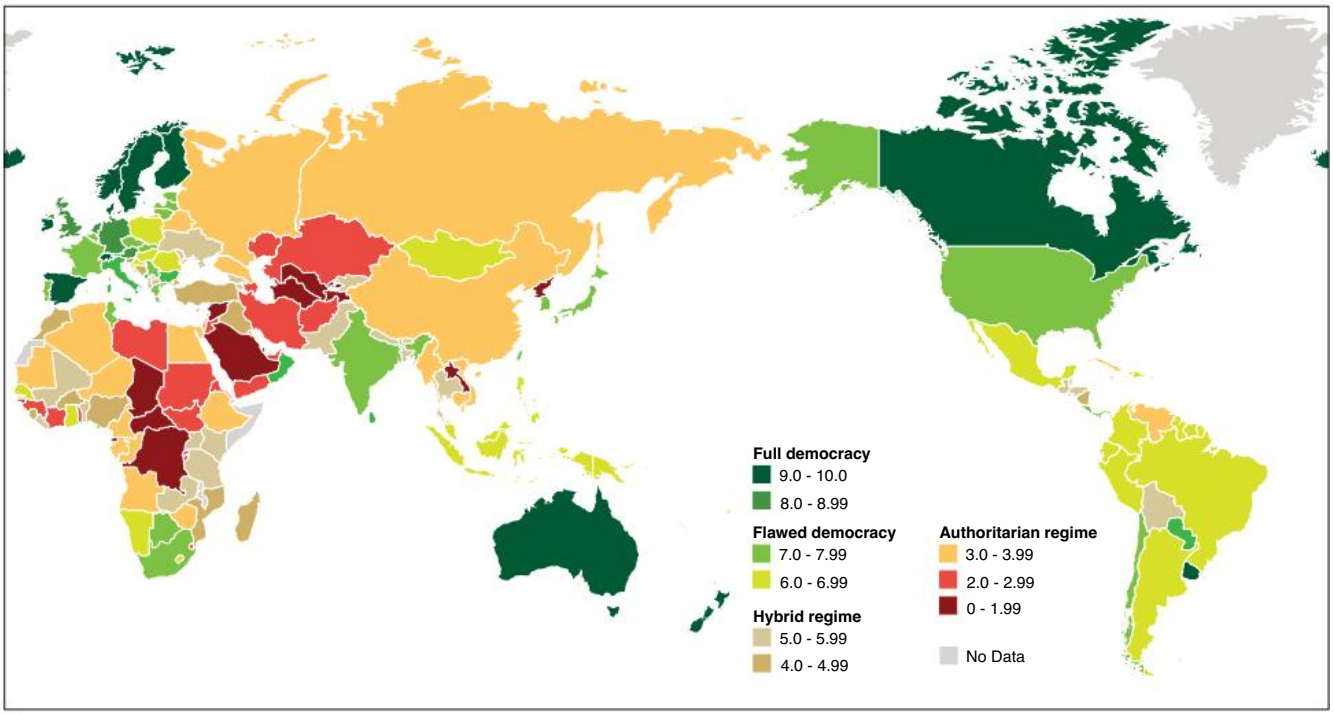
The *Democracy Index* classifies countries according to the extent to which their systems of government embody the operating principles of democracy. Each country is classified as belonging to one of the following four types of regime:

- **Full democracies** demonstrate strong checks and balances, the rule of law and an independent judiciary. There is a free media and a political culture that reinforces political rights and equality. Executive power is accountable. Democratic institutions, such as electoral systems, are robust and function well.
- **Flawed democracies** may have adequate election systems and basic respect for civil and political rights. There are some problems, such as low citizen participation rates or a lack of media diversity.
- **Hybrid regimes** have some democratic elements, but there are serious problems with how they function. The executive is much stronger than the legislature or courts. Elections may be unfair, courts may lack independence, the rule of law is weak, opponents of government may be harassed and political corruption may exist.
- **Authoritarian regimes** have no tolerance for opponents of government, rights are abused, there are limited or no checks on executive power, no free media, no independent courts and either no elections or rigged elections that are a sham.

The *Democracy Index 2017* classifies and ranks 167 nation states. It concludes that there are:

- 19 full democracies (or just 11 per cent of all nation states);
- 57 flawed democracies (34 per cent);
- 39 hybrid regimes (or 24 per cent); and
- 52 autocratic authoritarian regimes (or 31 per cent).

Of the 19 full democracies ranked in the *Democracy Index 2017,* Norway, Iceland, Sweden and New Zealand are the top four democratic countries in the world. Australia is ranked 8th. The US is equal 21st, but has been re-classified



■ Figure 4.4 — The Economist Intelligence Unit's Democracy Index map for 2017. Greener colours represent more democratic countries, as reported.
Source: Mike Filer, 2018

3 Economist Intelligence Unit, Democracy Index 2017, <https://www.eiu.com/topic/democracy-index>.

as a flawed democracy because of increasing distrust in its political system by its own citizens. Note that this occurred before the election of President Donald Trump in 2016.

The most autocratic country according to the *Democracy Index 2017* is North Korea. Saudi Arabia, an absolute monarchy is ranked 159. China, a one party system, is ranked 139 and Iran, a theocracy, 150. The concept of theocracy is discussed later in this chapter.

It is important to note that the number of democratic nations is not static. It has changed over time and will continue to do so. Equally, individual nations have transitioned, and will continue to transition, between full democracies and flawed democracies over time, whereas some will regress into non-democratic systems.

As Winston Churchill also said:

> *How is that word 'democracy' to be interpreted? My idea of it is that the plain, humble, common man … goes to the poll at the appropriate time, and puts his cross on the ballot paper showing the candidate he wishes to be elected to Parliament — that he is the foundation of democracy. And it is also essential to this foundation that … this man or woman should do this without fear, and without any form of intimidation or victimisation. He 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.*[4]

Democracies

Australia is a liberal democracy with a constitutional monarchy, organised as a federation with a responsible parliamentary government. Attentive students will have a sound understanding of the Australian political and legal system, and recognise that it embodies all the operating principles and democratic features that make it one of only 19 countries ranked by the *Democracy Index 2017* as a full democracy.

The defining characteristics of Australia's system are its Westminster-inspired features, which include a constitutional monarchy, parliamentary executive (a fusion of the legislature and executive) and a bicameral legislature. Australian citizens also have political freedoms and equality of political rights. Majority rule is achieved through free and fair elections for the representative parliament which then establishes the parliamentary executive.

> *Australia is a liberal democracy with a constitutional monarchy, organised as a federation with a responsible parliamentary government.*

There are ways of achieving democracy that do not use Westminster-inspired features. One example is the US. Others include France, Germany, Norway and South Korea. There are many others.

This section will look briefly at one case study, the US, using a democracy checklist that students can also use to evaluate the level of democracy in any system of government.

Democracy checklist: Measuring the 'goodness' of government

There are indicators that may be used to measure a system of government and assess how democratic it may be. Democracy indicators include:

- democratic doctrines
  - Does constitutionalism apply to limit power?
  - Is there an effective separation of powers, and checks and balances?
  - Does the rule of law apply?
  - Is government representative and accountable?
  - Does majority rule apply?
- free and fair elections
  - Are voters able to cast their ballots in secret?
  - Are all reasonably qualified citizens able to register to vote?
  - Are elections free from bias?
  - Do electoral systems reflect the will of the majority?
- citizen participation and pluralism
  - Is there tolerance for a range of political views and interests?
  - Can various associations like political parties and pressure groups form and participate?

4 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>.

– Are individual citizen's political freedoms (conscience, speech, assembly, information and media access) and equality of political rights (voting, running for office) respected?

Pluralism means there are many views, ideas, groups and individuals competing with each other for political influence. In a plural political system power is distributed, not concentrated. Pluralism is compatible with the key operating principles of democracy, such as separation of powers, political rights and freedoms, and political participation. Evidence of pluralism in Australia includes the existence of many:

- political parties, such as the Liberal and Labor Parties, and the many minor parties;
- pressure groups, such as the Australians for Constitutional Monarchy and the Australian Republican Movement; and
- individuals taking political action, such as independent members of parliament or anti-coal mining activists.

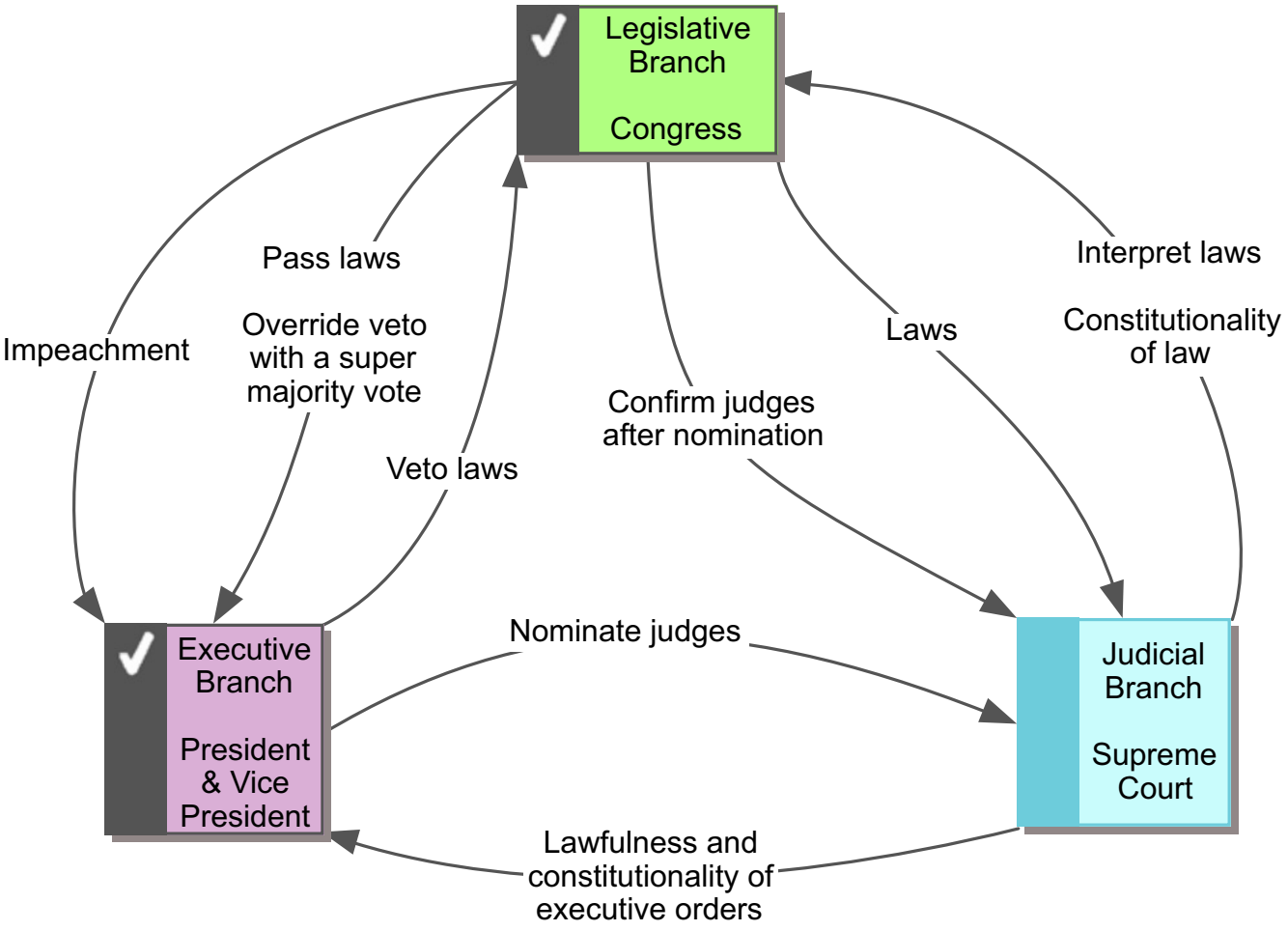
The US — A non-Westminster democracy

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

The US democratic model has been adopted by many democracies including some South American countries as well as some Asian nations. It influenced the newly democratic South Korea, for example.

Figure 4.5 illustrates the separation of powers and the strong checks and balances between them. The branches with a tick are elected directly by the people.

Table 4.1 which follows outlines the US system of democratic government and evaluates it using the democracy checklist.



■ Figure 4.5 — The US system of government.
Source: Stephen King, 2018

Power in the United States

United States	Overview	Evaluation
Political and legal system Institutions, processes and organisation	**Features of the United States' political and legal system**	**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 in this table below.) + 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).

table continued overleaf

United States	Overview	Evaluation
Political and legal system Institutions, processes and organisation	**Features of the United States' political and legal system**	**Democracy checklist** **+ = positive evaluation** **– = negative evaluation**
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	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.

■ Figure 4.6 — Some question whether President Donald Trump is a threat to American democracy.
Source: Alan Moir <https://www.moir.com.au/> and <https://twitter.com/moir_alan/status/789785023771586560>

Political participation, rights and freedoms in the United States

United States	Overview	Evaluation
Political and legal system Institutions, processes and organisation	**Features of the United States' political and legal system**	**Democracy checklist** **+ = positive evaluation** **– = negative evaluation**
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.
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 4.1 — United States political and legal system and overiew and evaluation.
Source: Stephen King, 2018

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.

Figure 4.7 — Russia under the leadership of Vladimir Putin is an example of a soft authoritarian regime.
Source: Kremlin.ru, CC BY 4.0, <https://commons.wikimedia.org/w/index.php?curid=60759727> and <https://en.wikipedia.org/wiki/Vladimir_Putin#/media/File:Vladimir_Putin_(2017-07-08).jpg>

> *"Socialism is the source from which the CPC claims its sovereign right to govern."*

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.
- **Dictatorships** are ruled by a single ruler with absolute power. Zimbabwe under Robert Mugabe (1987-2017) 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.
- **Soft authoritarian** regimes are quite common. Turkey has become one in recent years following an attempted coup against President Recep Tayyip Erdogan 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.

Saudi Arabia — An absolute monarchy

Saudi Arabia is an absolute monarchy founded by Ibn Sa'ud in 1932. The House of Saud, composed of descendants of Ibn Sa'ud, rules the unitary Islamic Saudi Arabian state with absolute power. The operating principles of liberal democracy are absent. There is no majority rule, minimal political participation, no equality of political rights and few political freedoms. There is no effective separation of powers and no checks and balances. There is no written constitution in the sense of a fundamental law which defines and limits power.

Creation of the Saudi state

The first Saudi state was established in 1744, when Muhammad ibn Saud made a pact with a religious reformer from that period. The aim of the union was to create an Islamic realm with a strict interpretation of Islam, known as Wahhabism. However, the state came under

attack in 1818 from the Ottoman Empire, causing it to collapse. Six years later, the second Saudi state was established. In 1891, that state also collapsed due to pressure from the Ottoman Empire and internal strife among Al Saud emirs. The third Saudi state was established in 1932 and continues to this day.

■ Figure 4.8— National emblem of the Kingdom of Saudi Arabia.
Source: Anus kafm, 2007, Own work, Public Domain, <https://commons.wikimedia.org/w/index.php?curid=27000326

Power in the Kingdom

The House of Saud's power comes from its close connection to Wahhabi religious clerics and traditions going back to the pact of 1744. Wahhabism is a strict interpretation of Sunni Islam, and it dominates Saudi social and political culture. There is also a tribal system inherited from the nation's past which is a vital component of the way modern power operates. The tribal system is patriarchal (based on male power) and is essential in mediating the relationship between the House of Saud and Saudi citizens by providing channels through which consultation can occur. The Al Sa'ud family draws its legitimacy from these religious and historical sources.

The basis of Saudi law is the *Sharia*, derived from the Islamic holy book, the Koran. The *Sunnah*, or sayings and traditions of the Prophet Muhammad (the founder of Islam), is also a source of law. No law, however popular, can contradict the *Sharia* or the *Sunnah*. In Saudi law, there is no distinction between the secular—things that have nothing to do with any religious matters—and the sacred, those things connected to God.

Salman bin Abdulaziz Al Sa'ud has been the King of Saudi Arabia since 23 January 2015. The King combines the executive, legislative and judiciary functions of government in one person. He is also the Custodian of Two Holy Mosques, which makes him the ultimate religious authority.

The House of Saud has thousands of family members. Hundreds of family members within the main family line dominate all the major political and legal posts within the system of government. Thus, real power flows through patronage based on princely networks.

■ Insert Figure 4.9 — King Salman of Saudi Arabia.
Source: Robinson Niñal, Philippine Presidential Communications Operations Office, 2017, <https://upload.wikimedia.org/wikipedia/commons/4/44/King_Salman_portrait%2C_2017.jpg>

The Basic Law of Governance

A Basic Law of Governance (the Basic Law) was adopted by royal decree in 1992. It outlines how the government is run and specifies citizens' rights and responsibilities. However, the Basic Law is subject to the will of the King and so is not a constitution in the same sense we have under the Westminster system of democracy.

The Basic Law sets out the institutions through which the executive, legislative and judicial powers operate. They are all controlled by the King and many senior posts within them are held by members of the House of Saud. The Council of Ministers (Majlis al-Wuzara) is the cabinet of the executive branch, the Consultative Council (Majlis al-Shura) is a quasi-legislative branch, and a Supreme Court and other courts form the judicial branch.

Executive power

The King is the prime minister of the Council of Ministers which form a cabinet. He is thus the head of the executive branch. The Council of Ministers administers the country through various portfolios such as Defence, Foreign Affairs, Finance, Health and Education. There is a bureaucracy, or public service, which carries out the law. Members of the House of Saud hold senior roles within the bureaucracy. Ministers are appointed and dismissed by the King; they are not elected nor drawn from the legislature. Senior bureaucrats are appointed and dismissed by the King.

Legislative power

The King appoints all 150 members of the Consultative Council. Members' terms are renewed every four years by the King. The Consultative Council can only propose laws to the King. It cannot pass laws to overrule the cabinet without the approval of the King. The Consultative Council has no power over the

budget and cannot scrutinise the government's spending. These are two critical checks and balances in democratic systems. Their absence severely undermines the power of the Consultative Council. These limitations mean the Council can only be considered a quasi-legislative body. Neither is it a representative body.

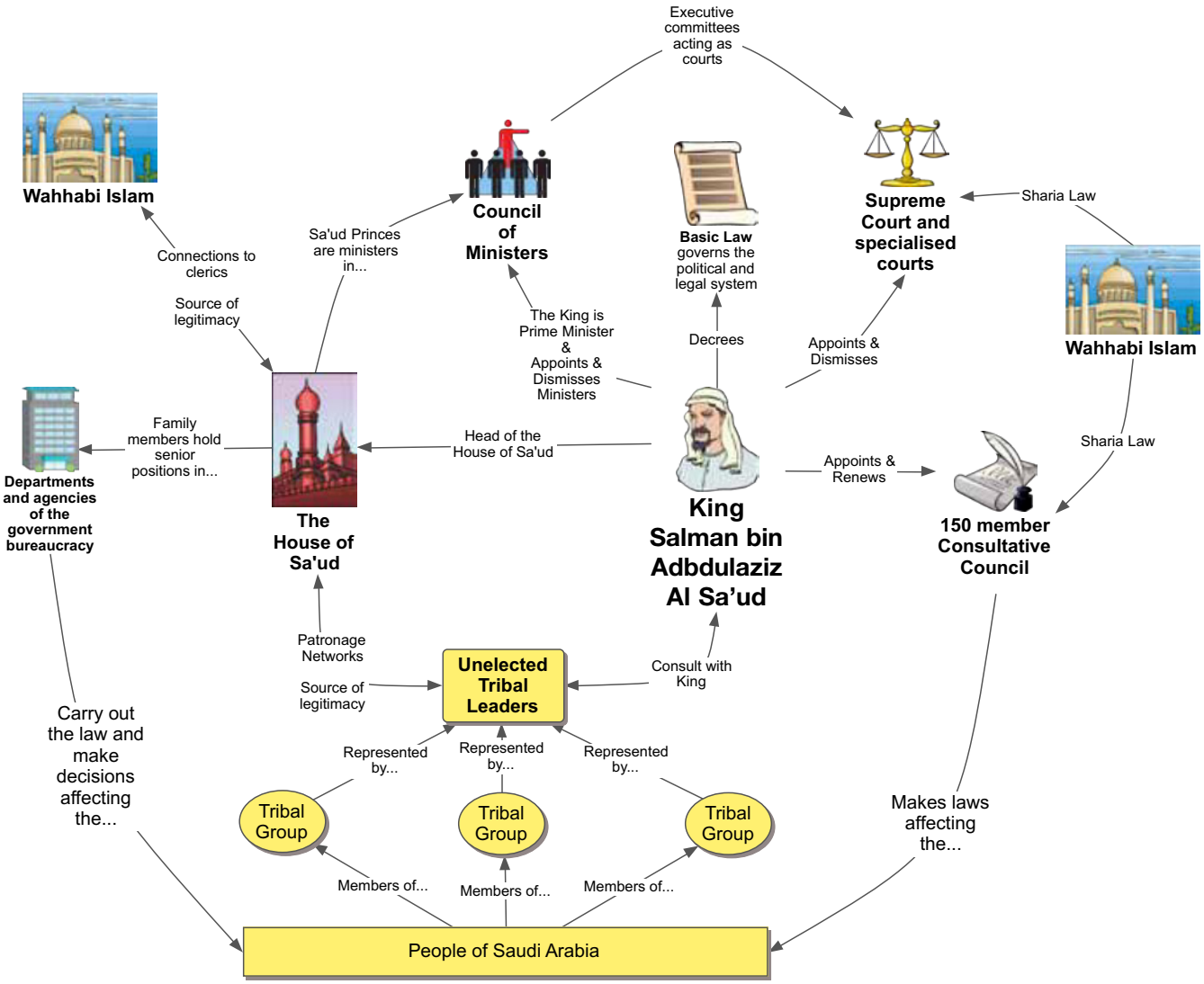
Judicial power

The Supreme Court has criminal and civil jurisdictions and administers *Sharia* law. There are specialised courts for labour, commercial and administrative law. There is a Board of Grievances for complaints against the government. Finally, there is an extensive system of committees within the executive ministries which act as courts in matters concerning the ministries' areas of responsibilities. A system of executive committees acting as courts has no separation of executive and judicial power. The King makes all senior judicial appointments and may also dismiss judges. The King is also the final court of appeal and may pardon those convicted by lower courts.

Political participation, rights and freedoms

Birthrights and patronage determine political participation. Princely networks enable direct political participation by members of the House of Saud. The tribal networks allow for some limited participation for citizens through patriarchal power within the tribal system. The House of Saud is sensitive to its reputation and responds to lobbying through the tribal networks. There are no elections at the national level.

Political rights are not equal. Women have no political rights at the national level. Men have political rights based on how closely they are related to the House of Saud or how influential they are within their tribal networks. There are local government elections and while, since 2015, women have had the right to vote and stand for election, the results have had little effect on real power. There are no universal voting rights and no equality of rights to access government positions of power.



■ Figure 4.10 — Government of Saudi Arabia.
Source: Stephen King, 2019

Political freedoms such as speech, association, assembly and the press are strictly limited. Severe punishments are dispensed to those who openly criticise the regime. For 2018–2019, the independent agency Reporters without Borders rated Saudi press freedom at 172 out of 180 countries, with such a high score representing very low levels of press freedom. Strict monitoring of journalists is standard and there is no independent media. Saudi journalist, Jamal Khashoggi, a former Saudi insider-turned-critic of the Saudi government, was murdered in the Saudi Embassy in Istanbul, Turkey in 2018. Crown Prince Mohammad Bin Salman (also known as MBS) was suspected of ordering his murder. The Crown Prince, who was considered a reformer, had authorised a clandestine campaign to silence Saudi dissidents more than a year before Mr Khashoggi's death. The number of journalists in detention in Saudi Arabia has tripled since the start of 2017.

Insert Figure 4.11 — Murdered journalist, Jamal Khashoggi. *Source: April Brady, POMED, 2018, CC by 2.0, <https://commons.wikimedia.org/wiki/Category:Jamal_Khashoggi#/media/File:Jamal_Khashoggi_in_March_2018_(cropped).jpg>*

Political parties exist, but they are all illegal, which completely undermines any freedom of association. The Saudi Government has been very effective in persuading political parties to disband. One effective measure has been to offer to release political prisoners in exchange for the party agreeing to disband. This was the case with the Democratic Assembly of Saudi Arabia, a former communist party turned democratic reform party. It agreed to disband in the 1990s in return for the release of those members held as political prisoners. The *Democracy Index 2018* ranked Saudi Arabia 159 out of 167 for civil liberties and pluralism. Freedom of speech and expression is strictly limited.

The case of 18-year-old Rahaf Mohammed al-Qunun illustrates the situation of Saudi women. Ms Mohammed fled an abusive family, sought refuge in a Thai hotel and used Twitter to speak out about her situation. Canada granted her asylum. She had no redress against abusive male members of her family through the Saudi legal system and no way to speak out about her treatment. The right to drive was only granted to women in 2018 after extensive covert social media pressure. Women in Saudi Arabia remain unable to venture out in public without a male family member acting as chaperone.

A wide range of offences are punishable by death, including apostasy (turning from or renouncing Islam). Execution is by beheading or stoning, and amputations are known to be performed on those convicted of some lower crimes. Saudi Arabia is the third highest ranked country in the world for judicial executions following China and Iran. In 2018 Saudi Arabia carried out a total of 149 executions.

China — A one party authoritarian system

Article 1 of the *Constitution of The People's Republic of China* defines the People's Republic of China as "a socialist state under the people's democratic dictatorship led by the working class and based on the alliance of workers and peasants".

It goes on to say that "the socialist system is the basic system of the People's Republic of China. Disruption of the socialist state by any organization or individual is prohibited".

Socialism is an economic and political ideology (a belief system) that argues that social equality is best achieved by overthrowing those who own capital (the capitalist class), confiscating their capital and placing ownership of the 'means of production' (land and capital) into the hands of the workers and peasants (the labouring working class). In socialist theory, this eliminates capitalist exploitation of labour.

Students should recall from their previous studies in *Economics and Business* (a HASS subject from Years 7–10) where they learned about the 'factors of production' or 'resources' — land, labour, capital and enterprise. According to socialist ideology, labour should own capital and land. Government should provide the enterprise. Organising society this way eliminates the 'capitalist class' and the exploitation of the labouring working class and peasants.

A 'communist party' organises society according to this ideology by making all property and economic activity 'communal'. Communist parties operate on the ideal that 'everyone

■ Figure 4.12 — National emblem of the People's Republic of China.
Source: <https://en.wikipedia.org/wiki/China#/media/File:National_Emblem_of_the_People%27s_Republic_of_China_(2).svg>

contributes to the communal wealth according to their abilities while the state distributes the communal wealth according to everyone's needs'. Socialism, which in its extreme form is known as 'communism', removes the right to individually own property. All property, especially productive capital goods and land, are owned by the State on behalf of 'the people'. The word 'people' is synonymous with the working class and peasants. Thus, the People's Republic of China is a state that is, in theory at least, governed by the working class and peasants through 'their' party, the Communist Party of China (CPC). 'Disruption of the socialist state' is unconstitutional. China's Constitution makes socialism the only lawful political philosophy.

Socialism is the source from which the CPC claims its sovereign right to govern. The tolerance of a range of political views and interests, which is an indicator on the democracy checklist, is clearly unconstitutional in China.

■ Figure 4.13 — Current President of China, Xi Jinping.
Source: Antilong - Own work, CC BY-SA 3.0, <https://commons.wikimedia.org/w/index.php?curid=33807498> and <https://en.wikipedia.org/wiki/President_of_the_People%27s_Republic_of_China#/media/File:Xi_Jinping_October_2013_(cropped).jpg>

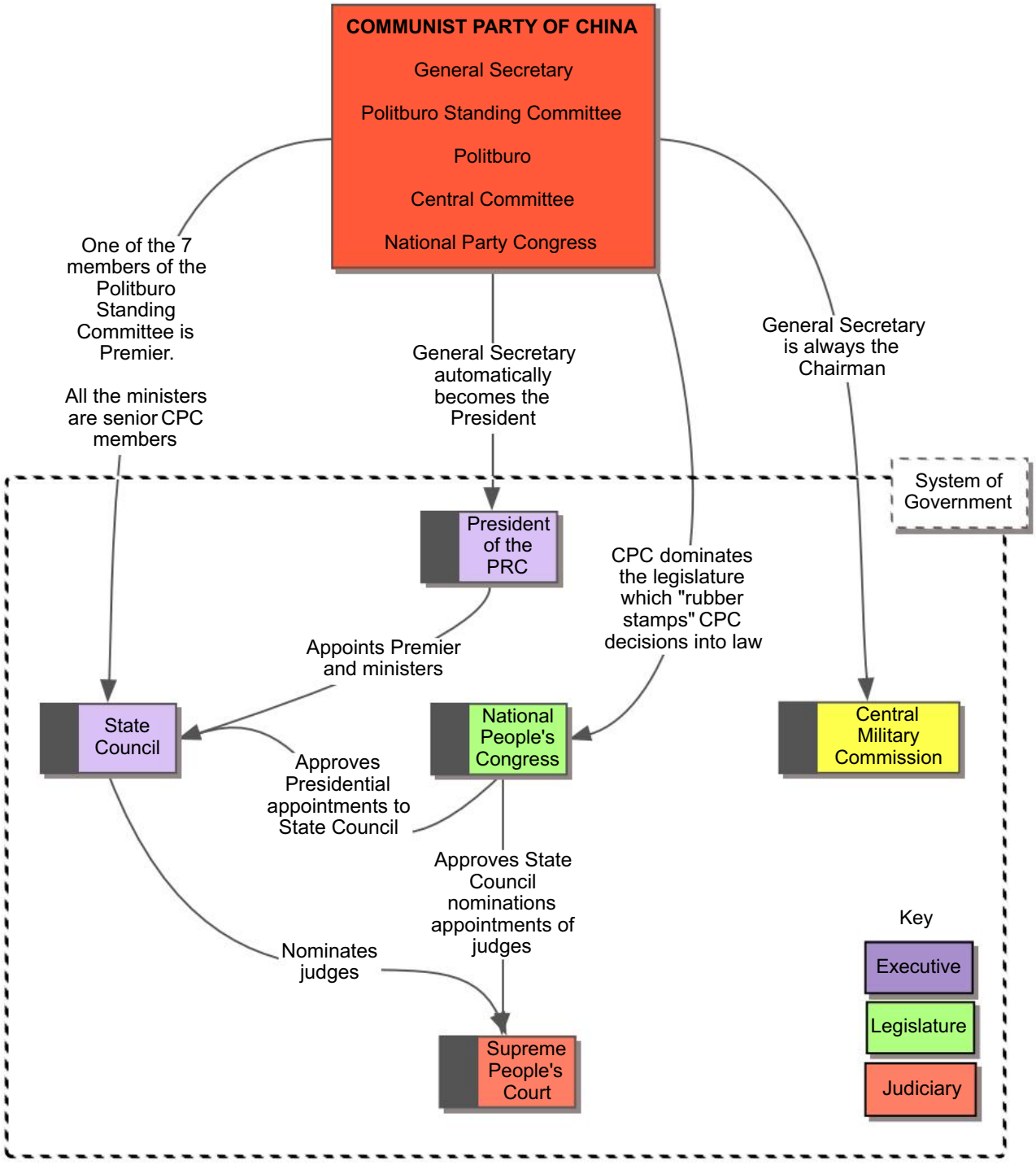
China is an authoritarian, autocratic, unitary state in which power is concentrated in the CPC and especially its ruling elite — the General Secretary of the CPC and the Politburo Standing Committee, an extremely powerful group of seven men, including the General SecretaryThe defining characteristic of China's system is the almost total control that the CPC exercises over the political and legal system of government. In short, the CPC controls the government — totally. Through its unchecked power over the public sphere of life and its ability to make, implement and adjudicate law, the CPC can intrude directly into the social and private lives of Chinese citizens. Through the infamous 'One Child Policy', it has been able to dictate how many children Chinese families can have. Through the Hukou residence registration system it can also control where people live, work and study. These are just two examples of the way in which the CPC impacts people's lives. In the past, truly catastrophic policies were inflicted on the Chinese people by their CPC government. The Great Leap Forward in the 1950s and the Cultural Revolution from 1966 to 1976 caused the deaths of tens of millions of people. No one was held accountable.

In contemporary China, the CPC is implementing a Social Credit System which will amass vast volumes of data on every citizen based on their movements, purchases, internet browsing, TV and media consumption patterns, friendships and an array of other activities including what books they buy. This data will be used to give every citizen a Social Credit Rank — a number which will define what job they get, what school they can send their children to, and whether they can travel or open a bank account. Every aspect of a Chinese person's life will be monitored, measured, judged and used to impact on their life choices. Their worth as Chinese citizens will be judged by their government and used to affect every aspect of their lives.

Chinese citizens have no political freedoms and/or equality of political rights. Majority rule is impossible since the CPC disallows any alternative choices.

The diagram (see previous page) illustrates the dominance of the CPC over all elements of the system of government. There is an apparent separation of powers, but it is not effective since all important decisions are made by the CPC outside the system of government. There are no real checks and balances

between branches of government. The army is under direct CPC control. There is limited use of direct election in the People's Republic of China and restrictions exist on candidature.



■ Figure 4.14 — The Chinese system of government.
Source: Stephen King, 2018

Power in the People's Republic of China

China	Overview	Evaluation
Political and legal system Institutions, processes and organisation	**Features of the Chinese political and legal system**	**Democracy checklist** **+ = positive evaluation** **– = negative evaluation**
The Communist Party of China (CPC)	• The CPC was founded in 1921, but did not take power until it won a civil war with its rival, the Nationalist Party of China, in 1949 following the end of World War Two. • Mao Zedong led the CPC to victory in the civil war and ruled by personal authority until 1954 when the first constitution was introduced. • Despite a constitution being adopted, General Secretary Mao continued to rule without limit or accountability. • After General Secretary Mao's death, the CPC created a system of collective leadership, but there is no established constitutional rule — it depends on the personal strengths and relationships amongst the top leadership of the CPC. • The CPC is led by the following: – the General Secretary of the CPC; – a group of seven Politburo Standing Committee members who meet weekly; – a larger group of 25 Politburo members who meet monthly; – the Central Committee of the CPC of approximately 400 members who meet yearly; and – the National Party Congress — 2,300 members who meet once every five years to 'rubber stamp' the decisions of the senior leadership group. • The CPC has a national membership of approximately 70 million (it is impossible to make significant progress in Chinese society without strong ties to the CPC). • The CPC is an 'extra-constitutional', all-powerful organisation within and superior to all other parts of the Chinese political and legal system.	– The CPC is above the Constitution and is not limited or defined by it. Therefore, its power is unlimited. – Only one party, the CPC, is permitted by the Constitution. There is no tolerance for alternative political views or interests. + Efficiency and administration in the political system. There can be long-term stabilisation and strategic planning, with swift implementation of decisions. There is no loss of function or efficiency that usually occurs with changes in government (as in democratic nations). Political meritocracy leads to strong administrative experience for appointed leaders. For example, Xi Jinping rose to the General Secretary's position following four decades of work and promotions through the local, regional and national levels of government. – Personal power and relationships amongst the senior leadership group determine how power operates within the CPC and within the political and legal system. There is no rule of law governing power relations within the senior ranks of the CPC. – Senior CPC members are accountable to other senior CPC members (a form of circular accountability). Circular accountability is weak and not institutionalised. Rather, it is based on personal power and relationships amongst the leadership group. – The General Secretary's power depends on his personality and relationships. Some, such as Deng Xiaoping, have been elevated to a special position called 'Paramount Leader' — an esteemed position that has no formal basis in the CPC's own organisation. General Secretaries Mao, Deng and the current General Secretary, Xi Jinping, have held positions similar to this. Each has had their thoughts adopted as part of the national constitution. For example, 'Xi Jinping Thought' was adopted into the Constitution in November 2017. This is a type of personality cult that glorifies the current leader, making them immune from criticism.

China	Overview	Evaluation
Political and legal system Institutions, processes and organisation	**Features of the Chinese political and legal system**	**Democracy checklist** **+ = positive evaluation** **– = negative evaluation**
Chinese Constitution	• The Preamble entrenches the CPC as the only lawful party. • Chapter 2 outlines rights and duties of citizens. • Chapter 3, Section 1 creates the National People's Congress (a unicameral legislature). • Chapter 3, Section 2 creates the President (a part of the executive). • Chapter 3, Section 3 creates the State Council (equivalent to a Cabinet of ministers led by the Premier — executive). • Chapter 3, Section 4 creates the Central Military Commission (making the military a separate arm of government, rather than under executive control). • Chapter 3, Section 7 creates the judiciary.	– Very weak constitutional limits to power. – Chapter 2 appears to provide protection and respect for rights, but rights are routinely ignored and violated by the executive and courts, both of which are controlled by the CPC. – There is an apparent separation of powers established by Chapter 3, Sections 1, 2, 3 and 7 of the Constitution. However, there are no checks and balances built into the Chinese constitutional system because the CPC dominates all arms of government, concentrating power in the CPC. There is no opposition to the CPC. – The Central Military Commission is a separate 4th arm of government. The chairman of the Military Commission is the General Secretary of the CPC. This puts the army under party control, rather than government control. The army's senior officers are CPC members. 'Political Officers' are part of the military, ensuring party control of the army down to its junior ranks.
Legislature — National People's Congress	Unicameral. No upper house to act as a house of review or a check on a CPC controlled lower house. • Approx. 3000 members; • Dominated by the CPC — about 70% are CPC members; • Other 'CPC affiliated parties' that 'represent' ethnic groups have seats but they share the same socialist political ideology of the CPC and are subordinate to it — thus they are not a 'parliamentary Opposition' in any democratic sense; • It is elected by provinces, regions and local government areas throughout China. All these regional and local assemblies are also dominated the CPC.	– The National Peoples' Congress (NPC) is elected by the people of regions within China. However, limited representativeness in government and law making is achieved because only CPC approved candidates can be elected. (see Electoral Processes in this table below.) – Legislative power is concentrated in the hands of CPC. – NPC members are loyal to the CPC first and the NPC second, making it a 'rubber stamp' of the CPC and unaccountable to the people. – In theory, the NPC is the most important part of the political system. In reality, the NPC merely approves decisions made by the higher organs of the CPC. – No separation of powers, and checks and balances. The NPC does not challenge the State Council or Presidential orders.
Executive – President	The head of state and is extremely influential over government. • The General Secretary of the CPC (leader of the Party) is always the President of China; • Chairs the 7-member Politburo Standing Committee of the CPC; • Also heads the Central Military Commission; • Appoints all members of the State Council.	– The CPC's leader is always the nation's supreme executive official — the President — concentrating executive power in the hands of the CPC leadership. – The President appoints the State Council, whose leader (the Premier) is a co-member of the CPC Politburo Standing Committee. There is no separation, and no checks and balances between these institutions.

table continued overleaf

China	Overview	Evaluation
Political and legal system Institutions, processes and organisation	**Features of the Chinese political and legal system**	**Democracy checklist** **+ = positive evaluation** **– = negative evaluation**
Executive — State Council	The 'Cabinet of ministers' who head major departments of government. • Led by the Premier (who is a member of the seven member CPC Politburo Standing Committee). • Premier nominates vice premiers and ministers — about 60 members in total. • President (who is the General Secretary of the CPC — its highest official) appoints the Premier's nominations. • The NPC approves the appointments.	– There is no majority rule reflected in the composition of the State Council. Appointment is by the senior CPC membership without any electoral accountability. The NPC (a nominally elected body) must approve appointments, but there is no question that it will always do so, and itself is dominated by the CPC. – No separation of powers, and checks and balances. President and Premier are the two most senior executive officials. They are two of the seven members of the Politburo Standing Committee of the CPC.
Judiciary — Courts	Courts and judges comprise the judicial arm of government. • Judges are nominally independent of the other arms of government, but in reality are heavily influenced by the CPC. • Judges are appointed by the NCP, which is dominated by the CPC. • Political pressure is exerted on judges through the CPC	– Limited rule of law exists because judges know that the CPC can cause them to be dismissed or curtail their career. – Parties to cases which threaten the CPC will not receive a fair trial. For example, Wang Yu, a human rights lawyer, was punished for taking a case to court alleging criminal misconduct by a school principal against his students. The principal was a middle-ranking CPC member. – No separation of powers, and checks and balances — the Supreme People's Court is not independent in practice.
Military Commission	The Peoples' Liberation Army (PLA) is both a military and a political organisation serving the CPC first and China second. • The General Secretary of the CPC (who is also the President of the Peoples' Republic of China) is the Chairman of the Central Military Commission. • Senior and middle-ranked officers of the PLA are CPC members. • 'Political Officers' are a fundamental part of the PLA in addition to normal 'Army Officers'. They ensure CPC control of the PLA.	– An extraordinary concentration of power in the hands of one person exists because the leader of the CPC is also the country's President and its most senior military officer. In a worst case scenario, such as a popular uprising against the CPC or the government, this means that the CPC can call the PLA out on to the streets to suppress any rebellion. The CPC can order the PLA to shoot Chinese civilians. This occurred in 1989 when a student led democracy protest was ruthlessly quashed by the PLA, resulting in the Tiananmen Square Massacre. An estimated 10,000 Chinese were killed by their own army, which used tanks against unarmed civilians. – The Tiananmen Square Massacre is evidence that political freedoms and rights do not exist in China. Pluralism was crushed as the CPC ordered the PLA to enforce its intolerance of alternative views and interests.

Political Participation, Rights and Freedoms

China	Overview	Evaluation
Political and legal system Institutions, processes and organisation	**Features of the Chinese political and legal system**	**Democracy checklist** **+ = positive evaluation** **– = negative evaluation**
Electoral processes	• There are elections at local levels in China. Chinese people directly elect their Local People's Congress (LPC) in elections that are similar to the local council elections in Australia. There are many thousands of these LPCs in China. – Direct election for the LPCs. – LPCs elect delegates for the Provincial People's Assemblies (PPA). – PPA's elect delegates to the NPC every five years. • Only the LPCs are 'directly chosen by the people'. All higher level congresses or assemblies are elected by the level below, making them 'indirectly elected by the people'. • In theory, independent candidates may run for LPC elections. In practice, the nomination process is so difficult that an independent candidate would suffer so much surveillance and harassment that almost none ever get elected. This results in CPC controlled LPCs. From there upwards, indirect election means that only CPC controlled congresses elect delegates to the next level up, right until the highest level. • Local, regional and city executive governments are 'elected' by the relevant level congress. They are all CPC controlled. • Judges are 'elected' into the court hierarchy by the relevant level congress. This makes judges CPC controlled appointments.	– Representativeness may be achieved in theory, but the processes for non-CPC candidates are so onerous that most never get elected to a LPC. This severely limits representativeness. – Majority rule cannot be achieved in executive government because all positions in governments at all levels are CPC controlled. – Pluralism is undermined by intimidation and suppression of non-CPC candidates at LPC level elections. From there upwards, no direct election occurs and the CPC controls the delegate selection process for higher level congresses right up to the NCP. – Intimidation and onerous rules prevent non-CPC candidates getting on the ballot, preventing genuine citizen participation. + Voting is voluntary and secret. – When voting, there is no genuine choice between candidates or parties, which fails to respect political rights. – CPC controlled election of local, regional and city level executive governments undermines majority rule and participation at these lower levels. – CPC controlled election of judges undermines judicial independence which, in turn, undermines the rule of law.

table continued overleaf

China	Overview	Evaluation
Political and legal system Institutions, processes and organisation	**Features of the Chinese political and legal system**	**Democracy checklist** **+ = positive evaluation** **– = negative evaluation**
Citizen participation and pluralism	• No real political parties, other than the CPC, can exist. • All pressure groups must 'sing to the tune of the CPC' or be suppressed. • Protest is dangerous and invites forceful suppression, in extreme cases by the PLA and military force. • Some groups, such as Tibetan and Uighur nationalist organisations which advocate for more freedom and autonomy for these regions, are heavily persecuted. • Falun Gong, a religious group, is outlawed and its members persecuted. • The CPC demands 'absolute loyalty' from the Chinese media. • The 'Great Firewall of China' blocks news and websites the CPC wants censored. Google is banned because it refused to allow censorship of its search engine. • International social media platforms are banned — no Facebook, Twitter et cetera. There are Chinese equivalents to these social media platforms, but all communications on them are monitored. Posts can be removed by the government. People who openly criticise the government or the CPC on these platforms risk harassment or worse.	– The Chinese are, in truth, 'subjects' and not 'citizens' because they cannot effectively exercise the rights of citizenship. – There is no freedom of the media. – Freedom of assembly and association do not exist because citizens cannot organise collectively to amplify the effectiveness of political participation. – There is no tolerance of a range of political views and interests. – Alternative political parties cannot be created and independent candidates are intimidated, thus suppressing political freedoms and rights. – The electoral system used makes it absolutely impossible for any party other than the CPC to win seats in any of the many congresses that exist at different levels or the Presidency or State Council. This effectively limits the range of political views and interests to one party. – The CPC is itself undemocratic. Effectively, this means that the political views and interests of its senior leadership (really the top seven members of the Politburo Standing Committee and even just the General Secretary) are all that is considered. There is an almost complete lack of tolerance for a range of political views and interests.

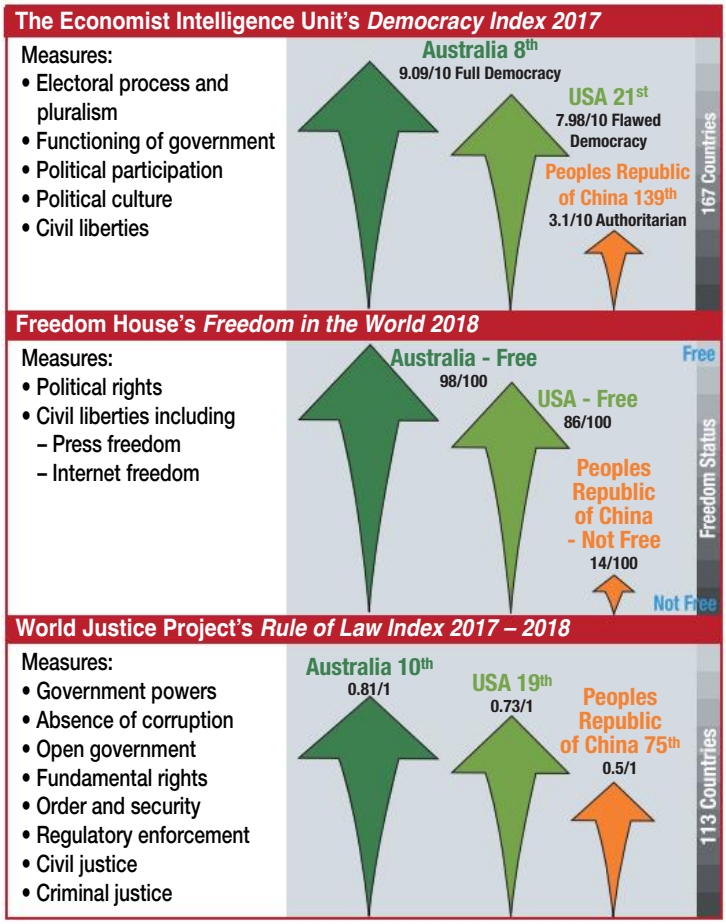
Table 4.2 — People's Republic of China political and legal system — overview and evaluation.
Source: Stephen King 2018

Democratic and non-democratic systems of government

There are many types of democracy (the 'good' governments) and there are many types of non-democratic autocracy (the 'bad' and 'ugly' governments). Here are some key ideas that students wishing to achieve a deeper understanding could reflect upon from this chapter.

- No democratic system is perfect in achieving all the democracy checklist indicators.
- No country or system of government is static. They can become better democracies, like South Korea has over the last several decades, or they may drift towards authoritarianism, like Turkey and Russia in recent times.
- Australia exhibits all of the democracy checklist indicators, but not all to the same high extent. An evidence based discussion about the strengths and weaknesses of Australia's democracy would be well worth the time and facilitate your understandings for Unit 4 of the course.
- The US has recently elected Donald Trump as President. It could be argued that he is challenging the US democratic system. Some refer to 'Trumpism' as a new threat to US democracy — potentially turning the US government towards 'bad' government.
  - What strengths exist in the US system to restrain Mr Trump's use of executive power?
  - Does Trumpism provide a good test by which to evaluate a non-Westminster democracy?
- China's system can be described as 'responsive authoritarianism'. Following the fall of the Soviet Union and the Communist Party of Russia, as well as its own experience with citizens' demands for more political freedoms and rights (resulting in the Tiananmen Square Massacre), the CPC modified its governing style. Since 1989, the CPC has become less directly oppressive and allows virtually complete freedom in the economic sphere of Chinese people's lives. After the Tiananmen Square Massacre, there was a clear break with Communist anti-capitalist ideology. New policies liberated citizens to create businesses and become entrepreneurial. The fantastic growth of the Chinese economy since 1989 is evidence that there is much economic freedom in China. In this sense, it can be argued that the CPC has listened and responded to the people. Students might like to consider questions such as these:
  - Is there more than one way for a government to be a good government?
  - Is responsive authoritarianism a good alternative to full democracy?
  - Is it enough to have economic freedom without political freedoms and rights?
  - Will the CPC be able to keep power if the economy stalls or goes into recession?
  - Does democracy suit Western cultures more than others, or is it a universally desirable system of government for all of humanity?

Multiple international organisations monitor and evaluate the performance of political and legal systems around the world. The Democracy Index, Freedom in the World and Rule of Law Index are all helpful in analysing the degree to which a country is democratic. They can help contextualise the merits and failings of a political and legal system.



■ Figure 4.15 — Evaluation snapshot of democratic and non-democratic systems by international organisations.
Source: Mike Filer, 2018

Summary

- There are many forms of government. Governments can be classified by how well they reflect democratic principles.
- Democracy is the most prevalent form of government in the contemporary world with approximately 45% of countries being democratic by some measure. Approximately 50% of the world's population lives under some form of democracy.
- The *Democracy Index i*s a useful measure of democracy. It classifies Australia as a 'full' democracy along with 18 other countries. The index uses democratic criteria to classify countries' systems of government. These criteria include the separation of powers, checks and balances, rule of law, judicial independence, freedom of the press, respect for political rights and freedoms, accountability of power, and the strength of democratic institutions such as electoral systems.
- Interestingly, by the above measures the *Democracy Index* classifies the US as a 'flawed' democracy.
- The US is a representative democracy organised as a federation with an executive presidential government. It features very strong limits to power prescribed in a written constitution that strictly separates the three arms of government and establishes strong checks and balances between them. There are many strengths in the US system, but it is weakened by poor electoral processes and a lack of equality of political rights and freedoms caused by the influence of money in politics.
- There are many forms of autocratic political and legal systems. They all share a concentration of power, limited checks and balances, weak judicial independence, lack of respect for political rights and freedoms, and rule by law rather than of law.
- Saudi Arabia is an absolute monarchy. The legislative, executive and judicial arms of government are all controlled by the King, who has higher authority than any other citizen. He can adjust and overrule any political or legal decision. Few freedoms exist, especially for women. There is no right to vote in elections for members of parliament. Entitlement of rights is limited and not enforced, and the rule of law exists, but not for the monarch.
- China has an autocratic system of government which has been described as 'responsive authoritarianism'. It may be thought of as part way between North Korean 'rigid authoritarianism' and Russian 'soft authoritarianism'. It is a one party system based on socialist ideology, which is claimed as the source of authority to govern. It has three arms of government, but its legislature, executive and judiciary are all controlled by the Communist Party of China. There are elections for various officials, but all candidates must be Party members or approved by the Party. The military is a fourth arm of government, also controlled by the Party. It gives the Party the ability to crush threats to the survival of Communist Party rule. There are heavy restrictions on media and the Internet. Political rights and freedoms are not respected and surveillance of the population is extreme. Despite these characteristics, the government can be responsive to popular pressure. Reforms after the Tiananmen Square massacre are evidence of 'responsiveness'.

Activities

Short answer

1a) Explain what is meant by the term 'good' government.

1b) Outline **three** features of democratic systems which help to ensure the principles of good government are upheld.

1c) Discuss the features or principles of a country that may be considered to have a 'bad' government.

2a) Define the term 'liberal democracy'.

2b) Describe **three** democratic indicators which may be used to measure a system of government.

2c) Discuss **two** democratic indicators as they apply to Australia's system of government.

3a) Explain what makes the Kingdom of Saudi Arabia an example of an absolute monarchy.

3b) Distinguish between a 'dictatorship' and a 'theocracy'.

3c) Discuss **one** strength and **one** weaknesses of the features of one autocratic political and legal system.

Source analysis

Use Table 4.1 outlining the US democratic system of government to respond to the following:

4a) Explain the feature created by Article 1 of the US Constitution.

4b) Using the table, explain **two** constitutional features ensuring the President can be held accountable.

4c) Discuss **one** strength and **one** weakness of the electoral process used in the US as it relates to democracy.

4d) Compare the independence of the US legislature with that of Australia's legislature.

Essay response

5) Compare the theoretical separation of powers in **one** democratic and **one** non-democratic political and legal system.

6) Assess the extent to which the Chinese Constitution creates institutions which uphold the principles of a 'democratic dictatorship'.

Investigation and discussion

7) In February 2018 the National People's Congress in China approved a change to the Chinese Constitution which allows the President to continue for an indefinite term. Consider the possible ramifications of this decision, and discuss the advantages and disadvantages of the legislature's ability to change the Chinese Constitution.

8) Many of the US electoral processes are praised for upholding the principles of democracy. Investigate the alleged Russian involvement in the 2016 Presidential Election.

9) Investigate 'data harvesting' and how it might affect political representation.

   9a) Explore the role played by Cambridge Analytica in the 2016 US Presidential election; and

   9b) Discuss whether using voters' personal data supports or hinders democratic principles.

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

Would people do the right thing if there were no consequences for doing the wrong thing?

It depends.

In very small groups we do not need formal codes to guide how we behave towards others. Our closest personal relationships are governed by concern and care for the people around us. We most likely love them as family or friends. Love creates trust. Love and trust govern how we act towards others within our closest circle. Yet even within familial and friendship groups rules and expectations exert a powerful influence. Parents establish rules to regulate children's behaviour. Friendship carries unwritten expectations.

What if we widen the circle? It is thought that humans can deal comfortably with a group size up to about 150 individuals.[1] 150 is the so-called Dunbar number, thought to be a natural group size for *Homo sapiens.* In groups up to this size we can know everyone reasonably well. We are all part of larger groups like this. Think of schools, workplaces and clubs. Common group sizes for Year 11 cohorts in schools are around 130–180 students, close to the Dunbar number. Think about your relationships with those in your year group. Do you know everyone? You will probably know your entire year group by sight. You will have strong relationships with some and weaker relationships with others. Humans share a lot in common with members of a group this size, but there will also be gaps in our understanding of other group members. We may know some as acquaintances only or interact with them infrequently. We may even dislike some. Groups of this size usually exist for a purpose — to allow us to learn, to work and to play.

> *Laws regulate behaviour and set standards for individuals to social cohesion.*

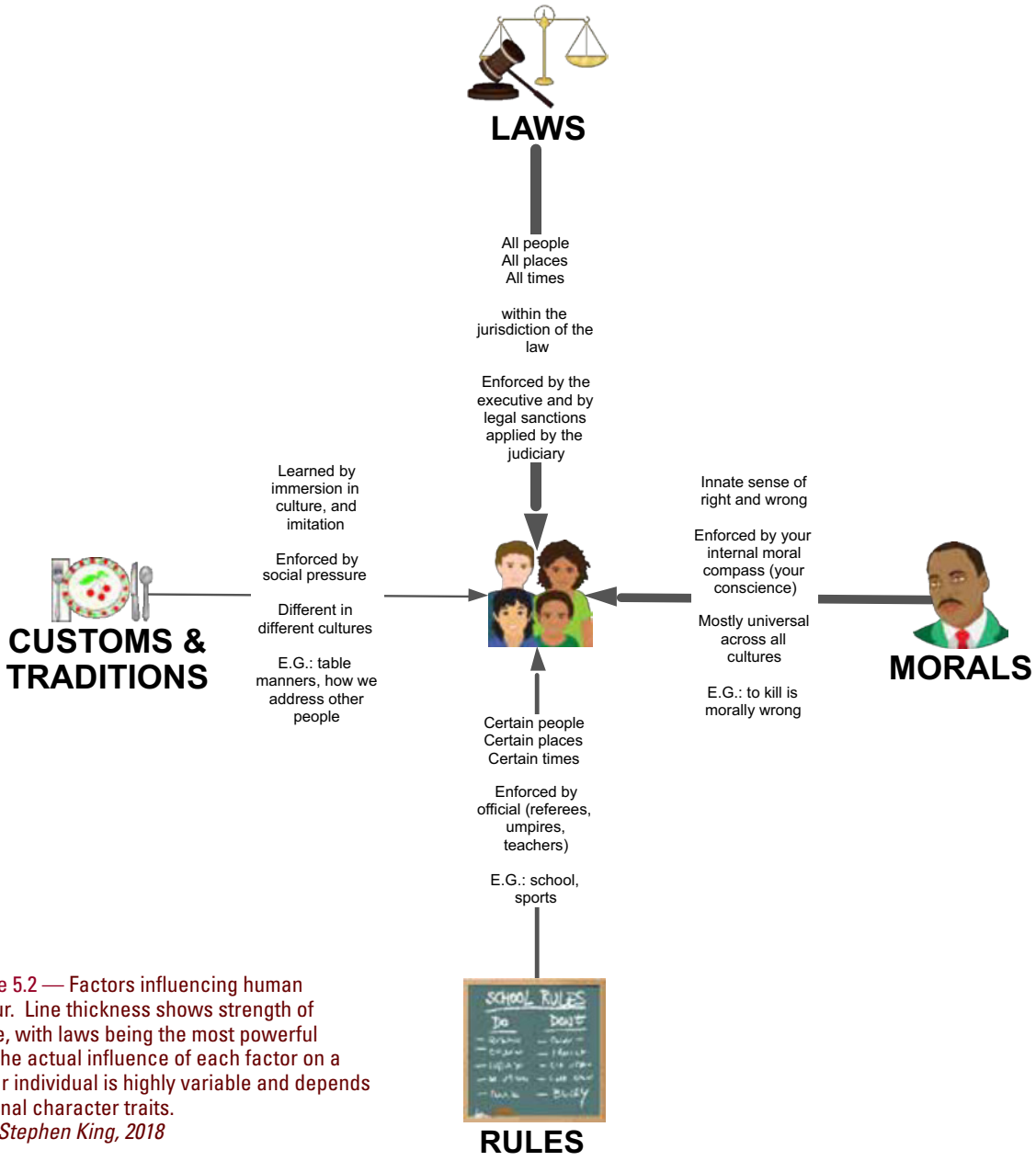
Behavioural guides like school rules or sports codes are needed to govern behaviour in these larger social groups because 'love is not enough'. Social bonds are weaker and interpersonal trust is not as strong in larger groups - especially among acquaintances. Humans develop behavioural codes to make social interaction safe and make it possible for larger groups to achieve goals associated with the group's purpose. Can you think of your school's rules that help students achieve the educational and other goals of the school? Without codes of behaviour, larger groups would dissolve into smaller units and be unable to cooperate effectively for a greater purpose. Everyone would be worse off. Rules are a good thing. Rules mediate behaviour and prevent conflict.

Figure 5.1 — By the time you graduate you will have developed strong relationships with some students and weaker relationships with others.
Source: Daria Romanova, The new graduates of the Europa-Institut in Germany gather to throw their mortar boards in the air as part of a graduation ceremony, 2011, Own work, CC BY-SA 3.0, <https://commons.wikimedia.org/w/index.php?curid=17256342> and <https://en.wikipedia.org/wiki/Student#/media/File:Europa-Institut_graduation.jpg>

In really large groups we may never know other group members. We are strangers to each other despite sharing common traits that identify us as part of larger groups. Most of us live in towns or cities with populations from thousands to millions. We are all part of these enormous cultural groups. The largest functional group sizes are political; they are states and nation states with populations often in the tens of millions or more. Laws regulate behaviour and set standards for individuals in political groups. Laws create predictable behaviour by reinforcing common values and norms. Laws resolve disputes peacefully so that violence is reduced and large groups of strangers can live together harmoniously. Thus, laws promote social cohesion.

The human species is one huge group to which we all belong. There is an emerging body

1 The Dunbar number is named after Robin Dunbar who discovered a direct correlation between brain size in primates and their social group size. In social primates, the larger the brain size, the larger the group.



■ Figure 5.2 — 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.
Source: Stephen King, 2018

of international law attempting to regulate behaviour on a species-wide scale, but it is quite weak at present. We are learning to govern ourselves as a species, but *Homo sapiens* is not yet one functional political group. Wars can result because of the lack of enforceable rules between very large groups of people. There is no effective 'world government'. Nation states sometimes resort to violence to resolve disputes because of the lack of enforceable law and effective courts at the international level.

Very large groups have evolved ways of guiding and constraining the behaviour of their members so that social relations are peaceful, rights are respected and people can enjoy their rights and freedoms. Strangers share a common identity and agree to a common code of behaviour. In this way, the actions of strangers are made predictable. Predictability complements or replaces personal trust as the social glue that binds these large groups together.

Ways of influencing human behaviour in large groups fall into to four distinct categories.

1. Customs and traditions
2. Morals
3. Rules
4. Laws

Figure 5.2 illustrates the factors influencing human behaviour.

- Customs and traditions vary from culture to culture, and are less influential in progressive advanced multicultural societies such as Australia. This is affected by the extent to which tolerance and acceptance are a key feature of democracies. Acceptance of diversity reduces the influence of customs and traditions, though these remain very important in homogenous societies such as Japan, for example, where the tea

ceremony and kimono continue to be of great significance. Customs and traditions are powerful in traditional societies such as New Guinea's tribal villages or those where religious law is important.

- Morals are, in theory, near universal and innate unwritten 'codes' that tell us what is right and wrong. People without morals lack empathy with others and may be sociopathic or psychopathic. These pathologies are regarded as psychological conditions and are not considered normal in healthy people. Morals are enforced by a person's own internal conscience and are part of our common humanity. They are powerful. They are the reason why most people will do the right thing even if there is no law or rule prohibiting a wrong action. Diverse religions have the same moral teachings, which hints at the universal human nature of morals. An example is the Golden Rule - *treat others as you wish to be treated yourself* - taught by almost all religions.
- Rules are codes of behaviour, usually written, that apply to particular people at particular places at particular times. For example, students when on the school campus during the school day follow school rules. These rules are enforced by people with authority, usually some kind of official such as a school teacher.
- Laws are written codes produced by sovereign political units (states and nation states) that apply to all people at all places and at all times within the jurisdiction of the law. They are made by the legislature of a state and are enforced by the state through its executive and judicial arms of government. Sanctions apply to those who break laws and may be used to lawfully limit an offender's rights (for example, detention in custody lawfully limits the right to freedom of movement).
- Laws may encode and reinforce morals. An example is the moral against killing others. The moral wrong of killing is translated into law as the crime of murder. Such 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 a custom or tradition. When cars replaced horses and carriages managing traffic become more important, and laws were developed for that purpose. For example, in Australia the custom of 'keep left' became the law. Traffic laws enhance safety and the protection of rights, and allow large numbers of people in public spaces like roads to cooperate without knowing each other.

Power

Power includes the ability to force others to act in ways they may not choose to otherwise. Power can be coercive.

Power is used to get people to comply with customs and traditions. For example, parents may punish a child for not eating their meal 'properly' at the table. A child might prefer to eat with their fingers and not willingly use a fork. Fear of punishment is power used to motivate a child to behave according to custom.

Power is used to make people comply with rules. Detentions are sometimes used to encourage students to obey school rules. Students would not attend a detention willingly and so issuing detentions is an exercise of power.

> *In democracies, power is limited by constitutional law and conventions. Power is separated, checked and balanced. The rule of law limits the use of power. In democracies, power can only be used according to law.*

Figure 5.3 — Eating customs vary depending on the culture in which you are immersed.
Source: Alex Gaylon, A wedding feast in India, dining tradition, 2007, USA - feasting, CC BY-SA 2.0, <https://commons.wikimedia.org/w/index.php?curid=52088243> and <https://en.wikipedia.org/wiki/Etiquette_of_Indian_dining#/media/File:A_wedding_feast_in_India,_dining_tradition.jpg>

Power is used to enforce law. Sanctions can be fines, intensive supervision orders, community based orders and imprisonment. No one would willingly choose any of these, yet the State can force them upon those who break laws.

Perceptive students would recognise that power is an important attribute of government. In democracies, power is limited by constitutional law and conventions. Power is separated, checked and balanced. The rule of law limits the use of power. In democracies, power can only be used according to law.

In these ways laws govern the behaviour of those who govern and the governed.

Laws

Laws are the most powerful means a group has of influencing and controlling the behaviour of its members.

Some important ideas should be considered.

First, the group to which laws apply is always the population of a political entity that possesses sovereignty. There is also a formal system of government to do the governing. These criteria mean only nation states, or states within federal nations, can make laws.

Second, laws have **jurisdiction**. Jurisdiction means 'where the law speaks'. There are two types of jurisdiction:

- Geographical jurisdiction is the land and sea areas over which laws apply. In unitary states this is the entire country. In federations like Australia there are federal laws that apply to the whole country and state laws that apply only in subnational regions.

> *Constitutions define both geographical jurisdiction and legal jurisdiction.*

Federal constitutions define geographical jurisdictions' powers:

- exclusive powers have national jurisdiction;
- concurrent powers have both national and state jurisdiction; and
- residual powers have state jurisdictions.

Figure 5.4 — Constitutions define geographical jurisdictions.
Source: Parliamentary Education Office, <peo.gov.au> and <https://www.peo.gov.au/uploads/image_gallery/the-law/PEO_0708_federal-law.pdf>

- Legal jurisdiction is the area of law that is covered. Family laws cover family matters like marriage, divorce, parenting arrangements for children, and joint assets. Trade laws cover imports and exports, tariffs and excise taxes, and so on. Federal constitutions like Australia's specify the legal jurisdictions of the two levels of government. For example:
  - the power to impose tariffs on traded goods — Section 90 — is exclusive to the Commonwealth;
  - the powers to legislate for marriage — Section 51(xxi) — and taxation — Section 51(ii) — are concurrent; and
  - the power over land uses and urban planning is residual.

Characteristics of laws

Like rules, laws are formal behavioural codes. In general, laws have four qualities. Laws are:

- applicable to a whole population;
- applicable to a geographical jurisdiction;
- applicable all the time; and
- backed by sanctions decided by the state's legislative arm, enforced by the state's executive arm and adjudicated by the state's judicial arm. Sanctions may include the lawful suspension of an individual's rights.

The first three points above all relate to the universality of law.

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 of this course is mainly concerned with the final three points above. However, constitutional law is covered briefly for the sake of encouraging a greater understanding, which will be useful in Unit 3.

Superior law — Constitutional law

Constitutional law is **superior law** or fundamental law. We know that it has a number of purposes. To quickly restate these, Constitutional law:

1. establishes the geographical and legal jurisdiction of power (unitary or federal);
2. creates the three arms of government (parliaments, governments and courts);
3. specifies the processes of government (for example, how government is to be formed);
4. protects fundamental rights (for example, the right to vote); and
5. codifies procedures for constitutional change.

Making constitutional law

Because of its special status as superior or fundamental law, constitutional law is not made in the normal way by law making bodies such as parliaments and courts. Instead, constitutions create these law making institutions, and define and limit their powers. Constitutions are above and beyond parliaments and courts. This means that there must be special ways of creating and changing constitutional law.

> *"The founding fathers drafted the Constitution, the citizens by direct democracy approved and the British parliament granted Australia sovereignty."*

Australia's Constitution was drafted by the 'Founding Fathers', then voted on by the citizens of the six Australian colonies and finally passed as a law through the British parliament.

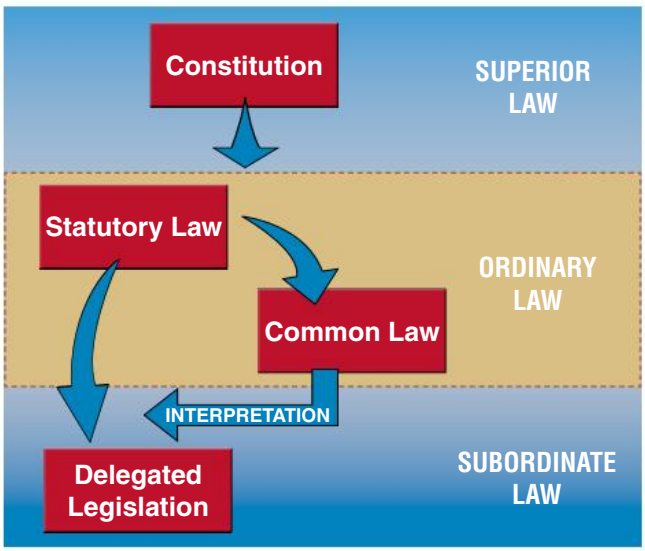


Figure 5.5 — Hierarchy of the sources of law.
Source: Nicol Davis, 2018

The Founding Fathers were prominent colonial politicians and people in public life. They met in several constitutional conventions in Melbourne and Sydney over the decade of the 1890s to discuss and draft the Commonwealth of Australia Constitution Bill 1900. After the draft was complete there was a series of referenda in which the colonies chose, by direct democracy, to adopt the new constitution. The six colonies agreed to become states within a new Commonwealth of Australia. Finally, because the colonies were subject to British law, the new democratically approved constitution had to pass as a law through the British Parliament. A British Act, the *Commonwealth of Australia Constitution Act 1900* (the Constitution), granted Australia national sovereignty and gave sovereignty to the states within the new federation.

All law needs a purpose and a source of authority. Statute law made by parliament draws its authority from the democratic will of the people expressed through their representatives in parliament and the formal assent of the Crown. The purpose of statute laws is many and varied, and these are outlined in detail in the next section.

> *Statutes will always override common law.*

From where does the Constitution draws its authority? The Constitution has three sources of authority which are stated in the its Preamble. A preamble is a statement that precedes the main body of a constitution and which states the constitution's purpose and sources of authority.

Preambles are not constitutional law, but may give guidance to the meaning of the law. Thus, preambles are useful to constitutional courts that, from time to time, must adjudicate and declare their meaning.

The Preamble to the Constitution states that the Constitution draws its authority from:

1. the people of the colonies;
2. Almighty God; and
3. the Crown.

The Constitution's Preamble states:

> *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…*

The reference to Almighty God reflects the less secular (or more religious) time in which the Constitution was drafted and came into operation. The second and third sources of authority are important for our understanding of the political system the Constitution creates. It creates a representative democracy under a constitutional monarchy.

The Constitution is one of the world's oldest democratic constitutions. It was partially created and approved by the people themselves. The strong democratic element is reflected in the authority for formal changes to the Constitution — the people themselves. Any change must be made by special referendum approved by a direct democratic vote, an innovation borrowed from Switzerland.

Ordinary law — Statute law

There are two types of **ordinary law** — a superior type of law made by parliaments and an inferior type made by courts.

1. Parliaments make statute law called Acts of Parliament
2. Courts make common law called case law, judge made law or precedents.

Students should note from the outset that statutes (Acts) are superior to common law (precedents). If the two types of law conflict, statutes will always override common law. The main reasons for this are twofold:

1. parliament is the primary legislative branch of government; and
2. parliament has democratic authority because it is elected and representative.

Laws made by parliament reflect the will of the people. Judge made law cannot be representative of the people. Judges are not legislators, and they are not elected.

This chapter deals in depth with Acts of parliament, how they are made, their purpose and sources of authority. This chapter also

addresses laws made by **subordinate authorities,** which are lower order laws made by executive officials and government departments under the authority of Acts of parliament.

Common law is covered in detail in the next chapter.

Parliament as law maker

A parliament is a legislature which has numerous functions. Primarily, parliament's role within the principle of separation of powers is to create law, but even this law making role is influenced by and enables its other roles. The functions of parliament are its:

- law making role. Through the proposal of financial and non-financial bills the parliament can debate and pass laws or reject bills using the law making process;
- representative role. Through the election of members of parliament (MPs), this ensures that laws reflect the popular will expressed through citizen's political participation via voting. Regular elections keep MPs accountable for the laws they make;
- debate role. Parliamentary debate contributes to law making through ensuring a wide range of opinions and ideas are contested. Debate in the legislative process exposes laws to scrutiny; and
- responsibility role. Through the forming of the executive and by holding it accountable, the parliament ensures majority rule. Well over 90 per cent of bills proposed in the Commonwealth Parliament are introduced by the government.

Parliament comprises a number of closely linked parts. Aside from the unicameral Queensland

> *Well over 90 per cent of bills proposed in the Commonwealth Parliament are introduced by the government.*

and territory parliaments, all Australian parliaments, including the Commonwealth Parliament, are composed of three elements:

1. a lower house, which:
   a. represents the people; and
   b. forms government in the Westminster style;
2. an upper house, which:
   a. represents the states (in state parliaments these are called regions);
   b. acts as a house of review; and
   c. acts as a check and balance on the lower house; and
3. the Crown, represented by the Governor-General for the Commonwealth, (in the states, a Governor represents the Crown). The Crown possesses no real power, but nevertheless has formal law making power and must give Royal Assent to a proposed law before it can become an actual law.

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, passing an Act involves all three parliamentary components — the lower house, the upper house and the constitutional monarch.

Remember that laws must have a purpose and a source of authority. Statute law has many purposes and two sources of authority.

> *Passing an Act involves all three parliamentary components — the lower house, the upper house and the constitutional monarch.*

Figure 5.6 — Australia's Commonwealth Parliament.
Source: Parliamentary Education Office, <www.peo.gov> and <https://www.peo.gov.au/multimedia/image-library/australias-parliament-house-il.html>

Understanding the law making process

- A bill must pass through both houses in identical form before it can receive Royal Assent and become law. If the second house makes amendments to a bill, it must be transferred back to the house of origin which must then agree to the amendments.
- If the two houses cannot agree on a bill, it is said to have been 'blocked'.
  - The Senate blocks more bills than the House of Representatives because most bills start in the lower house and the Senate is the house of review.
  - The Constitution contains a mechanism to resolve a deadlock in parliament (or when the two houses cannot agree on legislation). Section 57 of the Constitution allows the Prime Minister to advise the Governor-General to dissolve both houses of parliament and call an election. This process is referred to as a double dissolution. In 2016 a **double dissolution election** was called by Prime Minister Malcolm Turnbull over the deadlock of two industrial relations bills. Interested students are encouraged to investigate Section 57 further to prepare for Unit 3.
- Any member of parliament (MP) may introduce a bill.
  - Government bills are guaranteed passage through the House of Representatives because the government controls this house — a phenomenon referred to as executive dominance of the lower house. The government of the day has the 'numbers' in this house and can therefore rely on its MPs to vote in favour of motions to pass a bill.
  - Non-government bills are called private members' bills (PMBs) and they usually do not progress past the first reading because the government uses its numbers to vote them down. PMBs are often used to draw attention to an issue and may lead to the government introducing similar measures in its own bills. The recent amendments to the *Marriage Act 1961* were the result of legislation introduced by Western Australian Senator Dean Smith as a private senator's bill.
- The majority of bills are dealt with by the parliament in an efficient manner with little or no media reporting. However:
  - government policy legislation that is opposed by the Opposition often leads to much debate. It will almost always pass the House of Representatives because of the executive dominance of the lower house; and
  - the Senate is often not dominated by the executive. Frequently there is much debate and compromise in the upper house between government MPs and ministers on one side and **crossbench** and opposition members on the other.

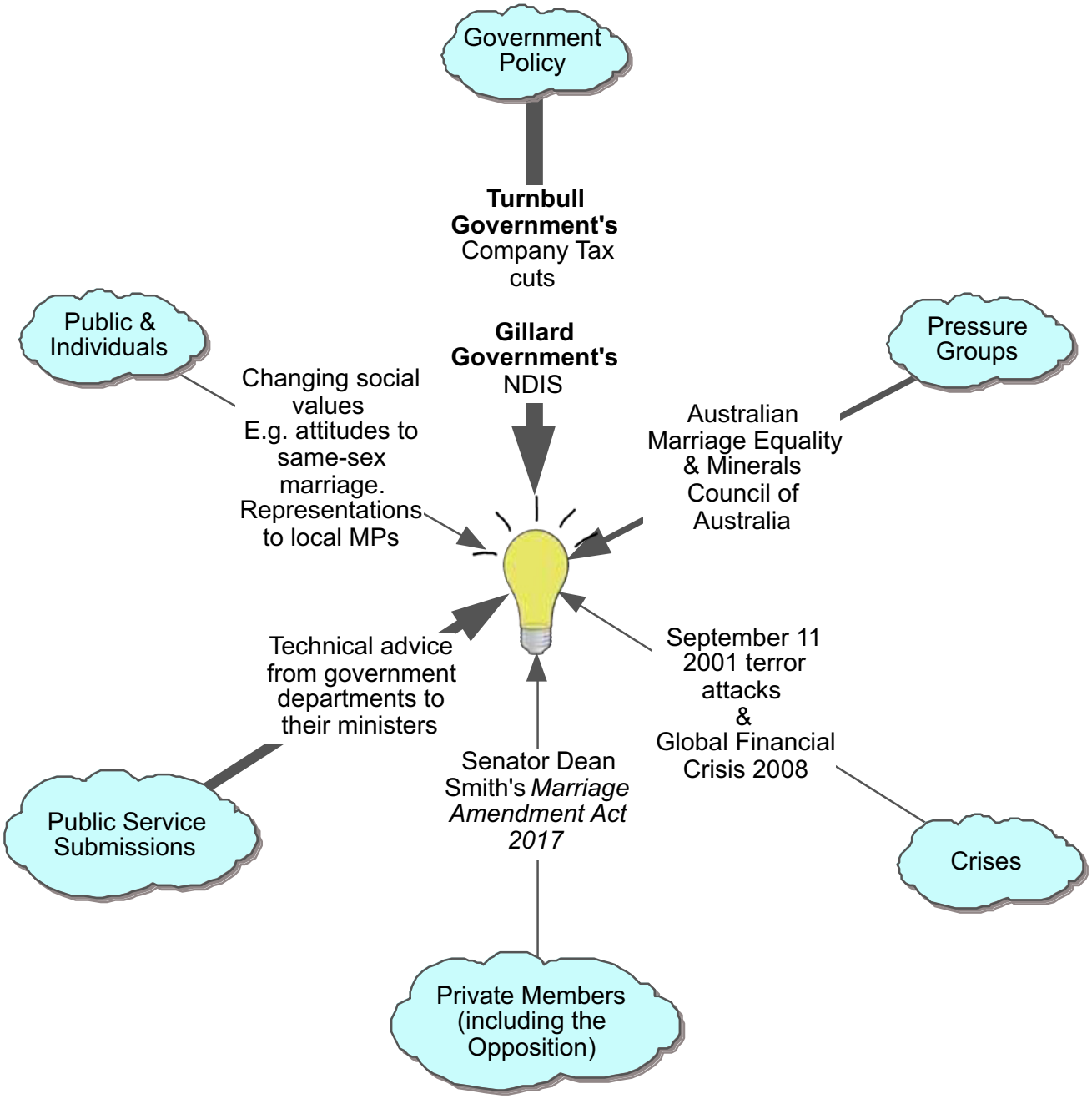
When reflecting upon the law making process students should think about:

- law making in parliament as a **deliberative process,** with bills being thoroughly debated and scrutinised;
- law making in parliament as a process that reflects and represents community values and needs;
- what checks and balances there are in the law making process that flow from the rule of law; and
- how the government is able to propose and introduce most bills into parliament.

The following three figures show the various sources of influence on ideas for laws and the quite complicated process of introducing a bill into one house, having it pass both houses and become an Act of parliament. Once you have studied these figures, try to answer the following questions:

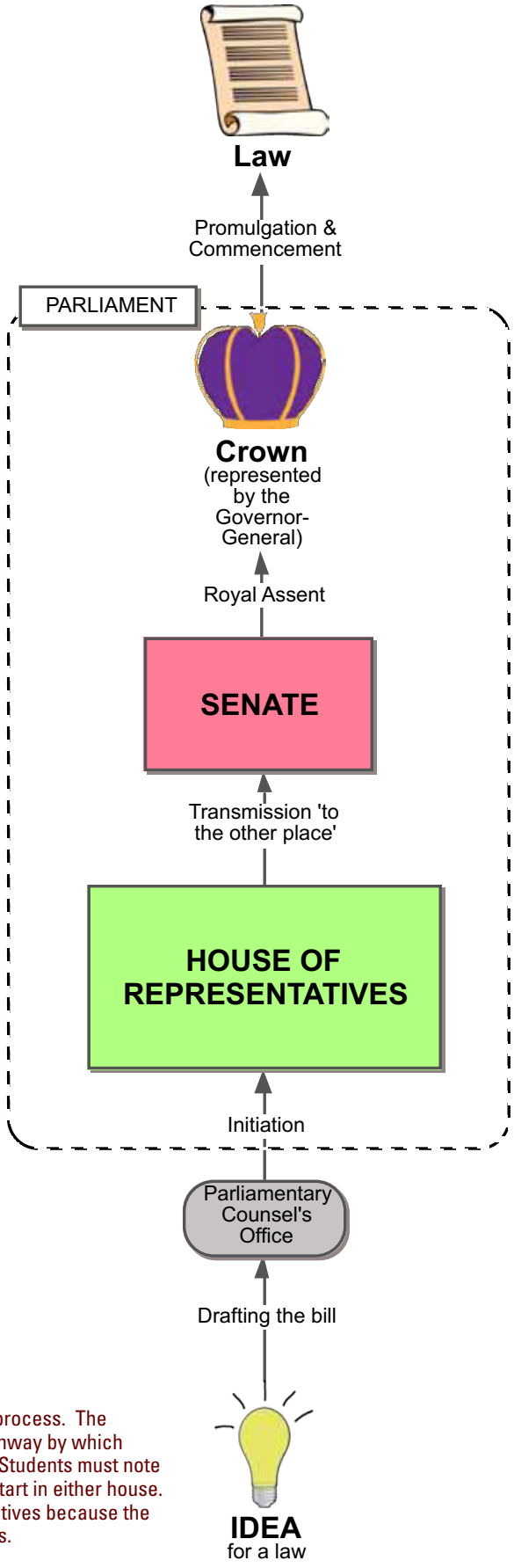
1. Which stages are the most deliberative?
2. At what points do citizens have opportunities to engage with the law making process and seek to influence law making through political participation?
3. Where are the checks and balances in the legislative process? and
4. How does the law making process enable the parliament to carry out its role of holding the government to account?

Ideas for new laws



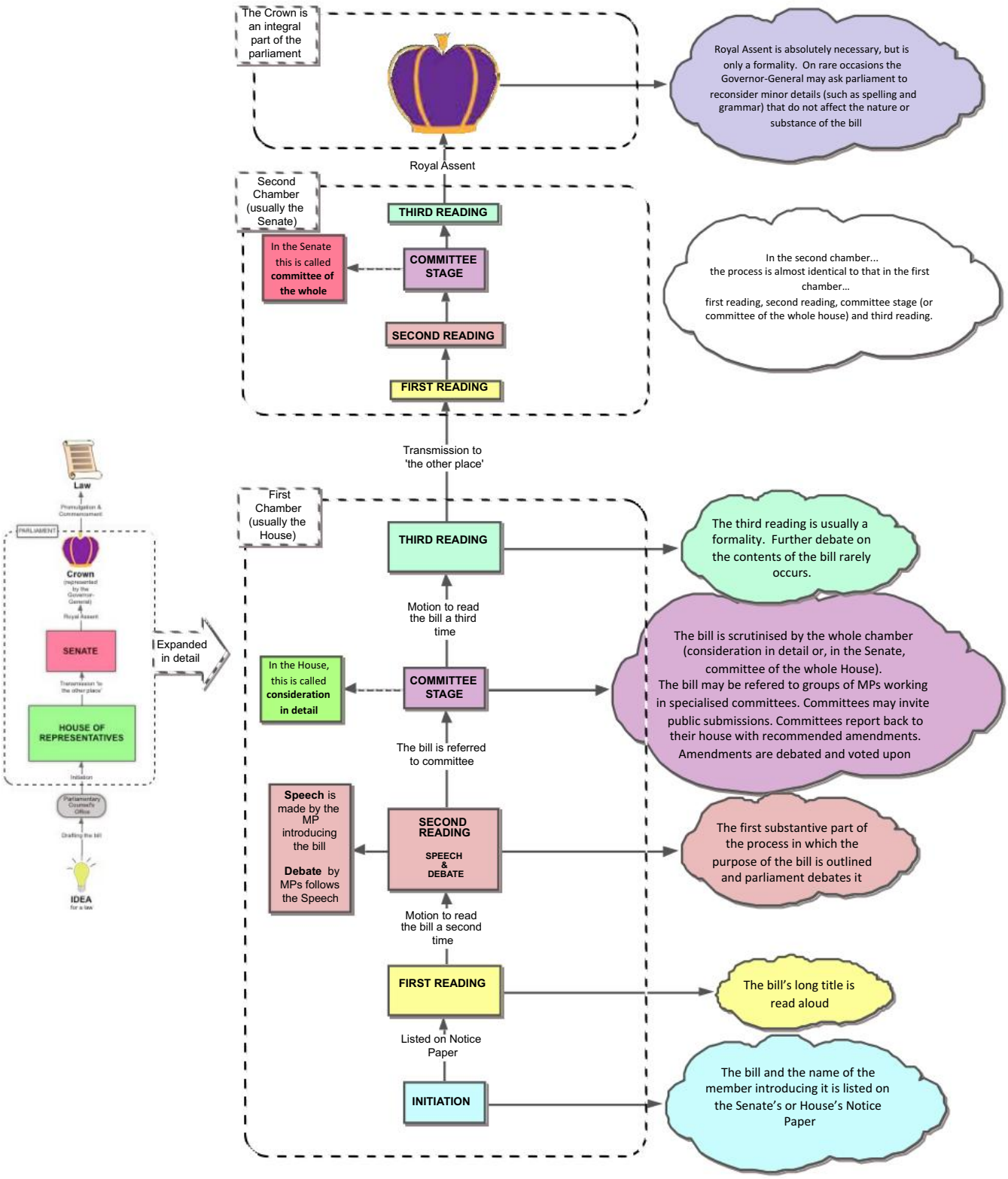
■ Figure 5.7 — Ideas for new laws can come from many sources. Line thickness indicates the strength of influence of the source. The government is the dominant source. Policy ideas are discussed in Cabinet and most bills are introduced by cabinet ministers or assistant ministers into the house in which they sit. In the 44th and 45th parliaments approximately three quarters of all bills were introduced in the House of Representatives and one quarter in the Senate.
Source: Stephen King, 2018

Simplified legislative process



■ Figure 5.8 — Simplified legislative process. The diagram shows the most common pathway by which statute laws are made in parliament. Students must note that all bills, except money bills, can start in either house. Most start in the House of Representatives because the government is the initiator of most bills.
Source: Stephen King, 2018

Law making stages within the parliament



■ Figure 5.9 — Each law making stage within the parliament. Note that each house goes through the same process before the Governor-General gives Royal Assent to a bill. The most important stages are the second reading and the committee stage in each house. These steps allow the most debate and scrutiny. The second chamber, usually the Senate, has an important review function and will use various means to consider the impact of the bill.
Source: Stephen King, 2018

Statute law

Parliaments pass statutes to achieve particular legislative aims, namely to:

- implement policy proposed by the executive branch of government;
- authorise spending by the executive branch of government;
- amend (change) existing statute;
- repeal (abolish) existing statute;
- consolidate law by combining several old statutes into one in order to simplify or update the law; and
- respond to court decisions and judge made common law by:
  - abrogating (overriding) judge made common law;
  - codifying (reinforcing) judge made law by elevating common law to the status of a statute;
  - defining judicial freedom or discretion in the post-trial phase of court cases (for example, sentencing Acts define how judges sanction those found guilty of a crime); and
  - clarifying courts' interpretations of statute law (statutory interpretation by the courts is covered in the next chapter).

> *Parliament can only make law under the 'heads of power' of the Constitution.*

Perceptive students will note that Acts passed by parliament can govern how the other two branches of government operate. For example, laws that implement the executive's policy or authorise the executive's spending clearly impact on how the executive branch of government operates, while laws that respond to court decisions and common law necessarily affects the operation of the judicial branch of government.

Consider each of the purposes of statutes in relation to concepts and principles that have been discussed earlier in this text, such as:

- the separation of powers;
- checks and balances;
- the rule of law; and
- the sovereignty of parliament.

Parliament's legislative aim of responding to court decisions and judge made common law will become clearer in the following chapter. Judges in higher courts can create common law precedents that sometimes trigger parliament into passing a statute.

Sources of authority for statute law

Acts of parliament have two sources of authority:

1. a democratic source; and
2. a constitutional source.

Democratic authority derives from the fact that the parliament is comprised of elected representative legislators. Therefore, the Acts have the stamp of democratic legitimacy. Recall that parliament expresses the will of the people who delegate and entrust power to representatives for a period of time. This occurs at an election and is renewed regularly at each election.

> *Acts have the stamp of democratic legitimacy.*

Constitutional authority stems from our system of government which is a constitutional monarchy — this has important implications for Acts. Refresh your understanding by re-reading the three parts of the parliament outlined above — a lower house, an upper house and the Crown. Another way to think of this is to understand that the authority to make laws comes from the 'Queen in parliament'. Without assent by the Queen's representative, the Governor-General, a bill cannot become an Act. This is the formal constitutional authority for Acts of parliament.

The Constitution is a federal constitution. All federal constitutions divide the law making powers between a central parliament and regional parliaments. Australia's Constitution follows United States (US) practice by specifying legislative powers for the Commonwealth Parliament, either exclusively or concurrently with the states. The parliament can only make laws under these 'heads of power' in the Constitution. Hence, these heads of power are used by the Commonwealth Parliament to justify why they can pass an Act. The Constitution therefore both empowers and limits the parliament.

The purpose of statute law

This section gives a detailed account of the main types of statute. Students are encouraged to become familiar with each. A deeper understanding of the types of law is very advantageous in Politics and Law Units 3 and 4.

Implementing policy proposed by the executive

Governments have agendas and they want to do things. Parties that form the executive government make promises to the electorate and have core ideological beliefs about what government should do. Often, but not always, governments need to convince the parliament to pass laws enabling their agendas, promises and ideologies.

Remember the rule of law? Governments must act lawfully, so sometimes they need the parliament to change the law to enable them to carry out their agenda or fulfil their electoral promises if the present laws do not allow them to do so.

In 2010 the Gillard Government convinced the parliament to pass new laws establishing the National Disability Insurance Scheme (NDIS). The NDIS was a Labor Party promise during the 2010 election based on Labor's ideological commitment to equality and looking after the disadvantaged. After the passage of the *National Disability Insurance Scheme Act 2013,* the Gillard Government could begin implementing their policy.

The Gillard Government was less successful in convincing the parliament to change the *Migration Act 1958* to implement its Malaysian Solution — a policy to transfer asylum seekers to Malaysia. After the High Court ruled the policy unlawful under the existing law, the government sought to change the Act. The parliament would not agree to pass the government's Migration Legislation Amendment (Offshore Processing and Other Measures) Bill 2011. As a result, the policy could not be implemented. This example illustrates both the rule of law (including the independence of the judiciary) and the separation of powers, with the parliament and the High Court checking the executive. The executive is only empowered to act if the Parliament authorises it to do so.

In the 2013 federal election the Liberal National Coalition parties led by Tony Abbott promised to repeal the Carbon Tax that had been passed by the previous parliament. Despite promising to 'axe the tax' and being committed to abolishing it, the new Abbott Government could not stop collecting the tax immediately. Instead, it had to wait until the parliament acted to repeal the laws. *The Clean Energy Legislation (Carbon Tax Repeal) Act 2014* was finally passed after being defeated in the Senate twice prior.

Figure 5.10 — In the 2016 federal election, the Liberal National Coalition promised to reduce the tax paid by companies and corporations by approximately $50 billion over 10 years.
Source: Alan Moir, 2018, <https://twitter.com/moir_alan/> and <https://twitter.com/moir_alan/status/998858571474391040 >

In 2018, the Coalition promised to reduce the tax paid by companies and corporations by approximately $65 billion over 10 years. To do this the re-elected Turnbull Government needed to convince the parliament to amend taxation laws. Governments usually have little trouble persuading the lower house to pass laws they want — after all, they control the lower house (hint: executive dominance of the lower house explains this). In this case, the Turnbull Government used its slight majority of lower house votes to pass the necessary bills. However, the Senate could not be convinced. The bills were blocked by the upper house. In a compromise, the Turnbull Government had to agree to the Senate limiting the cuts to small businesses with an annual turnover of less than $10 million, meaning the total cuts amounted to approximately $20 billion instead of $65 billion.

Authorising expenditure by the executive

Scrutinising government spending is a major part of parliament's responsibility role; that is, holding the government to account.

Executing laws is called governing — that is what governments do. Governing requires spending public money. Government departments have budgets. Public servants have to be employed and paid. Government services like pensions, health care and education cost large sums of taxpayers' money. The defence forces are also extremely costly. Infrastructure such as roads, ports and airports are essential public goods paid for by the government, sometimes in partnership with private companies. Operating embassies overseas is essential to Australia's external affairs and costs money too.

Section 83 of the Constitution says, "No money shall be drawn from the Treasury of the Commonwealth except under appropriation made by law". This means that any money spent by government must be approved first by passing laws through parliament. This is another example of the rule of law. Governments cannot access taxpayers' money unless the law permits. This puts parliament in a position to scrutinise the executive and oversee its activities.

Money bills and the Constitution

How does parliament authorise government spending?

A special type of bill, called an appropriation bill or a money bill, must be passed by both houses to approve taxes and spending by the executive. These are important bills because **Section 53** of the Constitution says, "Proposed laws appropriating revenue or moneys, or imposing taxation, shall not originate in the Senate". Section 53 means money bills can only be initiated in the House of Representatives — the house of government. Section 53 also says, "The Senate may not amend proposed laws imposing taxation… appropriating revenue or moneys for the ordinary annual services of the Government. The Senate may not amend any proposed law so as to increase any proposed charge or burden on the people". Therefore, the Senate is prohibited by constitutional law

> *Bills which fund the ordinary annual services of government are not able to be amended by the Senate.*

from introducing money bills or even amending them once they have passed the lower house. This is because raising taxes and spending public money is so important to the functioning of government that the lower house, as the house of government, is considered the only appropriate place for taxing and spending laws to originate.

Further, **Section 54** provides that any bill dealing with the appropriation of money "for the ordinary annual services of government shall only deal with such appropriation". This is important as it means that the government must separate necessary spending on parliament, government departments and agencies, including public servant wages, from any new and potentially contentious initiatives it may want to introduce.

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 the Senate as they cover the ordinary day to day services of government.

The budget

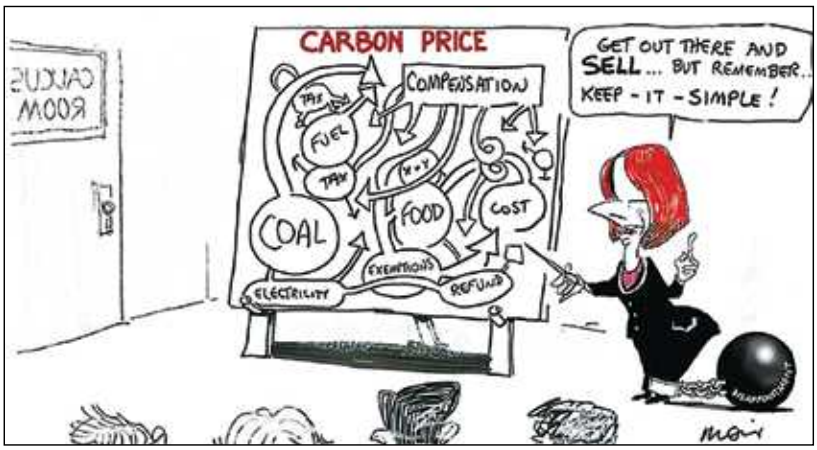
Every year, traditionally on the second Tuesday in May, the government releases its annual budget. The budget is a statement of expected tax revenues, proposed expenditures and forward estimates (out to three years) predicting the future of the nation's finances. 'Bringing down the budget' is the job of the Treasurer and is one of the major events in the Australian political calendar.

Following the announcement of the budget the government starts introducing money bills into the House of Representatives. Here they are debated, scrutinised by house committees and if necessary amended. The House of Representatives scrutinises all aspects of government spending and ultimately authorises the budget proposals by passing the money bills. The government's dominance of the lower house means that, while these bills are be hotly debated, they pass easily.

These bills are typically called the Appropriation Bill (No. 2), Appropriation Bill (No. 4) and Supply Bill (No. 2). The Senate may constitutionally amend these bills.

Budget bills may propose changes to taxes. For example, the Turnbull Government successfully changed personal income taxes in 2018 and it partially succeeded in passing corporate tax cuts in 2017. These proposals are incorporated in the budget because the concept of a budget is to outline proposed revenue and planned expenditure. So, the budget will incorporate projections of the expected revenue (increased if taxes are to increase or reduced if taxes are being lowered) and expenditure. Often when a government introduces a new tax or increases a current tax to pay for a new initiative there is a lot of focus by the Opposition and crossbenchers on whether the government can deliver this planned expenditure, especially if the change to taxes is not passed by the parliament.

If a government wants to introduce a new tax, in accordance with **Section 55** of the Constitution it must have its own proposed legislation dealing only with that proposed tax. This is why when the Gillard Government introduced its Carbon Tax and Mining Tax it had to introduce and pass these in separate bills, unique from the money



■ Figure 5.11 — The Gillard Government proposed and passed through the Commonwealth Parliament a Carbon Tax following the 2010 federal election.
Source: Alan Moir, 2012, <https://twitter.com/moir_alan/> and <http://www.sauer-thompson.com/archives/opinion/climate-change/>

bills or budget. This allows the Senate to carry out its role as a house of review and exercise its constitutional powers.

This was a similar scenario to when the Abbott Government attempted, and failed, to introduce a proposed $7 general practitioner (GP) co-payment when people visited their GP or doctor. As this would be a new burden on the people, only the House of Representatives could introduce it as an amendment to the existing legislation that affects payments for such services — the *Health Insurance Act 1973.* The Senate, which was critical of the cost to bulk billed patients and its potential detrimental impact on access to GPs for the vulnerable, was able to successfully defeat this proposal with both the Shorten Opposition and crossbenchers — including The Greens and Palmer United Party — threatening to vote against it.

■ Figure 5.12 — Senate Estimates in session.
Source: Parliamentary Education Office, <www.peo.gov.au> and <https://www.peo.gov.au/multimedia/image-library/the-senate.html>

Impact of the Senate on approving expenditure

The Senate's prohibition on introducing or amending money bills does not mean it has no role in the passage of these bills. Recall that all bills — including money bills — must pass both houses. **Section 53** does empower the Senate to "at any stage return to the House of Representatives any proposed law which the Senate may not amend, requesting, by message, the omission or amendment of any items or provisions". Obviously, the Senate could also block these bills by refusing to vote on them or rejecting them.

Before passing money bills, the Senate debates them, may send them to committees for further inquiry and votes on them in the same way it does for all other types of bills. It is one of the ways the Senate checks and balances the House of Representatives and contributes to parliamentary scrutiny of the executive.

> *"Parliament must authorise expenditure by the executive."*

The Senate enquires into aspects of the budget during its **Senate Estimates** hearings. Estimates are special sessions of Senate committees held in May and October/November every year. As the government's budget bills are passing the House of Representatives, Senate Estimates Committees get advance notification of what the bills contain. They then start inquiries into the spending proposed by the executive. Estimates committees can call public servants and even ministers from within the Senate to committee sessions to answer questions about the activities of government related to spending money.

Senate Estimates Committees are powerful agents of executive accountability. They are discussed only briefly here because they are investigated more deeply in Unit 4 of this course, which focusses on government accountability.

Supply in theory and practice

Money bills do more than simply introduce or amend taxes. They are also necessary to authorise the spending of the government. Money bills are introduced all the time to authorise the activities of government. Money bills form a constant stream of legislation often referred to as 'supply' because they supply the government with the funds it needs to function. The following is the synopsis of the Supply Bill (No. 2) 2017:

> *The purpose of this bill is to apply out of the Consolidated Account the amount of $12 187 000 000 for the services and purposes of the year ending 30 June 2018.*[2]

If money bills failed to pass it would create a crisis because government would soon run out of money and cease to function — government would shut down. Refusing passage of money bills is an extremely rare event and has happened only once in the Senate's history.

Recall that the Senate cannot introduce or amend money bills, yet must pass them in order for them to become law. What happens if the Senate refuses to pass money bills?

There are long-standing constitutional conventions preventing the Senate from 'blocking supply'. A Westminster convention holds that the Senate may debate money bills, but will always pass them. This convention applies because the House of Lords in Britain is a hereditary chamber with much weaker powers than the House of Commons and cannot block bills. However, the Australian Senate is strong and it can block money bills. The convention is supposed to keep the powerful Australian Senate true to the Westminster 'house of review' model — a model that does not include denying supply to the government.

In 1975 the Senate broke this convention and refused to pass the Whitlam Government's supply bills. By blocking supply the Senate triggered a constitutional crisis because the government started to run out of money. The government controlled House of Representatives and the Opposition controlled Senate were in deadlock over money bills.

The passage of supply is crucial for the government and, by convention, the failure to pass an appropriation bill should result in the resignation of the government or the calling of a general election. Loss of supply is generally interpreted as a loss of confidence in the government. This convention was also tested by the Whitlam Government's refusal to resign despite being unable to pass supply through the Senate. This sparked a crisis between the constitutional and Westminster conventions. But conventions are unwritten, flexible and unenforceable.

■ Figure 5.13 — Governor-General Sir John Kerr dismissed the Whitlam Government.
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>

To break the deadlock and restore the functioning of government, Governor-General Sir John Kerr dismissed the Whitlam Government — sacking an elected government in the process — by using the reserve powers of the Governor-General encoded in the Constitution. He appointed the Opposition Leader, Malcolm Fraser, as a caretaker Prime Minister on the condition that he pass supply and call an immediate election.

Bringing down the government is the ultimate mechanism parliament has for holding a government to account. By convention it is the lower house that performs this role, but the 1975 crisis demonstrated the unique power of the Australian Senate to hold the government accountable.

The 1975 constitutional crisis is studied in detail in Unit 3 of this course.

Less contentiously than the 1975 dismissal over lack of supply, every year the government must deliver a budget. Recently, on Tuesday 8 May 2018, then Treasurer Scott Morrison presented his third budget to the Commonwealth Parliament. This was also the third budget for the Turnbull Government and the fifth since the Liberal National Coalition came to power in 2013. Outlined within the budget are the bills for the appropriation of funds for the operation of government. An **appropriation bill**, also known as a supply or money bill, is a proposed law that authorises the spending of funds from consolidated revenue by government. Spending by government is not considered authorised unless it first passes through the parliament as a money bill.

2 Parliament of Western Australia, 'Supply Bill 2017 synopsis', <http://www.parliament.wa.gov.au/parliament/bills.nsf/BillProgressPopup?openForm&ParentUNID=AFDF17EE8CA58BC048258123000C9150>.

The Constitution clearly outlines the method by which the federal government can accumulate and spend its funds. **Section 81** establishes the Consolidated Revenue Fund (CRF) into which government revenues or moneys raised are to be placed. Such funds may come from sources such as taxes, charges, levies, borrowings, loan repayments and money held in trust. The Constitution does not outline how this money is to be spent nor how it is to be audited. All appropriations from the CRF must be for the purposes of the Commonwealth.

The constitutional requirement in **Section 56** is that proceedings on budget day commence with a recommendation from the Governor-General that appropriation of revenue should take place. However, by convention, the Governor-General acts on the advice of the government. This convention also emphasises the financial initiative of governments to request an increase or a decrease of an appropriation.

In order to legitimately withdraw funds from the CRF, in accordance with **Section 83** of the Constitution, the government typically proposes two main categories of spending bills — annual appropriations and special (standing) appropriations.

Annual appropriations outline the spending for Commonwealth entities such as the Department of Defence for the duration of one year. Annual appropriations are those that are presented by the Treasurer on budget night. Odd numbered bills outline the 'ordinary annual services of the government' and even numbered bills are for the 'other services' of the government.

On budget night, 8 May 2018, the Treasurer tabled three appropriations bills:

- Appropriation Bill (No. 1) 2018–2019;
- Appropriation Bill (No. 2) 2018–2019; and
- Appropriation (Parliamentary Departments) Bill (No. 1) 2018–2019.

While budgets outline the planned revenue and expenditure of the government, the reality is that the planned expenditures often do not match the actual funding requirements of government. This may occur for a variety of reasons, such as unforeseen natural disasters, that require additional spending commitments on the part of government or simply due to government not allowing sufficient appropriations for existing programs. The government may also choose to seek parliamentary approval for further appropriations bills later in the year.

You will recall that under the Constitution annual appropriations for the 'ordinary annual services of the government' and other matters must not be dealt with in the same bill. The reasoning behind this is the requirement under Section 53 of the Constitution that the Senate may not amend proposed laws appropriating money for the ordinary services of the government. The Senate, however, does have the ability to send a message to the House of Representatives requesting a change to a proposed bill. The issue, in the balance of powers between the House of Representatives and Senate, arises in determining what exactly is meant by the 'ordinary services' and 'other' services of government — and this is not clearly outlined in the Constitution.

As a result of this lack of clarity, in 1965 the government and Senate agreed on the distinction between the two different types of appropriations that became known as the *Compact*. Following recommendations from the Senate Standing Committee on Appropriations and Staffing, the Compact was again amended in 2010 to further clarify the type of spending that should not be considered to be part of the 'ordinary annual services' of government.

Despite the existence of the Compact it is in the interests of governments to try and classify as much of their expenditures as possible under 'ordinary annual services' as under Section 53 of the Constitution these bills cannot be amended by the Senate. Giving the Senate this power would decrease accountability of a government. Further, the High Court decision in *Osborne v Commonwealth (1911)* made clear that the Court would not intervene in disputes over such matters. Therefore, the passage of appropriations through the Senate at times results in heated debate.

Appropriation Bill (No. 1) in the 2018–2019 budget allocated $31.68 billion[3] to achieve Outcome 2 of the Defence portfolio. Outcome 2 tasks the department to "protect and advance Australia's strategic interests through the provision of strategic policy, the development, delivery and sustainment of military, intelligence and enabling capabilities, and the promotion of regional and global security and stability as directed by Government".[4]

3 Appropriation Bill (No.1) 2018–2019, <https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id:%22legislation/bills/r6104_aspassed/0000%22>.

4 Department of Defence, 2017, 2017–2018 Defence corporate plan, Commonwealth of Australia, p 3.

The Senate does not have the power to amend this bill for the 'ordinary services of government'. However, it does have the ability to amend laws appropriating revenue for 'other' services such as those within the Appropriation Bill (No. 2) 2018–2019. This power of the Senate is restricted by the Section 53 requirement that such changes by the Senate will not 'increase any proposed charge or burden on the people'. The Senate may choose to amend bills for other services of government to reduce the burden on the people or redirect funds. In this bill the government proposed that the Department of Defence receive $3.06 billion to fund the purchase of additional military equipment and to construct support facilities. Further the Department of Veterans' Affairs was to receive $11.4 million to make a payment to the Australian War Memorial. The Senate could have amended the bills to change these amounts if they wished to as they were not for the 'ordinary annual services' of the government.

The bills were all passed by the House of Representatives on 21 June 2018 and subsequently agreed to by the Senate on 25 June 2018. They were assented to by the Governor-General on 27 June 2018 and commenced on 1 July 2018. They are now known as the:

- *Appropriation Act (No. 1) 2018–2019;*
- *Appropriation Act (No. 2) 2018–2019; and*
- *Appropriation (Parliamentary Departments) Act (No. 1) 2018–2019.*

Over time, special appropriations have become the main mechanism for the appropriation of funds. In 1920 special appropriations accounted for only 10 per cent of all Commonwealth payments. By 1949–1950 this had increased to 49 per cent and by 2016–2017 special appropriations accounted for 77 per cent of all appropriations. **Special appropriations** refers to provisions for spending that are outlined in general policy legislation. These do not contain dollar limits provided the legislation outlines the purpose for which funds might be withdrawn. For example, Section 125 of the *Health Insurance Act (1973)* enables the funds to be withdrawn from Consolidated Revenue Fund to make Medicare payments. It provides that "all amounts payable for the Commonwealth under Part II or under an arrangement in force under section 129A shall be paid out of the Consolidated Revenue Fund, which is appropriated accordingly".

There are various reasons why a special appropriation should be used rather than an annual appropriation. Specific legislation allows the government to create a legal entitlement for people who meet specific criteria such as for an age pension. Such arrangements also enable the government to provide grants to inter-government bodies through the states under **Section 96** of the Constitution. For example, the *Schools Assistance Act (2008)* granted financial assistance for non-government primary and secondary education between 2009 and 2012. At times, it may be appropriate for a body to demonstrate its independence from the parliament and the executive for payment of their employees, such as the salaries of judges. For this reason, most significant programs are established under such provisions.

Additionally, it is important that governments are accountable for the spending of moneys appropriated for their use by the parliament. For this reason, the Auditor-General, supported by the Australian National Audit Office (ANAO), regularly reviews the processes and actual spending of government. The Auditor-General's primary function "is to assist the Australian Parliament in its role of scrutinising the exercise of authority and the expenditure of public funds by the Executive arm of the Commonwealth of Australia".[5] In April 2018, the ANAO tabled a report into the government's use of special appropriations in the 2016–2017 financial year. The audit examined the compliance of government entities for regulatory requirements and the ongoing management of funds. Overall, the audit found that use of funds by Commonwealth entities was compliant. However, the ANAO made recommendations regarding tightening up on the reporting of unused funds. Accountability and transparency in the approval of funds and in the spending of funds is important to Australia's political and legal system.[6]

Whilst complex, a detailed understanding of the role of the parliament in authorising expenditure can help demonstrate bicameralism and the separation of powers in Australia. Accountability of the executive and the role of the Auditor-General are important and will be explored further in Unit 4.

5 Australian National Audit Office, 2018, 'The purpose of the ANAO', <https://www.anao.gov.au/about/australian-national-audit-office>.

6 Australian National Audit Office, 2018, Management of special appropriations, Canberra, <https://www.anao.gov.au/work/performance-audit/management-special-appropriations>.

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

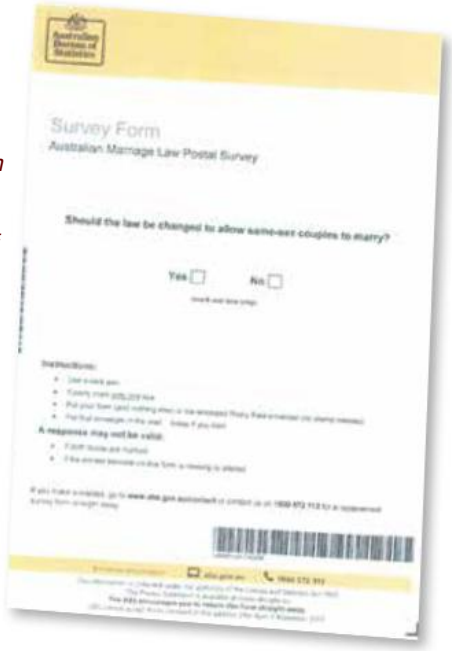
Recent changes to the Commonwealth *Marriage Act 1961 (the Marriage Act)* are a good example of how laws come to change.

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*.[7]

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.

7 Australian Bureau of Statistics, 1800.0 - Australian marriage law postal survey 2017, <http://www.abs.gov.au/ausstats/abs@.nsf/mf/1800.0>.



■ Figure 5.14 — A sample copy of the postal survey form sent to all qualified voters. *Source: Australian Bureau of Statistics, Commonwealth of Australia*

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 please see the relevant depth study on pages 102.

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.

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.

Changes to the Marriage Act

Australia is considered to be a liberal democracy in which individual rights and freedoms are officially recognised and protected. However, a close examination of the history of rights within our political system reveals that this has not always been the case for all groups. The rights of same-sex couples to equality before the law, especially with respect to marriage, has been one such area.

The Constitution vests power to make law with respect to marriage in both the federal government and state governments under **Section 51(xxi)**. The Constitution does not outline what marriage is or who can get married. The details on how marriage is to be conducted was first outlined by the Commonwealth's *Marriage Act 1961*. Since then any further legislation enacted by a state or territory government that was inconsistent with the *Marriage Act* became essentially invalid.

It was not until the Liberal National Coalition Government, led by Prime Minister John Howard, enacted the *Marriage Amendment Act 2004* that marriage was defined as being between a "man and woman".

Political support for same-sex marriage in Australia has consistently lagged behind that of public opinion. In 2004 the official policy of the two major parties in our liberal democracy was to oppose same-sex marriage. The Australian Labor Party (ALP), after a decision of its National Conference in 2011, was the first of the major parties to allow its members a conscience vote on the issue. Minor parties to the left of the political spectrum were quicker to adopt the policy, with the Greens consistently supporting the idea as part of its party platform. The Liberal Party of Australia did not allow a conscience vote until 2017 under the leadership of Prime Minister Malcolm Turnbull.

Throughout this period of time public pressure for the law to change grew for a variety of reasons including:

- international pressures; and
- domestic pressures.

Internationally, court decisions made in countries such as Canada and state jurisdictions such as Massachusetts legalised same-sex marriage as early as 2004. Within the US, the right to marriage for same-sex couples was entrenched when the US Supreme Court handed down its decision in the case of *Obergefell v Hodges 2015*. In the 5–4 decision the Court determined that all fifty states of the US were to perform and recognise the marriages of same-sex couples on the same terms and conditions of opposite-sex couples. Also in 2015, the Government of Ireland held a referendum on whether to permit same-sex marriage in the Republic of Ireland. This was necessary because redefining marriage required a change to their constitution. The resultant 'yes' vote of 62.07 per cent amended the Constitution of Ireland to allow for a marriage between two people to take place irrespective of their gender. It was also the first time that a state legalised marriage through a popular vote.

Domestically, support for same-sex marriage had also been growing across the political spectrum. Prominent Liberal figures such as Malcom Turnbull and Christopher Pyne, and Liberal Democrats Senator David Leyonhjelm were public supporters of same-sex marriage. Support also came from the ALP, with former Prime Minister Kevin Rudd as well as Tanya Plibersek, Anthony Albanese and Opposition Leader Bill Shorten amongst those in support of equality.

As with any pluralist society, there were also those who opposed the idea of same-sex marriage. Conservative elements of the Liberal Party such as Tony Abbott and Peter Dutton, as well as Australian Conservatives' Senator Cory Bernardi, consistently supported the traditional concept of marriage.

Between the introduction of the *Marriage Amendment Act 2004* and 2018 there were 22 unsuccessful PMBs introduced to parliament regarding the issue of same-sex marriage. The initial push towards a national plebiscite occurred in May of 2015 when the then Leader of the Opposition, Bill Shorten, introduced a private member's bill, the Marriage Amendment (Marriage Equality) Bill 2015, into the Commonwealth Parliament. Recognising that there had been a change in the political mood of the Australian electorate, then Prime Minister Tony Abbott committed his party to a "very full, frank and candid and decent"[8] debate regarding the PMB. Mr Abbott called a cross-party meeting of Liberal and National MPs to determine Coalition policy. The conservative elements of the Nationals swayed the vote, with 66 members voting against a free vote on same-sex marriage and 33 voting for. On

8 AAP, '"Decent" debate about gay marriage: PM', SBS News, 27 May 2015, <https://www.sbs.com.au/news/decent-debate-about-gay-marriage-pm>.

11 August 2015, Mr Abbott announced the outcome of the meeting and indicated that it was his "strong disposition"[9] to hold a national vote regarding the issue.

Bill Shorten's PMB was unsuccessful, but the issue remained topical. On 14 September 2015 Malcolm Turnbull successfully challenged Tony Abbott for leadership of the Liberal Party. Same-sex marriage lobby groups such as The Marriage Alliance hoped Prime Minister Turnbull would allow members of his party a free vote. However, he was politically hamstrung by his need to retain the support of the conservative factions of his party.

Pressure on the government regarding the issue continued to build and in March 2016, led to the ALP push for the suspension of parliamentary business to debate same-sex marriage. In order to deflate the issue, then Attorney-General George Brandis announced the government would seek to hold a plebiscite in 2017 if re-elected. The Liberal party took this promise to the electorate in the July 2016 election which they narrowly won.

Following a narrow victory in the 2016 federal election, then Prime Minister Turnbull announced the possibility of a plebiscite in the first half of 2017. A plebiscite required legislation to be passed by the Commonwealth Parliament, something that would be difficult if not impossible as the Senate was controlled by the opposition and cross benchers, who were not agreeable. Turnbull again affirmed that the Liberal Party was committed to holding the plebiscite "as soon as practicable".[10] However, rumblings from the conservative wing of the party began to emerge, with some individuals such as Tony Abbott and Cory Bernardi stating that should the plebiscite be unsuccessful it would be the end of the issue for at least three years.

Leader of the Greens, Senator Richard Di Natale, announced that his party would not support legislation on the plebiscite. Both the Greens and the Nick Xenophon Team (NXT) held to the view that same-sex legislation could be introduced into parliament and potentially passed using normal legislative processes to become law without the need for a costly and "'hateful' campaign"[11] that may lead to negative impacts for the LGBTQI community.

The Plebiscite (Same Sex Marriage) Bill 2016 was introduced into the parliament by the government on 14 September 2016. The plebiscite question was revealed as 'Should the law be changed to allow same-sex couples to marry?' to which Australians could answer only 'yes' or 'no'. Public funding of $15 million dollars was devoted to both the 'yes' and 'no' campaigns. By October, the ALP announced that it would not support the plebiscite, making it even more challenging for the government to get the numbers to push the plebiscite through the Senate. The bill passed through the lower house, but failed to pass through the Senate.

In November, a Senate Select Committee was established to discuss the proposed Marriage Amendment (Same-Sex Marriage) Bill to be introduced assuming the success of a plebiscite on the issue. The Committee received over 401 submissions from groups as diverse as the Christian pressure group, FamilyVoice, and the Parents and Friends of Lesbians and Gays, both of which were opposed to the idea of the plebiscite. Concerns raised by the groups included whether or not the bill would allow for civil celebrants to have the right to refuse to officiate at same-sex marriages and whether religious bodies would have the right to provide goods and services reasonably incidental to a same-sex marriage. The recommendations of the Committee were announced on 15 February 2017, including a recommendation for a new subdivision of marriage celebrant. It was proposed that the draft bill should allow ministers of religion to refuse to perform same-sex marriages, but this protection was not to be extended to civil celebrants.

Concerns about the recommendations of the Senate Committee led to further discontent on both sides of the debate. Conservatives were angered about the lack of protections while supporters believed that any protections for celebrants and business were divisive. In March 2017 a public letter signed by twenty prominent CEOs of large Australian businesses was sent to the government urging then Prime Minister Turnbull to legislate for same-sex marriage.

Frustrated with the lack of progress on the plebiscite, the government sought advice on

9 Henderson, Anna, 'Same-sex marriage: Tony Abbott has 'strong disposition' to put decision to popular vote', ABC News, 2015, <http://www.abc.net.au/news/2015-08-12/strong-disposition-for-same-sex-marriage-popular-vote-abbott/6692508>.

10 AAP, 'Same sex marriage as soon as practicable', SBS News, 2016, <https://www.sbs.com.au/news/same-sex-vote-soon-as-practicable-turnbull>.

11 Anderson, Stephanie, 'Greens to vote against same-sex marriage plebiscite', ABC News, 2016, <http://www.abc.net.au/news/2016-08-26/greens-move-to-block-same-sex-marriage-plebiscite-labor-equality/7788970>.

conducting a plebiscite via a postal survey. Fracturing was beginning to occur within the Coalition. Some individuals within the Liberal Party sought to push ahead with proposed legislation to legalise same-sex marriage through the parliament. On 9 July 2017, Liberal Senator Dean Smith announced that he would introduce a draft private senator's bill to legalise same-sex marriage. Conservative members of the party instead pushed for the postal survey.

The matter continued to be divisive until it was brought to a head at a meeting of the Liberal Party Room on 7 August 2017. The party again affirmed its decision to hold a plebiscite, but decided that, should the plebiscite be rejected by the Senate, the government would pursue a voluntary survey by mail.

The following day the government announced that such a survey could be conducted under the delegated authority of the Australian Bureau of Statistics (ABS). The survey was to be mailed out by the ABS to voters, with completed votes to be returned by 7 November 2017. This would enable a result to be made available no later than 15 November 2017. If the survey returned a 'yes' vote a private member's bill could be debated in the final sitting fortnight of the parliamentary year.

> *"The Constitution vests power to make law with respect to marriage in both the federal and state governments under Section 51(xxi)."*

On 9 August 2017 the Senate rejected the motion to debate the Plebiscite (Same-Sex Marriage) Bill 2016. In response, Finance Minister Mathias Cormann made an appropriation to the ABS for the purposes of running a postal survey. Treasurer Scott Morrison issued a direction to the ABS requiring it to collect information on people's opinions on same-sex marriage. The last date that people could register on the electoral roll to be included in the ballot was 24 August 2017.

Two simultaneous High Court actions were instigated against the Turnbull Government with regards to the postal survey. The first action was launched in August on behalf of Shelley Argent (representing Parents and Friends of Gay and Lesbian Children), Felicity Marlow (representing Rainbow Families) and independent Member of the House of Representatives (MHR), Andrew Wilke. A second challenge was launched soon after by the Human Rights Law Centre on behalf of the pressure group Australian Marriage Equality and Greens Senator Janet Rice. In both cases the challenge was based on concerns that the postal survey could breach the ABS remit to gather facts and figures, and also challenged whether the government had authority to appropriate the $122 million spending on the survey. The High Court agreed to hear arguments in the cases on 5–6 September 2017.

Following the hearings the High Court handed down a summary ruling on the matter. The court found that the government did, in fact, have authority to conduct the survey through the ABS. The High Court's unanimous reasons determined that the funds for the survey had been appropriated by the parliament, and that it was at the Finance Minister's discretion to determine whether the spending was unforeseen. As such there could be no error in law on the part of Finance Minister Mathias Cormann. Further, the High Court found that the information to be collected was 'statistical information' of matters prescribed in the *Census and Statistics Regulation 2016*. For these reasons, the High Court rejected the grounds of the plaintiff's application.

The High Court decision cleared the way for the government to move ahead with the postal survey. Campaigning on the various sides of the debate began in earnest. Marketing analytics firm, Ebiquity, estimated that by the end of September the 'no' campaign had spent over $4 million on television advertising to support their case. This included spending on a controversial 'you can say no' ad featuring a Sydney GP, Pansy Lai, mother of four, Cella White, and pastor, Heidi McIvor. The 'yes' campaign, on the other hand, had spent under $2 million on television ads.[12]

On the 15 November 2017, the results of the postal survey were announced by the ABS, with 61.6 per cent of respondents voting in favour of same-sex marriage and 38.4 per cent voting against. While elections and referendums are compulsory in Australia, this postal survey and other ballots in the past were not. Nearly 8 out of 10 eligible voters returned the survey. This is impressive, particularly when compared to the last non-compulsory ballot at a federal

12 Bickers, Claire, 'Same-sex marriage plebiscite: Huge difference in 'Yes' and 'No' advertising dollars', 26 September 2017, The West Australian, <https://thewest.com.au/news/australia/same-sex-marriage-plebiscite-huge-difference-in-yes-and-no-advertising-dollars-ng-b88610512z>.

level in Australia, the 1997 Constitutional Convention election.[13] Overall, in the postal survey each of the states and territories of Australia returned a 'yes' vote, with only 17 of the then 150 electorates returning a 'no' vote.[14] For many commentators, the figure in favour of the 'yes' vote was a strong indication that the majority had voiced their support for same-sex marriage.

In response to the survey results the government promoted a PMB entitled Marriage Amendment (Definitions and Religious Freedoms) Bill 2017. The bill was introduced to parliament by Western Australian Senator Dean Smith and was co-sponsored by eight other senators from Labor, Greens, NXT and Derryn Hinch's Justice Party. The bill would amend the *Marriage Act 1961* so that marriage was defined as a union between 'two people'. Furthermore, the bill would recognise same-sex marriages that had been formalised overseas and provide protections for religious celebrants, ministers of religion and bodies established for religious purposes.

The bill was introduced in the Senate on 15 November 2017. The *Committee of the Whole* agreed to eight amendments moved by Attorney-General Senator George Brandis to ensure that the provisions of the bill aligned with other existing Commonwealth laws. Such amendments included the ability to remove gendered language and to recognise past same-sex marriages solemnised overseas, as well as consequential amendments to numerous Commonwealth laws for consistency. These amendments were agreeable to Senator Smith and most political parties. The amendments were carried and the bill passed the Senate on 29 November 2017 by 43 votes to 12. Despite Penny Wong declaring that "this day has been a long time coming",[15] there were over 17 members of the Senate who chose to abstain.

The second hurdle faced by the bill was the House of Representatives. Members of the House of Representatives had to choose whether to vote according to their own conscience (as a trustee) or to represent the views of their electorate (as a delegate). For example, Nationals backbencher David Littleproud MHR (Maranoa), vowed to represent the 56.1 per cent of his electorate that had voted against same-sex marriage in the plebiscite. Other opponents of the same-sex marriage bill chose to absent themselves from the chamber during the vote. In doing so, these members, including Barnaby Joyce (former Deputy Prime Minister and leader of the Nationals), former Prime Minister Tony Abbott and then Treasurer Scott Morrison, left their constituents without representation in the vote. This may reflect the contrasting demands upon those MPs as delegates or trustees, where their personal views did not reflect the views of their electorates.

> *"Members of the House of Representatives had to choose whether to vote according to their own conscience or to represent the views of their electorate."*

The bill eventually passed in the House of Representatives with a vast majority as only 4 MHRs voted against the third reading on 7 December 2017. Indeed, some MPs (from both major political parties) voted in a way that was inconsistent with their electorates' expressed views in the postal survey. When justifying his reasons for not voting, Barnaby Joyce declared, "I said I'd never vote against the wishes of the Australian people and I didn't".[16] Proponents of the bill, such as Senator Dean Smith, were more positive about its passage through the parliament, declaring that "people can be proud that over the last few weeks, they have seen the best of their parliament, the best of parliamentarians… the real challenge going forward is to think about how we can do this more often, how we can put the politics and partisanship aside".[17]

The bill became an Act when it was signed by Governor-General Sir Peter Cosgrove on 8 December 2017. The first legal celebrations of same-sex marriages were formally able to take place on the 9 January 2018 when the Act came into effect (although some exemptions for earlier marriages were made for medical reasons).

13 The 1997 ballot was to elect representatives to a constitutional convention to decide what form of a republic would be put to referendum in 1999. The ballot attracted only 46.9 per cent participation of eligible voters.

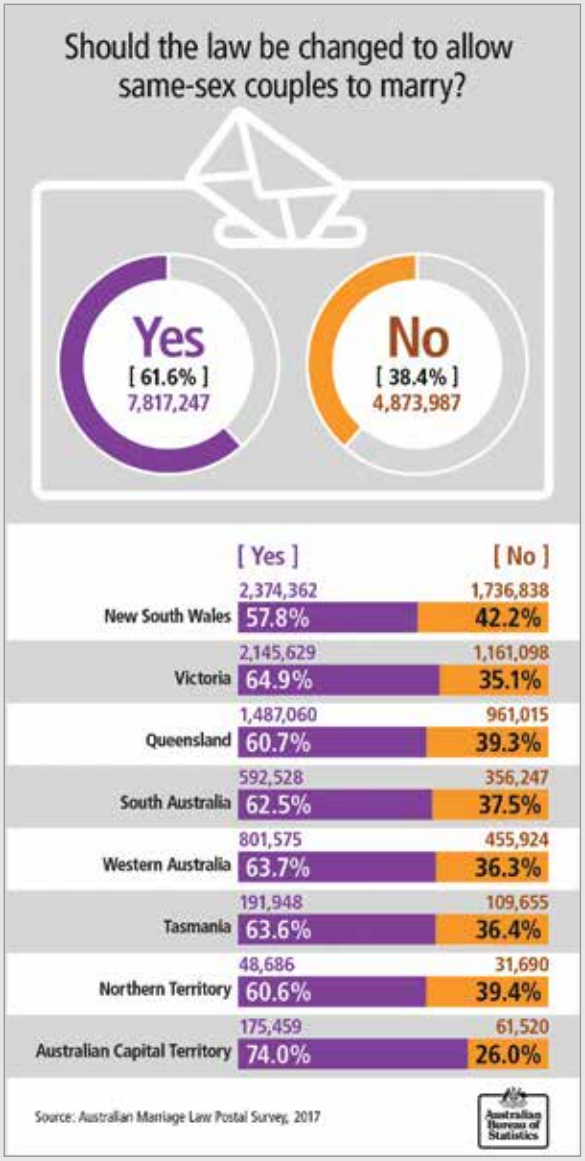
14 Australian Bureau of Statistics, 1800.0 - Australian Marriage Law Postal Survey 2017, <http://www.abs.gov.au/ausstats/abs@.nsf/mf/1800.0>.

15 Senator Penny Wong, @SenatorWong, "This day has been a long time coming. A day for which many in our community have struggled. A day we have hoped for. Today the Senate voted for #marriageequality", 29 November 2017, 10.26 am, tweet.

16 Henderson, Anna, 'Same-sex marriage: This is everyone who didn't vote to support the bill', ABC News, 8 December 2017, <http://www.abc.net.au/news/2017-12-08/same-sex-marriage-who-didnt-vote/9240584>.

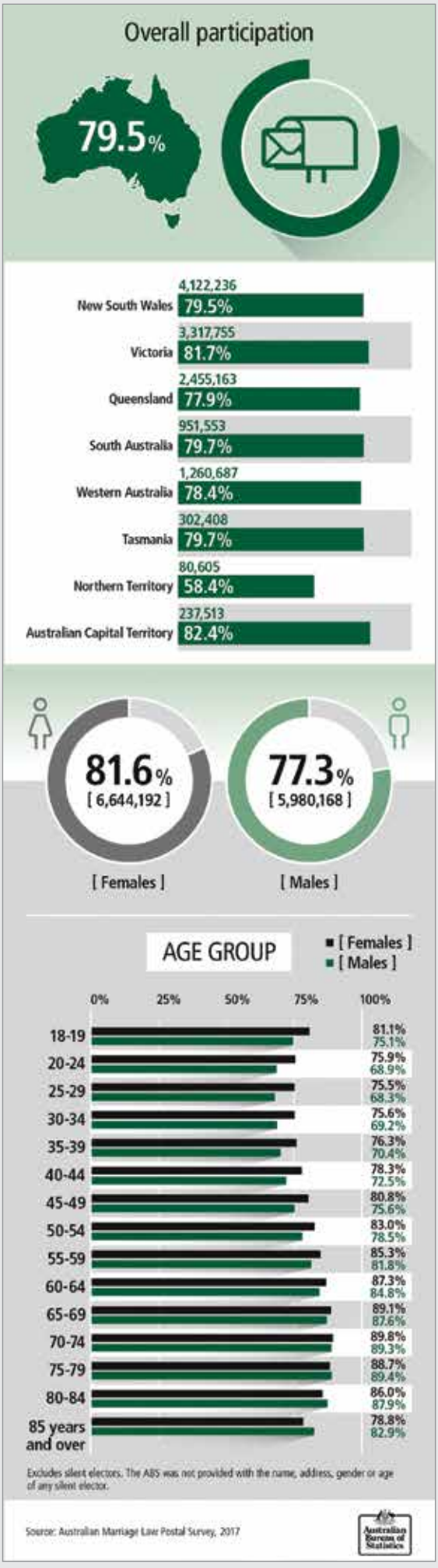
17 Senator Dean Smith, 'MPs vote Yes to same-sex marriage', PoliticsNow. The Australian, 7 December 2017, <https://www.theaustralian.com.au/national-affairs/politicsnow-ssm-bill-decided-today-citizenship-saga-continues/news-story/642ba787fcb52a24f08d61be8ac650d7>.

The bill is an example of a private senators' bill that succeeded with a conscience vote.



■ Figure 5.15 — Breakdown of participation in the Australian Marriage Law Postal Survey, 2017.
Source: Australian Bureau of Statistics, Catalogue Number 1800.0 Australian Marriage Law Postal Survey, 2017, <http://www.abs.gov.au/ausstats/abs@.nsf/mf/1800.0>

Some MPs voted in a way that was inconsistent with their electorates' expressed views in the postal survey.



Consolidating laws

The rule of law requires laws be clear and coherent. The existence of outdated or confusing law is damaging to the rule of law.

Periodically the parliament will repeal several old Acts and replace them with one consolidating Act. This simplifies and updates laws to ensure statutes stay up to date. Consolidating legislation helps tidy up the laws and reduces complications and inefficiencies.

There have been at least four major Commonwealth consolidations since Federation — 1911, 1935, 1959 and 1973.

> *Parliament is superior to the courts.*

A particularly important consolidation occurred in 1947. After a successful referendum in 1946, which added Section 51(xxxiiiA) to the Constitution, the Commonwealth was allowed to start paying additional social welfare payments. Since Federation in 1901 the federal government had only been able to pay invalid and old age pensions, but the 1946 referendum added many other forms of welfare payments to the list. Maternity allowance, child endowments, unemployment benefits, sickness benefits, benefits to students and other forms of welfare were added and, as a result, new laws were necessary.

Instead of creating an Act for each new form of welfare the Commonwealth Parliament repealed the previous Invalid and Old-Age Pension Acts 1908 and rolled these pensions over into a new piece of legislation called the *Social Services Act 1947*. The new Act also included the new forms of welfare.

Responding to court decisions and judge made common law

Courts make decisions on cases that come before them. All cases involve two parties who are in dispute about the meaning of law and how it should apply to them.

Courts resolve disputes by adjudicating:

- the specific facts of the case (the evidence); and
- the law which applies in the particular circumstances of the case.

All cases have unique facts and in most cases there will be existing law that applies to the case.

Courts and the law - the basics

The next chapter outlines how courts interpret the meaning of law in order to apply it to each case. The act of 'interpreting the law' (adjudication) can mean that courts alter the *meaning* of law by deciding how it should fit the unique circumstances of a case. Courts cannot alter the actual words of a law, but they can offer different *interpretations* of the words. A different interpretation will change the meaning of a word, and changing a word's meaning through interpretation can change the meaning of an Act.

In some rare cases there may be no law that applies to a particular case. Courts must still resolve the dispute. In these cases, the court's decision becomes new law (common law or precedent). This is explained in detail in the next chapter.

For now, students should be aware that courts:

- interpret the meaning of parliament's Acts when they decide cases; and
- can sometimes create new common law where no law exists and, thus, close a gap in the law.

> *Passing an Act to abrogate (or override) a court interpretation is parliament's way of asserting its authority as the supreme law maker.*

The Parliament is always aware of important court decisions. It carefully assesses how each significant court decision affects the way its statutes work in the real world. Parliament may disapprove of changes to the meaning of a statute resulting from judicial interpretation. In other words, parliament may be unhappy with the way courts are interpreting its laws. Passing an Act to abrogate (or override) a court interpretation is parliament's way of asserting its authority as the supreme law maker.

Abrogation

Parliament is superior to the courts. It may override (or abrogate) court decisions by passing an Act. An example is the Western Australian Criminal Code, the *Western Australian Criminal Code Compilation Act 1913* (WA). Before this Act was passed most of Western Australia's criminal law was composed of common law decisions by

courts over many years. Western Australian criminal law was case law until parliament overrode and codified it with a statute.

Over recent decades the Commonwealth and state parliaments have codified much of the common law built up over decades by higher courts (or centuries in the case of precedents inherited from Britain).

In recent years the Western Australian Parliament has capped the amount of damages courts may award in negligence cases. Before this, courts had set the amounts themselves based on previous court decisions and the judge's discretion. Damages had become very high in some cases. Some businesses were forced to close because of high insurance premiums caused by increasing legal risk. Parliament responded to community concern and overrode the court's ability to set the amount of damages. Damages are now governed by statutory limits that judges must follow - the rule of law requires them to do so.

Figure 5.16 — The High Court altered common law by overturning terra nullius. *Source: Alan Moir, 1992, <https://twitter.com/moir_alan/> and <http://www.nma.gov.au/exhibitions/off_the_walls/timelines>*

The Western Australian Parliament, following review by the Law Reform Commission of Western Australia in 1980, also acted to abrogate the precedent of *Searle v Wallbank (1947)* that reinforced the judgement in *SGIC v Trigwell (1979)* by the High Court of Australia. Effectively, this meant that those occupying land adjacent to a highway had no obligation to fence the land or take reasonable care to prevent animals from straying onto the road. In response, the Western Australian Parliament passed the *West Australian Highways (Liability for Straying Animals) Act 1983* (WA) to ensure that farmers were liable for their animals straying onto highways, effectively allowing farmers to be sued for negligence. All other states in Australia passed similar legislation to overcome the precedent by the High Court.

Codifying legislation

Occasionally a court decision will create new common law or discover rights that the parliament wishes to support, reinforce or to clarify.

The best historical example of this is *Mabo v Queensland (No.2) 1992.* In this case the High Court of Australia made a decision with profound implications for the law across the whole of Australia. Eddie Mabo, an indigenous man from Mer Island in the Torres Strait, fought the Queensland Government over the status of his island home. He argued that he and his people had inhabited the Murray Islands since ancient times and 'owned' the island. He argued he and his people had a form of 'native title' to the land. The Queensland Parliament had declared the islands to be the property of the Crown (that is, government owned) based on the legal principle of *terra nullius,* 'land belonging to no one', which had applied since European colonisation.

The High Court found in favour of Eddie Mabo. The decision abolished *terra nullius* as a legal principle throughout the whole of Australia, replacing it with common law 'native title'. The problem was the whole continent had been settled on the principle of *terra nullius* and existing land law was based upon it. The foundations of all that law had been demolished by the *Mabo* precedent.

The Commonwealth Parliament had to act, and it had a choice. Parliament is sovereign over the courts. It could abrogate *Mabo,* overriding it and reinstating *terra nullius* in statute. Or, it could support *Mabo* by clarifying what 'native title' actually meant in statute law, who could claim it and how.

The parliament regarded *Mabo* favourably. The High Court recognised and righted a historical wrong committed against Australia's indigenous inhabitants. The Commonwealth Parliament passed the *Native Title Act 1993* to support and clarify the High Court's *Mabo* decision. The Act sets out in law where native title may exist, who can claim it and what must be proven to substantiate a claim. The Act also created the Native Title Tribunal (located in Perth, Western Australia) to hear and resolve claims.

Factors affecting the making of statute law

The Commonwealth Parliament spends a significant proportion of its time considering government legislation. Typically, the House of Representatives dedicates more time to government business than the Senate does. In the 45th Parliament, under the Turnbull–Morrison Governments, 46 per cent of the House of Representatives' time has been spent on government business. The Senate, meanwhile, has spent only 39.1 per cent of its time considering government matters.

Commonwealth Parliaments also have had varying success in the passage of legislation. Most students may expect that minority governments would reduce the likelihood of government bills being passed. However, perceptive students will note that this can be true or false depending on the circumstances. The minority Gillard Government proved quite successful in seeing legislation through the houses—almost as accomplished as the majority Howard Government that also controlled the Senate. Other majority governments, under Prime Ministers' Rudd, Abbott and Turnbull, did not have control of the Senate and did not attain the levels of legislative success that both Prime Ministers Gillard and Howard enjoyed.

Parliament	Time	Per cent of Time
41st (2004–2007)	683 hours 8 minutes	45.6 per cent
42nd (2008–2010)	537 hours 43 minutes	47.1 per cent
43rd (2010–2013)	602 hours 15 minutes	42.3 per cent
44th (2013–2016)	593 hours 8 minutes	41.8 per cent
45th (2016–)*	400 hours 16 minutes*	39.1 per cent*

■ Table 5.1 — Time spent on government bills in the Senate.
Source: Parliament of Australia, 'Time spent on the consideration of legislation', <https://www.aph.gov.au/Parliamentary_Business/Statistics/Senate_StatsNet/legislation/timespent>

Parliament	Bills Proposed	Acts (passed and assented to)	Success Rate (per cent)
41st (2004–2007)	611	549	89.8
42nd (2008–2010)	571	409	71.6
43rd (2010–2013)	683	566	82.9
44th (2013–2016)	547	380	69.5
45th (2016–)*	530*	316*	59.6*
Average per year (1901–2017)	126	108	85.7

■ Table 5.2 — All bills and Acts in the Commonwealth Parliament.
* = to 25 October 2018
Source: Parliament of Australia, 'Parliamentary Business. Statistics', <https://www.aph.gov.au/Parliamentary_Business/Statistics/~/link.aspx?_id=1EED8E36E93E4CB7912BB96670720662&_z=z> and <https://www.aph.gov.au/Parliamentary_Business/Statistics/~/media/889A1A19021743AB84B9F39180031A72.ashx>

The value of committees in law making

Parliament is composed of two houses containing a total of 226 members who participate in the law making process. To support the parliament's role to create, amend and repeal statutes, sub-sets of these members work in parliamentary committees to review proposed legislation, inquire into key issues and also propose statutes to the parliament. A *parliamentary committee* is a specialised subset of the members of parliament. A committee has a defined membership and a specific area of work to focus on.

Committees are composed of members of the current parliament. They are formed by and within a parliament and must be dissolved when the parliament is dissolved. They can be formed by one house of parliament (House or Senate committees) or both houses of parliament collectively (joint committees). Parliamentary committees are not formed by the executive and that is partly why an assistant minister or minister may not serve on a committee.

Because committees are made up of members of parliament, most of whom are members of a political party (partisan representatives), rather than independents, the make-up of parliamentary committees reflects the composition of the house(s) from which they are formed. For example, **House of Representatives committees** have more members from the governing party or parties than from the Opposition because the government has more seats than the Opposition in that house. This automatically gives the government a voting majority in all House of Representatives committees. We have noted elsewhere that the House of Representatives is dominated by the executive. So, too, are House committees. However, the composition of **Senate committees** reflects the make-up of that chamber. As the Senate is usually a 'hung house' in which no party holds a majority of seats, Senate committees are usually free from partisan dominance by the government. As a consequence there is greater

Parliament	Bills Referred to Committees
42nd (2008–2010)	6
43rd (2010–2013)	224
44th (2013–2016)	10
45th (2016–)*	21*

■ Table 5.3 — Bills referred to committees in Commonwealth Parliaments.
** = Two-year period only to 30 June 2018*
Source: Chamber Research Office, House of Representatives, 'Bills referred to committees of the House of Representatives and joint committees for report', 2018, <https://www.aph.gov.au/Parliamentary_Business/Statistics/~/media/3CB07587101542789B4CECA8AFE1F7AA.ashx>

diversity in Senate committees than House of Representatives committees.

Further, each of these committees will either be a standing or select committee. **Standing committees** are formed when a parliament is first established after an election. They endure for the life of the parliament, being dissolved along with the parliament prior to the next election. **Select committees** are formed for a particular purpose and dissolve when that purpose is achieved.

All committees have a purpose. Their particular area of focus may be to inquire into legislation generally or to specialise in particular areas of legislation, to investigate a particular issue or to scrutinise the activities of government departments or agencies.

Both houses may refer bills to committees as part of their law making process. As Table 5.3 shows, during the 43rd Parliament, under the minority Gillard Government the number of bills referred to committee in the House of Representatives jumped exponentially to 224 bills with 181 reports delivered. This compares to the six bills under the majority Rudd–Gillard Governments, ten bills under the majority Abbott–Turnbull Governments and 21 bills under the Turnbull–Morrison Governments. Overall, 59 per cent of bills referred are done so by the House of Representatives Selection Committee, and 88 per cent of all bills are referred in the second reading stage.[18] During the 43rd Parliament, the Senate referred 404 bills.

Bills can also be considered in detail. In the 45th Parliament (as at 25 October 2018)[19] 449 government bills had been introduced into the House of Representatives, with only 17.6 per cent considered in detail. Of those bills that were considered in detail approximately 60 per cent were subsequently amended. All 546 government amendments (or 100 per cent) that were moved were accepted, whereas only five out of 110 (4.5 per cent) of the Opposition's amendments and one of 82 (1.2%) of crossbencher amendments (by Cathy McGowan) were agreed to. Of the 81 private members' bills introduced into the House of Representatives in the same period, only one bill (1.2 per cent) was considered in detail. None of the 93 proposed amendments were accepted.

Students should consider the large number and range of activities that committees undertake to support the sheer scope and volume of work that the parliament deals with simultaneously. The significant impact that executive dominance has over the lower house becomes clear when considering the bills referred to committee and bills considered in detail between majority and minority governments.

Apart from public hearings, the work of committees is usually conducted behind the scenes and out of the gaze of the media and public eye. The incentive for partisan members of parliament to play the party political point scoring game, so commonly a feature in the main chambers, is much reduced when there is no audience. Committee members work together across party lines much more effectively in this environment.

Committees can focus on the job they have to perform and do so relatively unencumbered by the partisanship of the main chambers. Their tasks are the serious, detailed and sometimes tedious business of scrutinising and debating legislation and issues. Committee members seek to represent the public interest in legislation.

They take detailed submissions from the public, the public service, key stakeholders and others into account and from them develop recommendations for government. They seek out expert technical and legal advice when considering amendments to legislation. They may travel to regions in Australia to take into account local concerns. They write detailed reports that are tabled in parliament so that parliament as a whole can review their suggestions and a government response to parliament can be requested.

18 Chamber Research Office, House of Representatives, 'Bills referred to committees of the House of Representatives and joint committees for report', 2018, <https://www.aph.gov.au/Parliamentary_Business/Statistics/~/media/3CB07587101542789B4CECA8AFE1F7AA.ashx>.

19 Chamber Research Office, House of Representatives, 'Bills considered in detail 45th Parliament', <https://www.aph.gov.au/Parliamentary_Business/Statistics/~/media/00646E6705974F9DAAA5D77A27099C92.ashx>.

Finally, committees enable all parliamentarians to take an active role in the business of the parliament. For backbenchers, who have no role in the executive, participating in committees is their main parliamentary business.

Modern Slavery Act 2018

For example, the Modern Slavery Bill 2018 was proposed following extensive committee processes and requests for information. The bill "establishes a Modern Slavery Reporting Requirement to require certain large businesses and other entities in Australia to make annual public reports (Modern Slavery Statements) on their actions to address modern slavery risks in their operations and supply chains".[20] Ultimately, the bill sought to provide transparency of any risks associated with modern slavery "in mines, in factories, in brothels, in brick kilns, and on construction sites, fishing boats and farms around the world".[21] It sought to enable business, consumers and government to tackle these human rights abuses.

The Joint Standing Committee on Foreign Affairs, Defence and Trade conducted inquiries and produced reports to parliament making findings and recommendations regarding modern slavery. These reports included the:

- *Inquiry into slavery, slavery-like conditions and people trafficking — Trading lives: Modern day human trafficking* 2013 report, produced by the Human Rights Sub-Committee following 82 public submissions, the appearance of the Attorney-General and 10 days of public hearings in 2012–2013; and
- *Inquiry into establishing a Modern Slavery Act in Australia* 2017 report, produced by the Foreign Affairs and Aid Sub-Committee following public submissions from 225 organisations and individuals with ten days of public hearings in 2017.

Following the introduction of the bill in the House of Representatives by the Assistant Minister for Home Affairs on 28 June 2018, the bill underwent additional scrutiny by the:

- Parliamentary Joint Committee on Human Rights that examined the bill's consistency with various international human rights treaties.[22] The committee's August 2018 *Human rights scrutiny report* found that there were "positive human rights implications of the Modern Slavery Bill 2018" and welcomed the "proposed reporting requirements, which promote the right to freedom from slavery and forced labour".[23] However, the committee noted that the measures it proposed "may engage and limit the right to privacy" and sought the minister's advice on whether they were "a reasonable and proportionate means of achieving the stated objective (including any safeguards in place against the disclosure of personal information, or information that could identify the victim or potential victim of modern slavery)".[24]
- Senate Standing Committee on Legal and Constitutional Affairs (Legislation Committee), which received 93 public submissions and conducted 3 days of public hearings. The committee made five recommendations regarding transparency, compliance standards and reputational risk of entities complying with the Act; the appointment of an independent statutory officer to support the operation of the Act; and mandatory penalties for non-compliance. Its sixth recommendation, though, was that the bill be passed, subject to the committee's five other recommendations. The Morrison Government responded to the report in October 2018, accepting three recommendations, noting two others and not commenting on the sixth.[25]
- Senate Standing Committee for the Scrutiny of Bills. In its August 2018 report, the *Modern Slavery Bill 2018* is listed as a bill on which the committee made no comment.[26]

The membership of all of these committees has been diverse and has changed throughout the early inquiries and subsequent examinations during the passage of the Modern Slavery Bill

20 Parliament of Australia, 'Summary. Modern Slavery Bill 2018', <https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=r6148>.

21 Parliament of Australia, 'Bills. Modern Slavery Bill 2018. Second Reading', <https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id:%22chamber/hansardr/429b4c41-4a6c-465d-a259-05e8252b994d/0037%22>.

22 These international human rights treaties are the: ICCPR, ICESCR, ICERD, CEDAW, CAT, CRC and CRPD.

23 Parliamentary Joint Committee on Human Rights, Human rights scrutiny report, Report no. 8, 2018, Commonwealth of Australia, p 20, <https://www.aph.gov.au/~/media/Committees/Senate/committee/humanrights_ctte/reports/2018/Report%208/Report8.pdf?la=en>.

24 Parliamentary Joint Committee on Human Rights, Human rights scrutiny report, Report no. 8, 2018, Commonwealth of Australia, p 22.

25 Legal and Constitutional Affairs Legislation Committee, Modern Slavery Bill 2018 [Provisions], Commonwealth of Australia, 2018, p vii. <https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/ModernSlavery/Report>.

26 Standing Committee for the Scrutiny of Bills, Scrutiny digest 8 of 2018, Commonwealth of Australia, 2018, p 36, <https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Scrutiny_of_Bills/Scrutiny_Digest>.

2018 through the parliament. Through the committee process, the bill received input from Attorneys-General of both Labor and Coalition governments. The process used facilitated the purpose which has been encompassing of the views of all stakeholders concerned both domestically and internationally. It is an impressive example of the law making process.

The bill passed the House of Representatives and was subsequently sent to the Senate where it was successfully amended eight times by the government. The Senate then agreed to the third reading and the House of Representatives approved of the Senate amendments, marking the passage of the bill through both Houses on 29 November 2018. The *Modern Slavery Act 2018* received royal assent on 10 December 2018 and the entirety of the Act will commence within six months of proclamation.

> *Do not neglect or underestimate the value of committees in the law making process.*

Do not neglect or underestimate the value of committees in the law making process as committees enable the parliament to perform its functions to a much higher standard.

The role of private members in law making

All members of parliament are expected to participate in the law making process. As a member of the House of Representatives or the Senate they can have a direct impact on the legislative process in a number of ways including:

- voting on government bills in each stage of the law making process:
  - first reading;
  - second reading;
  - committee stage; and
  - third reading;
- by serving on committees of the parliament to review proposed government legislation or conduct inquiries that may lead to the proposal of legislation; and
- initiation of a private member's or private senator's bill.

Each of the above processes are important to helping an individual member of parliament represent the people who elected them and assists parliament as a whole to fulfil its role of legislating and approving expenditure by the executive.

A **private member** of the parliament is any MP acting in a personal capacity. They can be a government member who is not a minister as well as any backbencher, crossbencher and member of the Opposition. An executive member, an assistant minister or minister, could technically act as a private member, though this is very rare. Western Australian Senator Rachel Siewert acted as a private member when she sponsored the *Low Aromatic Fuel Act 2012* to mitigate the negative impacts of petrol sniffing in designated areas of Australia. As did the Leader of the Opposition Bill Shorten when he introduced the Marriage Amendment (Marriage Equality) Bill 2015. Some actions by private members can be successful, whilst others may not be.

Private member's bills are an important element of the law making process as they are often on topics the government has chosen not to legislate upon. Private members are able to propose bills on social issues and on matters that political parties are unwilling or unable to take a policy position as it may be divisive in the community, amongst their supporters or within the political party representatives themselves. These bills can reflect the ideology or personal morals of the sponsor of the bill or the will of their electorate or the wider community. Senator David Leyonhjelm proposed the *A New Tax System (Goods and Services Tax) Amendment (Make Electricity GST Free) Bill 2017* in the Senate. His bill sought to remove the goods and services tax from electricity which he argued was an essential service. Two days after the bill was introduced, despite the support of the crossbenchers, it was defeated in a second reading division by the combined 'noes' of the government and opposition.

Private members' bills also offer the opportunity to members of the parliament to collaborate with others across the political divide. Members of different political parties can recognise a common issue and work together to propose a widely accepted solution to a problem, or an amendment to or repeal of a law. The *Therapeutic Goods Amendment (Repeal of Ministerial Responsibility for Approval of RU486) Act 2005* demonstrates this as four Senators worked together to propose and garner support to remove the ability of the Minister for Health to override certain decisions

1901–1949	1950–1999	2000–
Life Assurance Companies Act 1905	*Matrimonial Causes Act 1955*	*Adelaide Airport Curfew Act 2000*
Commonwealth Conciliation and Arbitration Act 1909	*Australian Capital Territory Evidence (Temporary Provisions) Act 1971*	*Therapeutic Goods Amendment (Repeal of Ministerial responsibility for approval of RU486) Act 2006*
Electoral (Compulsory Voting) Act 1924	*Parliament Act 1974*	*Prohibition of Human Cloning for Reproduction and the Regulation of Human Embryo Research Amendment Act 2006*
Defence (No.2) Act 1939	*Wireless Telegraphy Amendment Act 1980*	*Evidence Amendment (Journalists' Privilege) Act 2011*
Supply and Development (No.2) Act 1939	*Senate Elections (Queensland) Act 1982*	*Auditor-General Amendment Act 2011*
	Income Tax Assessment Amendment Act 1984 [No.2]	*Safety, Rehabilitation and Compensation Amendment (Fair Protection for Firefighters) Act 2011*
	Smoking and Tobacco Products Advertisements (Prohibition) Act 1989	*Territories Self-Government Legislation Amendment (Disallowance and Amendment of Laws) Act 2011*
	Parliamentary Presiding Officers Amendment Act 1992	*Low Aromatic Fuel Act 2013*
	Euthanasia Laws Act 1997	*Marriage Amendment (Definition and Religious Freedoms) Act 2017*

■ Table 5.4 — 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 23 have successfully passed both houses and received assent from the Governor-General.[27]
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>

of the Therapeutic Goods Administration. Senator Fiona Nash (Nationals, NSW), Senator Claire Moore (ALP, Qld), Senator Judith Troeth (Liberal, Vic) and Senator Lyn Allison (Australian Democrats, Vic) all collectively advocated for and successfully achieved a change in Commonwealth law.

Finally, when the government and other political parties choose to support a private member's bill or allow their members to have a conscience vote on the issue, this generally increases the chance of the bill being fully debated and passing both houses successfully. The *Marriage Amendment (Definition and Religious Freedoms) Act 2017* is a recent example of this, with members of both the government and opposition having a 'free vote'.

> *Fewer than two per cent of proposed private members' bills are ever promulgated into law at a Commonwealth level. Despite the rarity of success, private members' bills are a valuable contribution to the legislative, debate and representation functions of the parliament.*

It is necessary to note that a lot of private members' bills do not progress far in the legislative process. A vast majority are introduced in the Senate and few have an opportunity to be fully debated or to pass the Senate itself. Those that are introduced in the House of Representatives have even less chance of being debated or passing the first and second reading stages. This is because the government controls the notice paper in the houses and usually the majority of votes in the lower house. If the government does not support the bill it will also not be amenable to allowing it to progress through the parliament if it can be avoided. Fewer than two per cent of proposed private members' bills are ever promulgated into law at a Commonwealth level. Despite the rarity of successful, private members' bills are a valuable contribution to the legislative, debate and representation functions of the parliament.

27 Table 5.4 does not include successful private members' or private senators' bills introduced by the presiding officers in each house.

Dominance of the legislative process by government

Because Westminster convention provides that the government is formed by the political party or parties that have the support of the majority of the lower house, a parliamentary executive can dominate the House of Representatives, the lower house. The legislative function in the House of Representatives is thus dominated by the executive which may use various tactics to force through its legislation. The gag, guillotine and floodgating are all tactics that can be used to speed up the passage of a bill to pass legislation quickly or reduce scrutiny of a bill.

> *Gags and guillotines are used less frequently in the Senate due to the fact that the opposition and crossbenchers are unlikely to support such a limitation.*

A **gag** often occurs during the second reading debate on a bill where the government may use one of its members — either a minister or a backbencher — to move a motion that the bill be put to the vote. These are known in parliament as 'closure of member' (that the member be no longer heard) or 'closure of question' (that the question be now put) motions. Because the government has a majority of seats in the House of Representatives, gag motions will almost always pass. The effect is to prevent any further debate and so members who were listed to speak to the bill lose the opportunity to do so. In the 44th Parliament, 176 gag motions were used in the House of Representatives compared to 132 gag motions in the 45th Parliament (to 31 October 2018). Compare this to the mere ten gag motions and 19 guillotines of the 43rd Parliament under the minority Gillard Government and the impact that executive dominance over parliament can have becomes clear. Interestingly, on 1 September 2016, the Turnbull Government was the first government since 1962 to lose a closure motion on the floor of the House of Representatives. This occurred because some of its Western Australian members left parliament early to catch flights home and left the government without a majority on the floor of the house. This was a rare occurrence where the government lost control of the lower house.

Before debate commences on a bill the government may move a motion, commonly known as the **guillotine**, that the time allocated to debate be set to a certain limit. Once the time limit expires, which is usually two hours, debate ceases and a vote is taken immediately. Again, the government controls this because it has a controlling vote in the House. An example of this is when the Abbott Government sought to pass its tranche of Clean Energy Legislation (Carbon Tax Repeal) Bills 2013. Senator Mitch Fifield, the Assistant Minister for Social Services, moved the 'declaration of urgency' to declare all eight bills urgent and requiring a limitation on debate. The Senate agreed to this motion and hence restricted the time available for debate of these bills. Despite this successful guillotine motion, in Committee of the Whole stage the Senate defeated this second attempt by the Abbott Government to repeal the Clean Energy Acts.

Time limitations on proposed bills occur in the parliament. An example is the Building and Construction Industry (Improving Productivity) Bill 2013, which the Abbott and Turnbull Governments wished to pass to reinstate the Howard era Australian Building and Construction Commission. The bill was debated and passed quickly in the House of Representatives. The *Financial Framework Legislation Amendment Act (No.3) 2012* was also passed by the Gillard Government under limitations.

Parliament	Gags used	Guillotines used
41st (2004-2007)	152	31
42nd (2008–2010)	91	6
43rd (2010–2013)	10	19
44th (2013–2016)	176	Data not available
45th (2016–)*	132*	Data not available

■ Table 5.5 — Limitations used in the House of Representatives.
* = 45th Parliament to 31 October 2018
Source: Parliament of Australia, 'Parliamentary Business. Statistics', <https://www.aph.gov.au/Parliamentary_Business/Statistics/~/link.aspx?_id=1EED8E36E93E4CB7912BB966707206 62&_z=z>

Gags and guillotines are used less frequently in the Senate due to the fact that the opposition and crossbenchers are unlikely to support such a limitation. In the 44th Parliament ten bills[28] were considered under limitation in the Senate during the Abbott Government and only one bill during the Turnbull Government.

28 Eight of these bills were debated on 10 July 2014 and related to the carbon tax repeal legislation. Students should note that the original Clean Energy bills were also passed through the Senate under guillotine motion.

In the 45th Parliament[29] only one bill in the Senate, the Treasury Laws Amendment (Personal Income Tax Plan) Bill 2018, was considered under limitation and passed into law. This is demonstrated further in the 44th Parliament when the Commonwealth Electoral Amendment Bill 2016 debate went for 39 hours and 4 minutes. Despite gaining the support of the Greens to pass the legislation, the Turnbull Government could not get Greens' agreement to limit debate in the Senate through the gag or guillotine. By comparison, the debate in the Senate on the Marriage Amendment (Definition and Religious Freedoms) Bill 2017, passed in the 45th Parliament, went for 26 hours and 35 minutes without threat of limitation. This shows the restrictions that are evident on the use of these tactics in any chamber when the government does not have control of a majority of the votes.

Floodgating occurs when the government introduces a lot of bills simultaneously into the House of Representatives. This has the effect of overwhelming the deliberative procedures of the law making process. Floodgating is sometimes used in combination with gags and guillotines to push legislation through the House of Representatives quickly, but often at the expense of scrutiny and diversity of input.

This executive dominance may compromise the level of scrutiny provided to bills and the diversity of democratic input. However, it could be argued that the use of gag, guillotine and floodgating tactics are necessary tools of a government to ensure the parliament fulfils its function to legislate.

Delegated legislation

Subordinate authorities

'Subordinate' means under the control or authority of another.

Subordinate authorities are:

- government departments, such as the Department of Home Affairs;
- specialist agencies, such as security and intelligence services. The Australian Security and Intelligence Organisation (ASIO) is an example;
- statutory authorities, such as the Reserve Bank of Australia and the Australian Electoral Commission, which are created and governed by an Act of parliament. Statutory authorities are often delegated wide powers to act independently of the government;
- executive officials, such as senior public servants with decision making power, such as Greg Moriarty who is the Secretary of the Department of Defence; and
- Ministers are members of parliament appointed by the government to lead a government department. Ministers are responsible, and thus subordinate, to the parliament. For example, Christopher Pyne, as Minister for Defence from 28 August 2018, has a leadership role with the Department of Defence and is, thus, subordinate to parliament.

These are all parts of the executive branch of government and are 'under the control or authority' of (or subordinate to) parliament. Recall that the executive is responsible to the parliament in Westminster systems like Australia's.

To 'delegate' means to authorise or place trust in another. An agency with **delegated power** may exercise the power of the delegating authority under the conditions it specifies. The agency which is entrusted with delegated power has no entitlement to the power. If it breaks the trust, then its authority to use the power may be removed or limited by the delegating authority.

Figure 5.17 — ASIO's new central office building in the Parliamentary Triangle, Canberra.
Source: Nick-D, 2014, Own work, CC BY-SA 3.0, <https://commons.wikimedia.org/w/index.php?curid=33256286> and <https://en.wikipedia.org/wiki/Australian_Security_Intelligence_Organisation#/media/File:Ben_Chifley_Building_viewed_from_Mount_Ainslie_June_2014.jpg>

29 As at 31 October 2018.

In the case of **'delegated legislation'**:

- the *delegating authority* is the parliament. It has law making power and the authority to delegate it; and
- the *subordinate authority* is the executive. Government, with its ministers, departments, agencies and officials, is authorised or entrusted with law making power by Acts of parliament.

Parliamentary sovereignty is the principle that the parliament is the supreme institution within the system of government. All institutions, except the Constitution, are subordinate to parliament.

Why law making power is delegated

Why would parliament delegate law making power to the executive? There are two reasons:

1. Efficiency. Some law making is low-order and does not need the high levels of deliberation that parliament provides through the legislative process.

   For example, every year welfare payments are adjusted so that pensions and benefits keep up with rising prices and the cost of living. Parliament delegates the power to change rates of welfare to a government department so that it does not have to amend the Act every time a change is needed. This saves parliament time for more pressing matters.

2. Responsiveness to emergency situations. Deliberative law making by parliament may sometimes be too slow to respond to events. By delegating powers to a subordinate authority, and imposing and monitoring strict conditions on their use, parliament can ensure that Australia can respond quickly to changing circumstances or emergency situations.

   For example, ASIO has wide powers of surveillance and the power to conduct searches and arrests in response to emerging terrorist threats. The following is from ASIO's website and explains the agency's extraordinary powers under the *Australian Security Intelligence Organisation Act 1979* (the ASIO Act):

   > When investigating threats to Australia's security, the ASIO Act allows us to do certain things which would otherwise be unlawful. Use of these special powers is strictly limited by legislation and is available to us only when authorised by a warrant. Special powers provided for by the ASIO Act can allow the Organisation to enter and search premises, intercept and examine items in the mail, install and monitor surveillance devices, monitor telecommunications, and remotely access computers.
   >
   > ASIO can, in exceptional circumstances, obtain warrants to question and/or detain people during investigations into terrorism offences. Questioning Warrants and Questioning and Detention Warrants are issued by an issuing authority who must be a current judge appointed by the Attorney-General and who acts in their personal capacity.[30]

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.

An Act delegating law making power to a subordinate authority will:

- nominate the subordinate authority, such as a government department or a specific official within the executive;
- define the purpose of the delegated law making power;
- specify the extent of the law making power, thus limiting the power; and
- define the circumstances in which the power is to be used, further limiting the power.

How a subordinate authority uses its law making power

Subordinate authorities use delegated legislative power to make **regulations and ordinances.** An **instrument** is another type of law made by subordinate authorities. Regulations, ordinances and instruments have the full power of law because they are made under the authority of an Act of parliament. Regulations give the executive power to 'legislate' without going through the parliament.

For example, the Commonwealth's *Environment Protection and Biodiversity Act 1999* delegates to the Department of Environment and Energy (a government department and part of the executive) the power to make regulations concerning national parks, the movement of

30 Australian Security Intelligence Organisation, 2018, 'ASIO's special powers', <https://www.asio.gov.au/special-powers.html>.

Figure 5.18 — With the advent of new anti-terror laws, the then Minister for Immigration and Border Protection, Peter Dutton MHR, and ASIO were delegated authority to respond to emergency situations.
Source: Alan Moir, <https://twitter.com/moir_alan/> and <http://loonpond.blogspot.com/2015/06/in-which-ewen-jones-helps-promote.html>

plants and animals into Australia, land use and other matters of national environmental significance. These regulations can directly affect people and businesses such as landowners, developers, industry, farmers, local councils, states and territories, and even other Commonwealth agencies.

Students should recognise that regulations made by subordinate authorities can have a profound impact on the way Australians and businesses may conduct themselves. Remember, they have the full force of law and impose obligations required by the rule of law.

> *Parliament's sovereignty and its legal superiority preserve the separation of powers doctrine because parliament can always abrogate judge made common law and disallow subordinate authorities' regulations.*

Some might question why the executive has such enormous law making power. Perceptive students will by now be considering: whether giving legislative power to the executive is a breach of the separation of powers; the extent to which parliament has the sole job to legislate; the risk of giving so much power to unelected officials in subordinate authorities; and how these unelected agencies are held to account.

In what appears to be a breach of the separation of powers, all three arms of government can actually make law. Perceptive students will appreciate that parliament remains the premier law making body because of **parliamentary sovereignty** and the superiority of its laws over common law made by courts as well as regulations made by the government.

Parliament's sovereignty and its legal superiority preserve the separation of powers doctrine because parliament can always abrogate judge made common law and disallow subordinate authorities' regulations. An Act of parliament always trumps a common law precedent or a regulation. Citizens adversely affected by regulations may exercise their political rights and freedoms to petition parliament to modify or disallow regulations. Active political participation by citizens through their parliament gives them the capacity to influence power delegated to subordinate authorities.

Parliament retains oversight and control

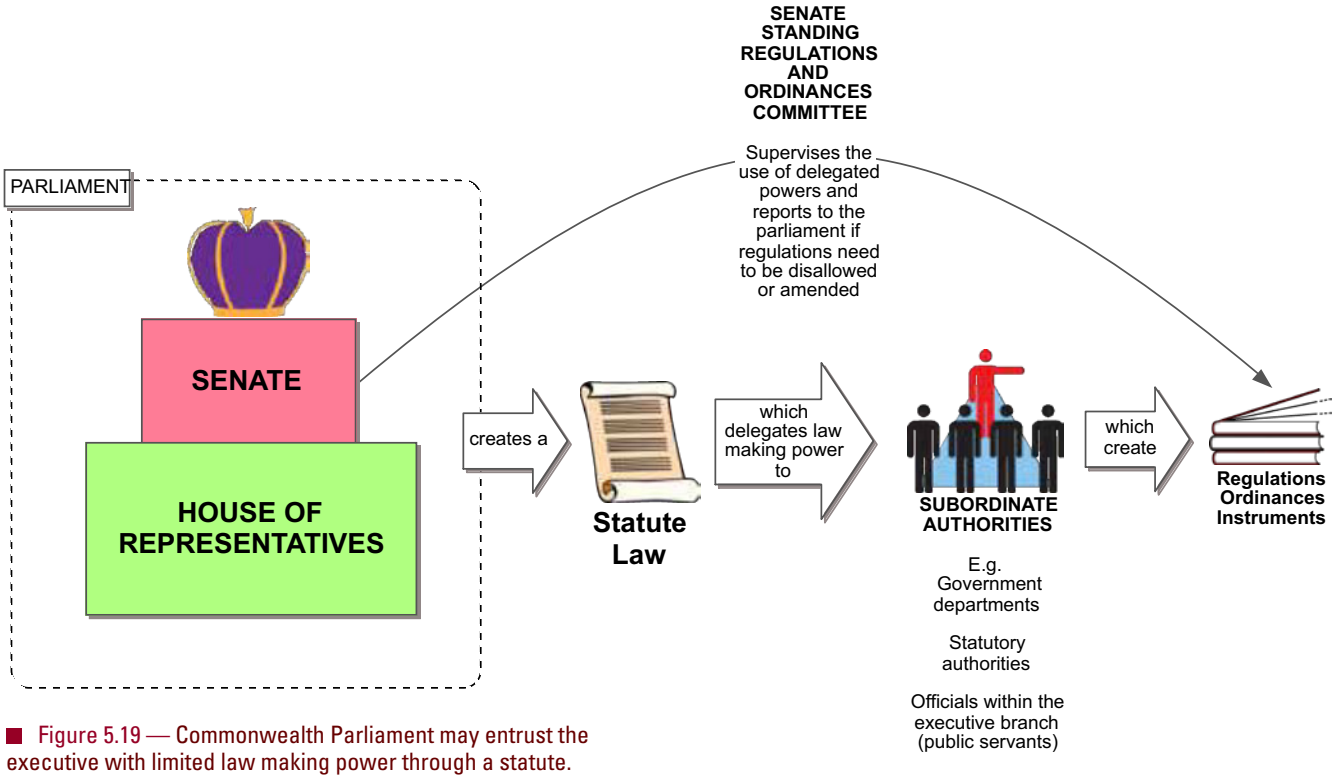
Once an Act delegates law making power, parliament will continually monitor its use by the subordinate authority. A special committee oversees how subordinate authorities use their delegated powers.

At a federal level, the Senate's Standing Committee on Regulations and Ordinances tables a weekly report in parliament, called the *Delegated Legislation Monitor,* in which it publishes its inquiries and recommendations concerning subordinate legislation. This is the committee that guards against executive encroachment into citizens' liberties and rights.

When conducting its inquiries into subordinate legislation the Committee focuses on ensuring that:[31]

- regulations are in accordance with the meaning and purpose of the statute which delegates the law making power;
- the subordinate authority does not use its delegated power to make regulations to trespass unduly on personal rights and liberties;
- the subordinate authority does not unduly make the rights and liberties of citizens dependent upon public servant decisions which cannot be reviewed by a court or tribunal; and
- it does not contain matter[s] more appropriate for parliament to deal with rather than the subordinate authority.

31 Laing, Rosemary, ed, 'Chapter 15, Delegated Legislation and Allowances', Odgers' Australian Senate practice, 14th edn, 2016, <https://www.aph.gov.au/About_Parliament/Senate/Powers_practice_n_procedures/Odgers_Australian_Senate_Practice/Chapter_15>.



■ Figure 5.19 — Commonwealth Parliament may entrust the executive with limited law making power through a statute. Parliamentary oversight of delegated legislation and subordinate authorities exists to check the use of this delegated power.
Source: Stephen King, 2018

The Committee sees its role as ensuring regulations, ordinances and instruments:[32]

- are in accordance with the spirit of the statute, not just the black letter of the law;
- put the onus of proof on the accused in criminal matters;
- do not deny traditional civil and legal liberties, for example, by allowing police or intelligence agencies such as ASIO to search homes or offices without a warrant; and
- do not permit retrospective decisions (that is, a decision back-dated to affect past decisions), particularly involving payment of money such as fines.

The two lists above reveal that the Senate's Standing Committee on Regulations and Ordinances protects against excessive executive power by guarding:

- the law making powers of the parliament;
- the rights of citizens; and
- the processes of fairness and natural justice.

Figure 5.19 illustrates how Acts of parliament delegate law making power to subordinate authorities and how the Commonwealth Parliament oversees the use of such powers. The executive (departments, statutory bodies and officials within the public service) may make regulations and ordinances under the Act that have the full force of law provided by the Act. The subordinate authorities of the executive are continuously scrutinised by the Standing Committee on Regulations and Ordinances in how they use their delegated powers. The parliament will act on the advice of the committee and modify or disallow regulations that breach the spirit of the law or trespass on rights and liberties.

> *"The Senate's Standing Committee on Regulations and Ordinances protects against excessive executive power by guarding the law making powers of the parliament, the rights of citizens and the processes of fairness and natural justice."*

32 Laing, Rosemary, ed, 'Chapter 15, Delegated Legislation and Allowances', Odgers' Australian Senate practice, 14th edn, 2016.

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
  - subordinate 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.
- Statute law sources its authority from democratic legitimacy and constitutional law.

continued overleaf

- 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.
- Subordinate 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 overreaches its power or threatens rights and liberties.

Activities

Short answer

1a) Explain why constitutional law is also called 'superior' or 'fundamental' law.

1b) Outline **three** purposes of constitutional law.

1c) Discuss **one** strength and one weakness of the making of constitutional law in Australia.

2a) Define the term 'statute law' as it applies to law making in Australia.

2b) Briefly explain **three** sources of legislative ideas.

2c) Discuss the extent to which the passage of a bill provides for effective law making.

3a) Explain what is meant by the term 'delegated legislation'.

3b) Distinguish between a 'delegating authority' and a 'subordinate authority'.

3c) Discuss **two** impacts of parliamentary law making power being delegated to the executive.

Source Analysis

Using the depth study 'Changes to the Marriage Act', respond to the following:

4a) Define the term 'private senator's bill'.

4b) With reference to the source, distinguish between the provisions of the 'principal Act' and the 'amending Act'.

4c) Discuss **two** advantages **and one** disadvantage of the legislative process used to introduce same-sex marriage in Australia.

4d) Assess the extent to which the marriage equality debate and postal survey mechanism upheld the principles of a 'liberal democracy'.

Essay response

5) Discuss, with reference to specific laws, the extent to which the Commonwealth Parliament is able to effectively scrutinise proposed bills before they become Acts.

6) Assess the impact of private members compared to ministers on the law making process in the Commonwealth Parliament.

7) Discuss the relative advantages and disadvantages of executive law making compared with parliamentary law making.

Investigation & discussion

8) The introduction and repeal of the Carbon Tax proved contentious.

   8a) Investigate the framework of the *Clean Energy Act (2011)* — commonly referred to as the Carbon Tax — and the *Clean Energy Legislation (Carbon Tax Repeal) Act (2014).*

   8b) Discuss the advantages and disadvantages of parliamentary law making with respect to the introduction and repeal of contentious issues.

continued overleaf

9) Review the factors that may affect the ability of parliament to effectively fulfil its functions.

   9a) Compare what a 'gag' motion and 'guillotine' motion are in parliament, then identify how often these motions are used in the House of Representatives and the Senate;

   9b) Explain how committees work and provide an example of how a committee has contributed to the law making process;

   9c) Explain what a private member is in the parliament and how they can contribute to the law making process;

   9d) Discuss the merits and criticisms of gags, guillotines, flood-gating, committees and private members on the law making process in parliament; and

   9e) Investigate how effective the current parliament is in passing legislation, and explain the composition of the House of Representatives and Senate; as well as how the political parties or cross benchers have used their power to affect the law making of the parliament.

10) Law made by the executive is known as administrative law. Investigate one administrative law, recording the advantages and disadvantages of the law, and then draw a conclusion as to whether, with reference to your example, the executive should have the power to make administrative law. Examples may include:

   10a) the 2011 'Malaysian Swap' deal, initiated by then Minister for Immigration, Chris Bowen MP, and later challenged by Plaintiffs M70 and M106 in the High Court;

   10b) the National School Chaplaincy Program which was later challenged by Ronald Williams in the High Court in 2012; and

   10c) the power of the Commissioner of Taxation (a public servant) to make certain determinations regarding tax paid on imported goods under the *A New Tax System (Goods and Services Tax) Act 1999.*

11) In 2015 the *Acts and Instruments (Framework Reform) Act 2015* was passed by the Commonwealth Parliament in response to a 2008 review of the *Legislative Instruments Act 2003.* The purpose of the new Act was to review the practice of executive law making and seek to ensure that there are limits on executive power. Investigate the *Acts and Instruments (Framework Reform) Act 2015* and identify three ways in which it limits executive law making power.

Courts and the law

Syllabus points:

- **Types of laws made by parliaments, courts and subordinate authorities**
- **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 is the judiciary, and its role in the political and legal system is essential to the doctrine of the separation of powers and the rule of law.[1] It checks and balances the parliament through interpreting statute and, in the case of the High Court, constitutional law. It checks and balances the executive by ruling on the lawfulness of government administration and policy. It even creates its own form of law — called common law — that is complementary to statute law and can alert the parliament to gaps and problems in the law.

The judiciary is appointed and not elected. It may lack democratic legitimacy, but it has great authority, and the public has high regard for its integrity. Importantly, it is an institution built on the protection and enforcement of rights and obligations.

Courts are the main institutions of the judiciary. Systems of government create and administer the law in order to regulate society. Inevitably, disputes about the law arise and it is the role of courts and the judiciary to resolve them.

Courts resolve disputes in 'cases'. Courts consider questions such as: 'does the law apply to the circumstances of this case?' and 'if so, how should it apply?' At the very heart of legal disputes is the meaning of law in specific cases.

When deciding the application of a law, courts determine its meaning in particular situations. Interpreting law is to declare the law because a court makes a declaration about how the law operates in a particular case. Declaring the law can change a law without changing its wording. It makes clear how the law operates where, previously, there was doubt. Future disputes can be resolved more easily because of the legal clarity courts create when they decide cases and declare the law.

"The judiciary may lack democratic legitimacy, but it has great authority, and the public has high regard for its integrity."

Figure 6.1 — The Supreme Court of Western Australia.
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>

Judicial power

Courts resolve disputes between parties. They do so by discovering the truth and then interpreting and declaring the law in a case. A case is a dispute between two parties brought before a court. Interpreting law to fit cases is called **adjudication**. Court decisions in cases are legally binding on the parties involved. The power to impose legally binding decisions is called **judicial power**.

The power and independence of the courts are crucial for democracies. Judicial power is essential for the rule of law because it makes all parties subject to law whatever their importance, wealth or 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. For example, judges can enforce rights that governments may wish to suppress, or compel the powerful to fulfil their obligations to the weak.

"The power to impose legally binding decisions is called judicial power."

The judiciary makes minority rights compatible with majority rule. Protecting rights against arbitrary power is an essential element of the rule of law. Judicial power can uphold the legal rights and obligations of parties, including the government. Legally binding decisions force powerful parties to meet obligations and protect the rights of weaker parties.

Judicial power is the third form of power exercised within systems of government, alongside legislative power and executive power.

1 Law making by parliament and subordinate authorities was covered in Chapter 5.

Trials

Disputes about law are resolved through trial. The purpose of a trial is to discover the truth. Trials have pre-trial, trial and post-trial phases. Each stage has a series of formal processes developed over hundreds of years by English courts. Australia and other former British colonies, such as the United States of America (US), New Zealand, Canada and India, all use the same basic trial processes. The trial system inherited from Britain is called the **adversarial trial**.

Adversaries are opponents in a contest against each other. The basic assumption behind the English adversarial trial is that 'contest' is the best route to the truth. It is assumed that a contest between parties will bring forward the best evidence and argument from each party, thus revealing the truth. Students should note that Australian courts do not 'inquire' into or investigate the truth — the truth is revealed before them. This has important implications for the role of judges, parties and legal representation.

Parties

Parties to a dispute are **legal persons**. Legal persons can be:

- natural persons. Real people are natural persons; and
- artificial persons. Corporations have legal 'personhood' and can be parties to a case. Governments are also legal persons.

Legal persons, both natural and artificial, have rights protected by law and obligations they must honour by law. They may also enter into legal contracts with each other.

Courts make no distinction between the type of legal persons involved as parties to a case.

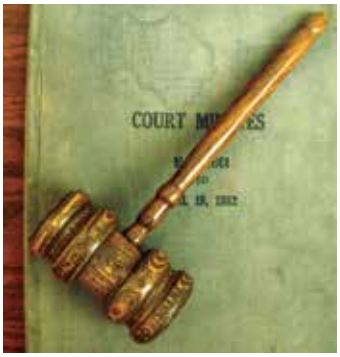


Figure 6.2 — Gavels are used as a symbol of a judge's authority.
Source: Jonathunder, Old gavel and court minutes displayed at the Minnesota Judicial Center, 2008, Own work, CC BY-SA 4.0, <https://commons.wikimedia.org/w/index.php?curid=3899115>

For example, a **civil case** may be a private dispute between neighbours over noise (both natural persons) or a private dispute between corporations over a patent for a new invention (both artificial persons), as was the case between Apple and Samsung over touch screen and wireless patents.

A **criminal case** may be a public dispute between a natural person (the accused) and the State (an artificial person) or a corporation accused of breaking the law and the State (both artificial persons).

A **constitutional case** in the High Court is a dispute about the meaning of the *Commonwealth of Australia Constitution Act 1900* (the Constitution) or the application of constitutional limits on the actions of the legislature, executive or judicature itself. It may involve several States in dispute with the Commonwealth (all artificial persons) about the meaning of the Constitution. Natural persons may even challenge the Commonwealth over the meaning of a law or the Constitution. The flesh and blood person and the enormously powerful Commonwealth are equal parties in the eyes of the court.

Courts view both parties as equals before the law, regardless of who they are or their wealth and power. This is a critical element of the rule of law.

Interpreting law

Courts interpret law by deciding how it fits a particular case. They do so by applying the law to specific facts. Each case is unique. The facts of a case are likely to be similar to earlier cases, but will never be identical. Perceptive students will recognise that the 'uniqueness of cases' and the 'generality of law' creates the need for interpretation. Law needs to fit circumstances.

Figure 6.3 — Everyone is equal before the law.
Source: Jean Poussin, Balance à tabac, 2007, CC BY-SA 3.0, <https://commons.wikimedia.org/w/index.php?curid=1681347>

Types and nature of law

Recall the four main types of law, ordered here from superior law through to ordinary law and subordinate law:

1. constitutional law;
2. statute law;
3. common law; and
4. delegated legislation (also called regulations, ordinances and instruments).

All types of law can be interpreted by courts in particular cases. Different courts have jurisdiction over different types of law. For example, the High Court has jurisdiction in cases involving constitutional law. State Supreme Courts have jurisdiction over most serious civil and criminal cases. In a federation like Australia, jurisdictions are divided between the two levels of government. For example, the Family Court of Australia, a federal court, has jurisdiction for cases involving family law disputes in all states except Western Australia, which has not referred its family law powers to the Commonwealth.

A contemporary example of court jurisdiction and types of law is the High Court sitting as the Court of Disputed Returns. In 2017 and 2018 the High Court heard cases in which parties disputed the qualification of members of parliament (MPs) under **Section 44** of the Constitution. The parties were the individual MPs and the Commonwealth. The Court decided that several MPs were dual citizens and, therefore, ineligible to be elected. This is a strong example of judicial power and the rule of law. Parliamentarians are law makers, yet despite their exalted status and power they are subject to the law and have no power to influence the independent court's decision. In one Section 44 case, Barnaby Joyce, then Deputy Prime Minister, and in the second most powerful position in the executive, was disqualified from parliament by the High Court.

All laws, except Westminster conventions, are written. Students of English ATAR or General will appreciate that text (that is, the written word) is capable of alternative 'readings'. For example, feminist and Marxist readings of the same novel often result in different meanings being found in the text. The reason is different interpretations can be made of the same text. An author tries 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.

The authors of law[2] 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 law making processes in both houses of parliament, different interpretations of statute can 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.

In short, constitutional law, statute law, common law and subordinate law can all be read to give different meanings. Recall that courts resolve disputes. Often the dispute is about which interpretation of a law is the right one in the circumstances of a case. When courts declare the law, they are saying one interpretation is the correct one.

> *Constitutional law, statute law, common law and subordinate law can all be disputed about which interpretation of law is the right one in the circumstances of the case.*

Perceptive students may be thinking about the Westminster conventions. Can courts adjudicate these important constitutional customs and practices?

No, they cannot. Courts can only declare the meaning of written law.

Constitutional conventions are non-justiciable — that is, they are incapable of adjudication by a court because there are no texts to interpret. This fact makes constitutional conventions quite flexible and adaptable. Australia has invented several of its own constitutional conventions because our Washminster hybrid form of government requires rules that the British Westminster system did not need. One such convention is the Senate convention to allow that house to pass money bills. This is a convention invented by Australia because our upper house, the Senate, is very powerful and can block money bills. Because the British House of Lords is weak and cannot, the British do not need such a convention.

Constitutional conventions are weakly enforceable because courts cannot exercise judicial power to bind governments and parliaments to a declaration of their meaning. In Year 12, students will learn about the 'Whitlam Dismissal', which was caused by breaches of the Senate money bill convention. Prime Minister Whitlam couldn't mount a constitutional challenge against the Senate in the High Court because it was an unwritten convention that was in dispute.

2 Lawyers trained in 'statutory construction' are employed by the Office of Parliamentary Counsel to write bills for introduction into parliament.

Types of courts

Each court in the federal and state hierarchies has jurisdictions which restrict the geographical region and area of law over which they exercise judicial power. Federal courts have jurisdiction in matters relating to Commonwealth law across Australia and state courts over state law in their states.

The major legal **jurisdictions** in state courts relate to jurisdiction in civil (private) and criminal (public) disputes. Disputes vary in seriousness, so court hierarchies enable a distribution of the caseload (workload) of courts by allocating less serious matters to lower courts and more serious ones to intermediate or superior courts.

Western Australia has a hierarchy of courts, with general jurisdiction courts and courts with special jurisdiction.

Courts with **general jurisdiction** can hear a wide range of cases, including civil and criminal matters and administrative law. The Supreme, District and Magistrates Courts are courts with general jurisdiction.

Figure 6.4 — The High Court, sitting as the Court of Disputed Returns, heard cases in which parties disputed the qualification of members of parliament under Section 44 of the Constitution.
Source: Matt Golding, 2017, <http://www.threefingers.com.au> and <https://www.smh.com.au/politics/federal/high-court-justices-lose-patience-with-one-nation-arguments-as-lawyer-declares-it-unaustralian-to-penalise-immigrants-20171012-gyzg5y.html>

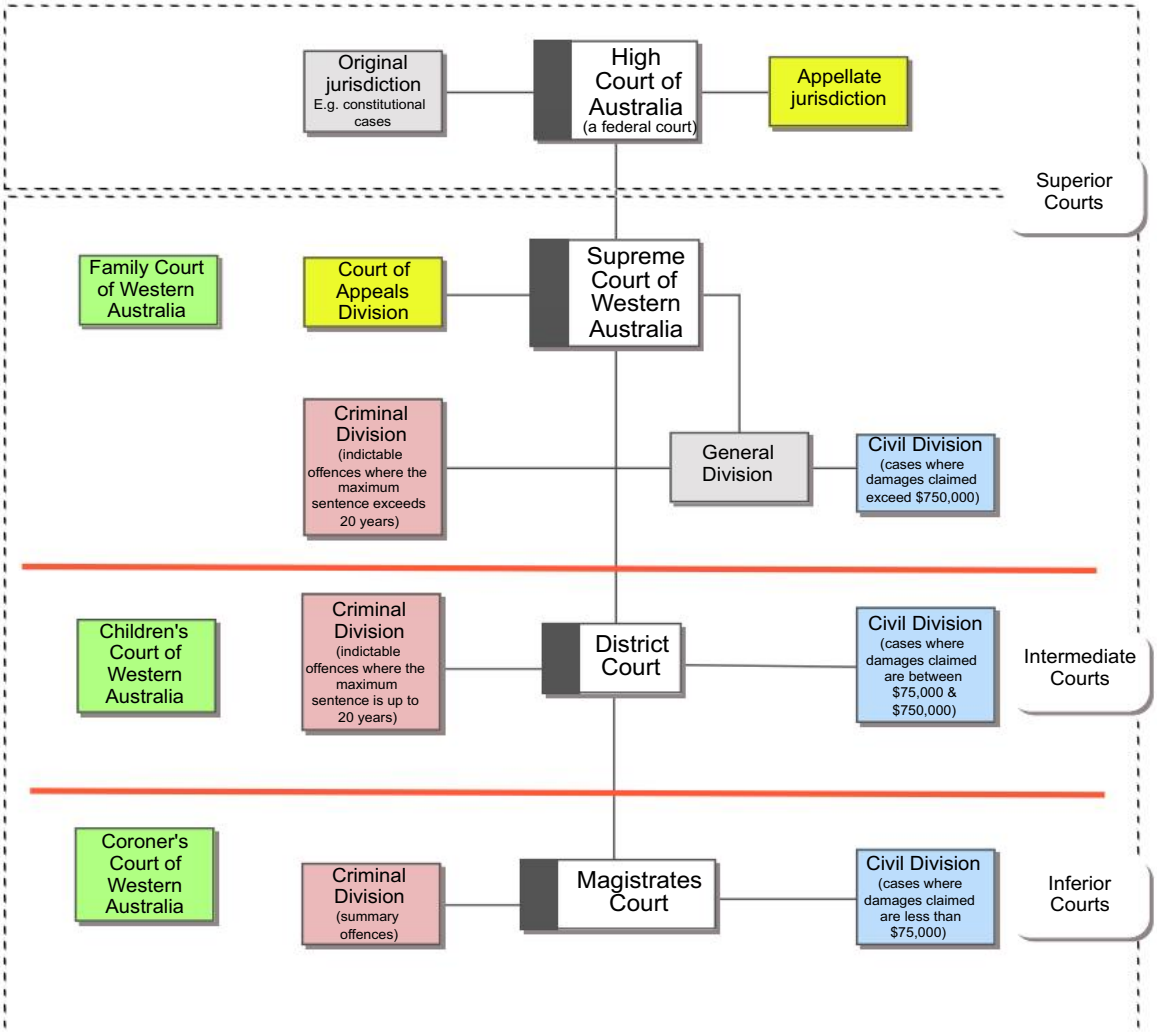


Figure 6.5 — A simplified diagram showing the types of courts in the Western Australian court hierarchy. The High Court is a federal court. The Supreme, District and Magistrates Courts are courts with general jurisdiction. Courts coloured with green have special jurisdictions (there are many more). Courts coloured yellow have special appellate jurisdiction.
Source: Stephen King, 2018

Courts with **special jurisdiction** are specialised courts that hear cases related to their specialisation. For example, the Children's Court of Western Australia hears matters relating to juveniles between the ages of 10 and 17 years. The Family Court of Western Australia hears matters relating to divorce, custody of children and the division of assets owned by divorcing couples.

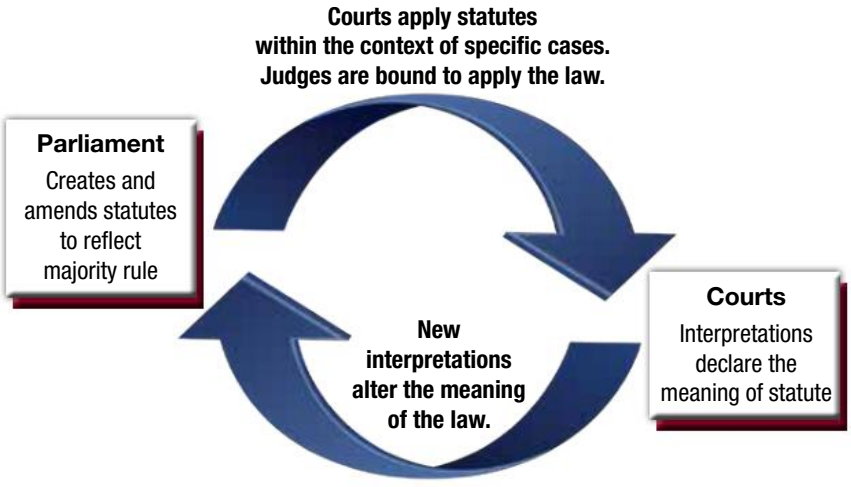
An interesting Western Australian court with special jurisdiction is the Coroner's Court. The Coroner investigates unexpected or suspicious deaths, called 'reportable deaths'. It is the only type of court in Australia which does not use the adversarial trial system. Instead, the Coroner's Court uses an inquisitorial process to find the truth concerning reportable deaths.

> *In all cases, except High Court constitutional cases, the courts are inferior to parliament.*

Figure 6.5 illustrates the simplified Western Australian court hierarchy and indicates each court's legal jurisdictions. The High Court is a federal court and is included because it can hear appeals from Western Australian courts. The illustration includes several examples of courts with a special jurisdiction and where they fit within the court hierarchy.

Relationship between parliament and the courts

The judicial power to declare the meaning of law gives courts great power. They have the power to 'legislate' by changing the meaning of a law.



■ Figure 6.6 — 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.
Source: Stephen King, 2018

The problem for a democratic system is that, 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 very difficult for the executive or the parliament to hold them to account for decisions they make and laws they create.

Interpretations of a law change the law. 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.

How do we prevent judges interpreting laws in ways that run counter to the democratic principle of majority rule? The answer lies in the relationship between the courts and parliament. In all cases, except High Court constitutional cases, the courts are inferior to parliament.

Parliament passes statutes. Judges in courts are obliged to follow statute — the rule of law demands they, like everyone else, are subject to the law. Court declarations of the meaning of a law can be overturned by our democratic parliaments if they are sufficiently out of alignment with majority will. Remember that parliament is a representative assembly of law makers. Representative parliaments can override interpretations made by unrepresentative judges by passing statutes or amending existing ones. Public pressure exerted through parliament ensures the judicial power to alter law through interpretation remains accountable through democratic processes.

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'. Perceptive students will note the separation of powers is preserved by the doctrine of **parliamentary supremacy.** Parliament's supremacy makes it the primary legislator.

Statutory interpretation

Statutes are laws made by parliament. They are made through the statutory process — also called the legislative process — described in Chapter 5.

Statutes are written by expert lawyers[3] specialised in turning ideas for law into bills. 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 law making 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.

In theory, statutes should be clear and unambiguous after such a rigorous process.

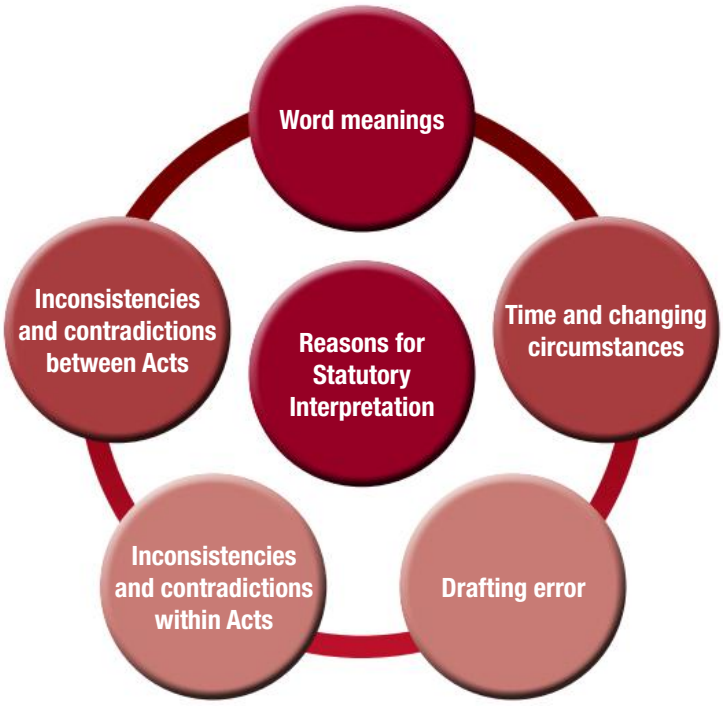


Figure 6.7 — Reasons for statutory interpretation.
Source: Nicol Davis, 2018

The need for interpretation

In practice, despite the intense process described above, the meaning of a statute is open to interpretation. Why? As already noted, it is because a statute is written and all texts have meanings dependent on who reads them. Different interpretations are unavoidable no matter how precise the wording.

There are other reasons why statutes need to be interpreted.

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

Old laws are written in the language of their times. They remain the law until amended or repealed by parliament. Language can go out of date. Its meaning changes slowly over time.

Interpreting old laws for new times keeps them up to date without the need for redrafting or amendment by parliament.

Of course, parliament monitors how its old laws are working by following court interpretations and decisions. Parliament may decide the courts can no longer maintain an old law with new declarations of its meaning. Because parliament is superior to courts and statutes can be amended or repealed, parliament can dispose of an old law, update it or replace it entirely.

Periodic **consolidating legislation** is used to update statutes from time to time. Court interpretations of old law may be used by parliament as a source of information about how a new law should be written.

Drafting error

Mistakes are 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.

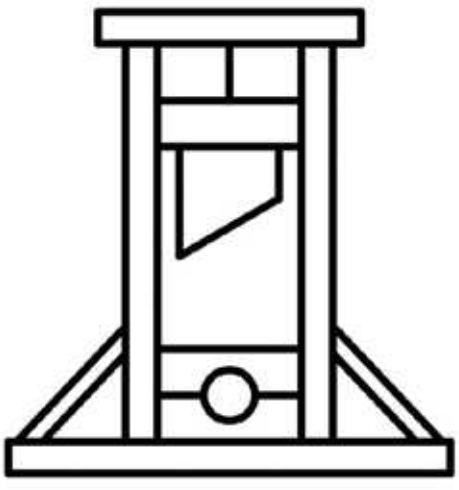
The need to pass large volumes of law to govern a modern nation state like Australia imposes enormous demands on any legislature. Since

3 'Statutory construction' is a basic part of any law degree. Law students must learn how to write and read the law. Parliamentary counsel (lawyers employed by parliament to draft bills) are specially trained in writing precise legal language so that parliament's laws express its intent as accurately as possible. MPs use the services of the Office of Parliamentary Counsel to turn ideas for bills or amendments into the words of the law.

Federation, the average number of bills passed annually by the House of Representatives is 108. The highest number on record was 264 in 1992. From 1901 to 1945 the average number of bills passed per year was 48. Since 1995 the average has increased to 160 bills per year.[4] The average number of sitting days per year is 58 for the Senate and 67 for the House of Representatives. One can readily see that there is little time for deliberation on every bill. In short, the incredible demands for legislation and the limited time available to produce it may result in drafting errors.

> *Floodgating, gagging and guillotining can result in poorly drafted laws by denying parliament the opportunity for proper deliberation and scrutiny of bills.*

Recall also that the government may use its 'executive dominance' of the House of Representatives to gag or guillotine debate. Governments can flood the house with a backlog of bills it has kept aside. This government strategy can deny parliament the time and opportunity to deal with government bills properly. **Floodgating** is a political strategy the government uses to overwhelm parliament and impose its will. Floodgating, gagging and guillotining can result in poorly drafted laws by denying parliament the opportunity for proper deliberation and scrutiny of bills.



■ Figure 6.8 — The government often uses the guillotine to put a time limit on the debate of legislation.
Source: Juan Pablo Bravo, Guillotine, Noun Project, <https://thenounproject.com/search/?q=guillotine&i=374018>

Inconsistencies and contradictions

Inconsistencies and contradictions can exist **within an Act**. There may be thousands of words in one Act. It is always possible, because of the drafting errors outlined above, that parts of an Act are inconsistent with other parts of the same Act. They may even be contradictory. Courts must resolve these inconsistencies and contradictions through interpretation or the statute will be incoherent. Coherent law is one of the principles of the rule of law, so courts need to ensure inconsistencies are resolved.

There are a great many Acts on Australian statute books. They range from very old Acts to those just passed. It is very easy to see how inconsistencies and contradictions can arise **between Acts**. 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* is more than 600 pages long and contains nearly 180,000 words. Further, it is only one of many taxation Acts. 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.

Statutes are *in futuro*

In futuro is Latin for 'in the future'. Parliament seeks to regulate society in the present and the future, not the past. The future becomes the present, with changes unfolding day by day, but statutes stay the same unless amended. 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 are disrupting old ways of doing things. Many believe the law cannot keep pace.

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 or many other innovations. Yet, somehow, its laws must be able to cope with them.

4 Chamber Research Office, Department of the House of Representatives, 'General statistics. Legislation statistics', 2018, <https://www.aph.gov.au/Parliamentary_Business/Statistics/House_of_Representatives_Statistics>.

Parliament 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 Act. Good interpretation by courts aims to give life to an Act's purpose in evolving real world situations.

To make laws work in future situations, parliament writes them in 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 an Act that fails to communicate parliament's purpose.

> *Broad and general terms allow courts the flexibility to adapt an Act to changing technologies or social values.*

■ Figure 6.9 — Parliament does not have a crystal ball to foretell the future.
Source: Trace Lexington Byrd, Crystal Ball, Noun Project, <https://thenounproject.com/search/?q=crystal%20ball&i=250876>

Uber and A New Tax System (Goods and Services Tax) Act 1999

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. Laws regulate the number of taxis on the roads by requiring each taxi business to have a licence to provide taxi travel services. Licensing is regulated by law and controls the number of taxis, the qualifications of drivers, the rates of fees, the standards of the vehicles and many other aspects of the taxi industry.

The GST Act requires that businesses providing taxi travel services collect and pay 10 per cent GST on the service they provide. Most businesses which earn less than $75,000 per year are exempt from the GST, but taxi travel businesses are not included in the exemption. A customer pays the taxi business directly for the taxi travel service. The taxi driver is often the owner of the business (that is, he or she owns the taxi licence). As providers of taxi travel services, taxi owners are not entitled to the $75,000 exemption from GST and must collect GST on every dollar they earn, and then pay it to the tax office.

Uber provides ridesharing services 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

■ Figure 6.10 — Taxis, Uber and the GST.
Source: Peter Nicholson, 2015, <http://nicholsoncartoons.com.au/uber-v-taxis-margin-call-cartoon-2015-03-24.html>

for the rideshare service, and then Uber pays the driver a percentage. This is quite different from a taxi business.

According to Uber, it does not provide taxi travel services. Its drivers are not employees of a taxi business. 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. It means that Uber drivers qualify for the GST exemption if they earn less $75,000 per year.

In short, taxi drivers must collect and pay GST, whereas Uber drivers don't. It allows Uber to compete, unfairly according to some, with taxi businesses and this could result in taxis being driven out of business. It is the meaning of 'taxi travel' in the GST Act that allows this to occur.

The dispute

The Australian Taxation Office (ATO) is a large Commonwealth Government department that administers taxation laws, including the GST Act. The ATO decided to include Uber as a taxi travel service in its definition of 'taxi travel' under the Act. It would mean that Uber drivers would lose their GST exemption and have to pay GST on every dollar earned, just as 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**, a superior court in the federal court hierarchy.

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 no longer qualify for the $75,000 exemption and 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.

Students should understand the following:

- 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?

There are three ways courts approach statutory interpretation:

1. over centuries English courts developed methods of reading statutes, called maxims, to ensure their interpretations were consistent;
2. courts also use rules of interpretation to declare the law; and
3. courts must abide by Acts Interpretation Acts which define terms and provide guidance on how courts should read statutes.

Maxims of interpretation

A '**maxim**' is a rule of conduct. Legal maxims are similar to 'conventions' (as in Westminster conventions). They are unwritten rules that

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.

guide legal professionals such as judges in their work.

Maxims of statutory interpretation evolved over centuries through English court adjudication. Many Westminster MPs in past centuries were illiterate. The reason why we refer to the stages of the legislative process as first reading, second reading and so on is that bills were read aloud by educated clerks employed by parliament to help less educated MPs write laws. Bills were read aloud to MPs so they understood the laws they were debating and voting on.

Laws drafted in this way were frequently poorly written and lacked the rigorous standards of statutory construction by which today's bills are drafted. Consequently, they were not always clear and consistent. Parliament's intention — the purpose of the law and how it should work — was often hard to work out.

> *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 rule of law demands laws be coherent, predictable and clear. Courts developed maxims as a way of reading unclear statutes. Maxims provided a sort of 'lens' through which to read poorly written law so it could 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.

Ejusdem generis

Ejusdem generis means 'of the same kind'. In law, parliament may create a class or category of things using specific terms. The specific terms are then followed with a general term to allow courts to decide on a case by case basis if other things are of the same kind and belong to the class or category.

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?

Figure 6.11 — Through decisions of the court, different classes of animals, such as 'assistance animal', have been added to the class of 'other animal'.
Source: Courtmay22000, Macie stands while her owner takes a picture, 2018, CC BY-SA 4.0, <https://commons.wikimedia.org/w/index.php?curid=69443027> and <https://en.wikipedia.org/wiki/Service_dog#/media/File:MACIE22300.jpg>

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

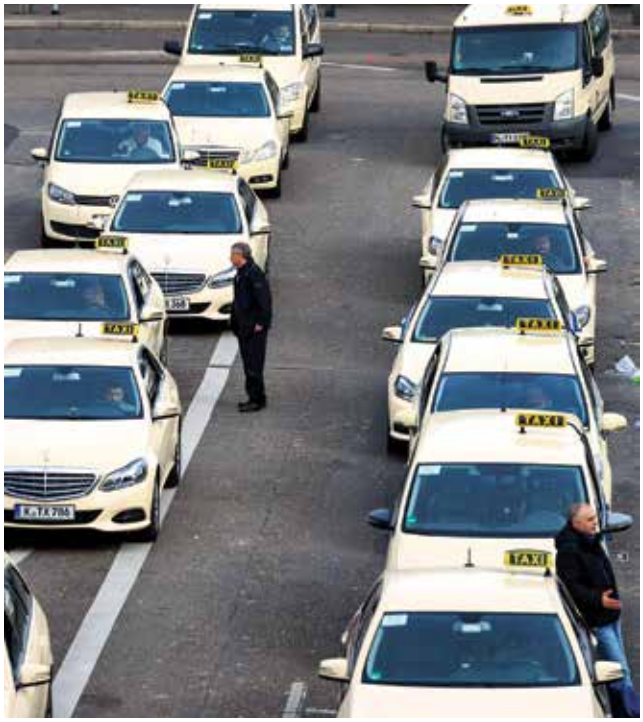
'assistance animals'. Note that courts never add words to an Act, they add meaning to existing words.

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.

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. *Noscitur a sociis* means reading words in context.

> *Statutory construction allows parliament to either tightly control the interpretation of its laws or allow judges the interpretative freedom to develop a statute.*



■ Figure 6.12 — The Federal Court classified Uber as a "taxi travel" service.
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>

The word 'passenger' can mean a person riding in a taxi, bus, train, friend's car, aeroplane or cruise ship. It could even refer to the English music artist, Michael David Rosenberg, who is known by the stage name, 'Passenger'. How can we be sure what it means?

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'.

Expressio unis est exclusio alterius

Expressio unis est exclusio alterius means 'the express mention of one excludes all others'.

Parliament may list a series of specific things in a class of things. Unlike general terms allowing courts to use *ejusdem generis* and add to a class or category, the use of specific terms without a general term following prevents courts expanding the class or category. In other words, parliament can limit judicial interpretation by being specific and not using general terms in an Act.

For example, strictly defining a taxi as a motor vehicle capable of carrying up to four passengers — and not including 'other such vehicles' — prevents courts including minibuses or coaches in the meaning of the word 'taxi'.

Ultimately, careful statutory construction allows parliament to either tightly control the interpretation of its laws or allow judges the interpretative freedom to develop a statute on a case by case basis over time.

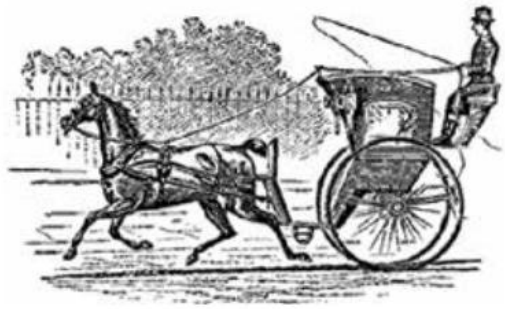
Rules of interpretation

Courts also use a hierarchy of rules of interpretation to assist in making consistent declarations of the law.

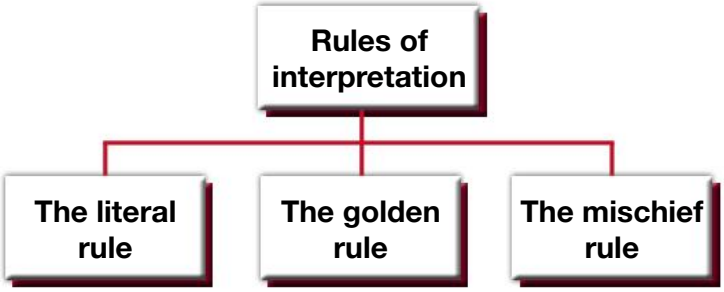
The literal rule

When interpreting an Act, judges start by assuming that parliament has clearly stated its intention in the wording of the law. They assume the Act says what it means and means what it says. In other words, judges read an Act 'literally'.

The GST Act defines 'taxi travel' as "travel that involves transporting passengers, by taxi or limousine, for fares". This literally means



■ Figure 6.13 — 'Taxi cab' once meant 'a one horse vehicle for hire'.
Source: Hansom cab, <https://upload.wikimedia.org/wikipedia/commons/2/2b/HansomCab.gif> and Public Domain, <https://commons.wikimedia.org/w/index.php?curid=17884932>



■ Figure 6.14 — The three rules of statutory interpretation.
Source: Nicol Davis, 2018

what it says. In *Uber B.V. v The Commissioner of Taxation of the Commonwealth of Australia (2017) FCA 110,* the Federal Court read the GST Act literally, giving the words 'taxi travel' their ordinary definition, and classified Uber as a 'taxi travel' service.

The golden rule

Occasionally a literal reading can result in an unjust or nonsense interpretation. This is more likely to occur with older Acts as the words used may have changed their literal meaning over time.

'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 purpose rule (or mischief rule)

If the literal and golden rules fail to result in a just outcome or to prevent absurd interpretations, courts will seek the 'purpose' of the Act. Judges ask, 'what was parliament's purpose in passing this Act?' or 'what mischief (wrong) was parliament intending to prevent by passing this Act?'

Courts may refer to sources outside the Act itself for guidance. One such source is **Hansard**. Hansard is the record of parliamentary speeches and debates. The second reading speech of the Act in question will explain why the law was needed and its purpose. Using these sources courts can make an 'intentionalist' or 'purposive' interpretation that gives effect to parliament's original intention.

In Australia, purposive interpretation is the dominant method in use. Judges usually seek parliament's intent in the statutes they interpret.

Extraneous sources

Courts try to seek the meaning of an Act from within the Act itself. However, judges may need to use sources outside the Act, from Hansard, for example, as noted above.

Dictionaries, specialised legal dictionaries, other Acts, Hansard and other documentary sources may be used to assist in the search for a purposive interpretation. The judgments of other courts in related cases may be persuasive for a court looking for guidance on how to interpret a statute. Any source outside the Act being interpreted is an extraneous source.

Acts Interpretation Acts

Judicial discretion

Judges have always had some degree of **judicial discretion** in how they interpret statutes. Their discretion — or freedom to use their reasoning to decide for themselves — was always constrained by maxims and rules of interpretation that aimed to produce consistent readings of Acts. Maxims and rules of interpretation are guidelines imposed by judges upon themselves to limit discretion and prevent divergent interpretations.

Nevertheless, judges are human. They are different from each other. Some use judicial discretion conservatively. They rely heavily on literal interpretations of statutes believing that law says what it means and means what it says. They are reluctant to change the meaning of statutes through interpretation because they believe changing the law is 'legislating'. 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**

■ Figure 6.15 — Styles of judicial interpretation.
Source: Nicol Davis, 2018

of the law. These interpretations are predictable and consistent, which is good for the rule of law, but they may not always be fair, which is not.

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 more readily use the golden and purpose rules, for example. They still respect the separation of powers, but in a different way. These judges know that parliament is superior to courts. They 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.

Reducing the impact of different styles of interpretation

Things have changed since the days of poorly educated MPs producing poorly written laws. Today, statutory construction is almost scientific in its precision and statutes are written in plain English. Parliament expresses its intentions and meanings with much greater clarity.

Modern parliaments are more inclined to limit adventurous interpretations of statutes. Legislatures prefer literalist/legalist interpretations to activist ones. Clarity in statutes ensures parliament guards its role as the legislature and upholds the rule of law, which requires the law to be clear, coherent and widely understood.

Parliament has used at least two approaches to ensure its laws are clear.

> *Acts Interpretation Acts are a firm attempt by parliament to limit judicial discretion in statutory interpretation.*

One approach is reforming statutory construction through **using plain English** instead of legal jargon. Laws are now written in plain English, making them more accessible and readable. It is easier for both lawyers and ordinary people to understand statutes. This is good for upholding the rule of law. It is also good because courts can decipher the meaning of law more easily if it is written in ordinary language.

A second approach is by passing special Acts known as **Acts Interpretation Acts**. Acts Interpretation Acts are statutes that force judges to interpret other 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 Acts. The rule of law and parliamentary supremacy mean judges are legally bound to follow an Act Interpretation Act when interpreting other statutes. Such Acts override all the rules and maxims of interpretation.

The Commonwealth *Acts Interpretation Act 1901* applies to all Commonwealth Acts and other legislative instruments. It is essentially a list of definitions, terms and rules to apply when interpreting legislation. Where an Act Interpretation Act defines a term, judges must interpret that term in every other Act to which the Acts Interpretation Act applies, using the definition parliament has given. Figure 6.16 provides examples of definitions defined in law. Judges must apply these to all the Acts listed in the *Acts Interpretation Act 1901*.

Sections 35 and 37 *of the Acts Interpretation Act 1901*

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.

■ Figure 6.16 — The Acts Interpretation Act 1901 contains definitions that must be applied by judges when they interpret other Acts. 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 statutes clear, coherent and predictable.
Source: Section 35 and Section 37, *Acts Interpretation Act 1901*

Legal systems

There are two great 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.

Civil law

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.

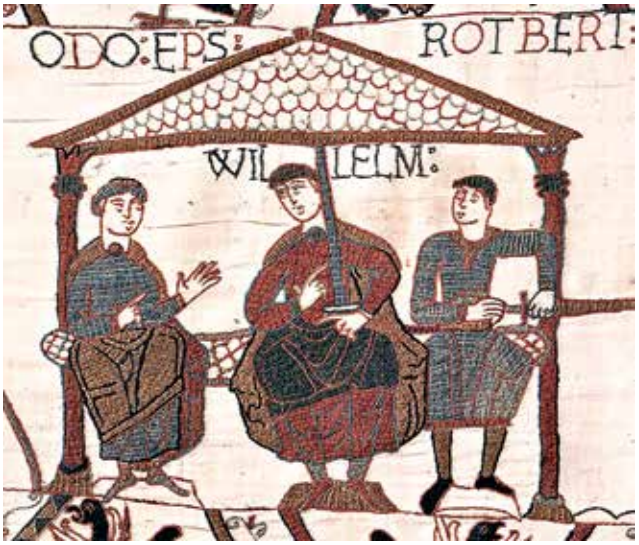
Civil law is the dominant legal system throughout most of Europe and those countries colonised by non-British European powers. Examples include Indonesia, (colonised by Holland), Brazil (colonised by Portugal), Vietnam (colonised by France) and most of South America (colonised by Spain).

Common law

Britain was invaded by the Normans, who came from France, in 1,066 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 his judges began to recognise that many disputes throughout England were settled using the same legal principles. These principles were 'common' throughout much of the kingdom.

William's judges discovered these common legal principles by deciding cases in trials. They 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 previous decisions as a guide to resolving new cases.

■ Figure 6.17 — Civil law has its roots in Roman law.
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 6.18 — Image from the 12th century Bayeux Tapestry showing William with his half brothers. William is in the centre, Odo is on the left with empty hands, and Robert is on the right with a sword in his hand.
Source: Lucien Musset, 2005, The Bayeux Tapestry, Public Domain, <https://en.wikipedia.org/wiki/William_the_Conqueror#/media/File:Bayeuxtapestryodowilliamrobert.jpg>

Constant referral to previous decisions in law reports resulted in less common legal principles being replaced by more common ones. Thus, 'common law' could be developed throughout England by extinguishing uncommon laws.

The development of common law was possible because courts were able to refer to previous decisions and apply them to similar cases. It became possible because William's judges had more authority than local English magistrates. Lowly magistrates had to follow the decisions of superior Norman judges. The process of applying the decisions of superior judges stamped out the local customary law. William the Conqueror had unified England and produced one legal system under a hierarchy of courts, the most superior being run by his senior judges.

Common law is made by judges in court decisions on specific cases. Therefore, it is also known as **judge made law** or **case law**.

Trials

Trials are used by legal systems to resolve disputes. Trials have one purpose — to discover the truth. But there are different pathways to the truth.

Civil law countries use a trial system called the **inquisitorial system**. In this European system judges actively investigate through inquiry to find the truth. Inquiring judges are the principal agents in the search for the truth.

Common law countries use the **adversarial system** of trial. In this English system competition between parties creates incentives for them to fight their case with the highest quality evidence and argument. Both parties strive to convince an impartial judge (or judges or jury) of the truth. Competition between the parties is the principal agent in 'revealing' the truth.

> *"In the inquisitorial system inquiring judges are the principal agents in the search for the truth. In the adversarial system competition between the parties is the principal agent in revealing the truth."*

Both trial systems are covered later in the text.

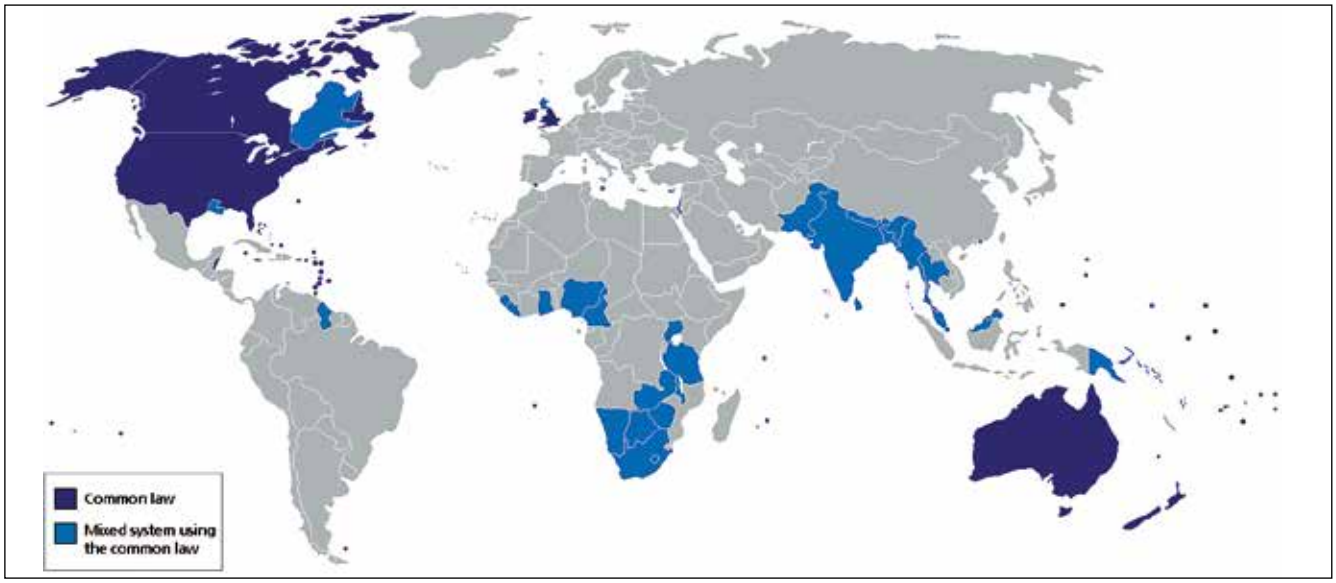
Common law in the world — Beyond Australia

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 those countries like the US that discarded the British Westminster political system retained its common law legal system.



■ Figure 6.19 — Countries throughout the world that use common law.
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>

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

Common law 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 Latin. It means 'to stand by what has been decided'. *Stare* is pronounced "star-ray".

Common law is based on *stare decisis* — it is the bedrock idea upon which common law is built. *Stare decisis* ensures judicial thinking (reasoning) is similar in similar circumstances.

> *Stare decisis results in fairness, predictability, consistency and flexibility.*

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 sufficiently different from any previous case and, therefore, the court should not 'stand by' a previous judgment. Instead, it should make a new decision. They are arguing for their case to be **distinguished** from the previous case. 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'.

Note, 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 case law.[6]

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".[7] In the context of common law the 'event or action' is a judgment in a case creating new case law.

In other words, a precedent is a law. The common law is a body of precedents developed by judges' decisions in cases over time.

How do we know the decision of a judge? How do we know the judicial thinking process, or reasoning, that resulted in a decision? Recall that judges explain their decisions in writing and important ones get published in law reports.

6 Note, only courts capable of hearing appeals (appellate jurisdiction) have power to create new case law. This means only intermediate and superior courts can create common law.

7 'Precedent', English Oxford living dictionary, <https://en.oxforddictionaries.com/definition/precedent>.

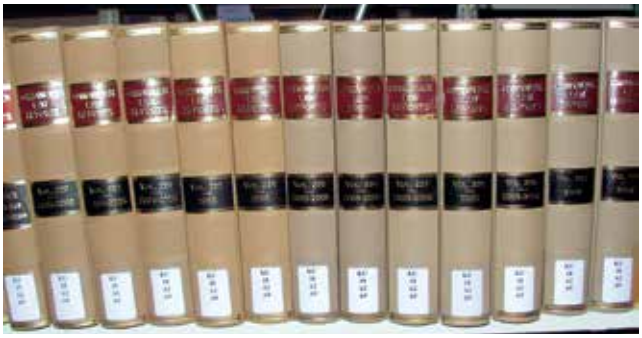


Figure 6.20 — The Commonwealth Law Reports.
Source: Volumes of the Commonwealth Law Reports on a shelf at the law library of UC Berkeley School of Law, Coolcaesar, English Wikipedia, 2008, CC BY-SA 3.0, <https://commons.wikimedia.org/w/index.php?curid=15912836> and <https://en.wikipedia.org/wiki/Commonwealth_Law_Reports#/media/File:Commonwealth_Law_Reports.jpg>

Lawyers and judges are trained to know important past decisions and where to find them in the law reports. They are trained to read and interpret judicial reasoning by locating judges' written reasons in past decisions.

Ratio decidendi

Judges must explain why and how they decided 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.

Ratio decidendi is Latin for 'reason for decision'. It is the judge or judges' 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.

Ratio decidendi can create precedent. A new *ratio decidendi* is a new common law. *Ratio decidendi* may be either a binding or persuasive precedent.

> *"Precedent found in ratio decidendi may be either binding or persuasive whereas obiter dicta are only persuasive."*

Obiter dicta

Judicial reasoning is complex. Judges include the main reasons for their decision (the *ratio decidendi*) and may also include other considerations that contributed to their thinking. These other comments are known as 'sayings by the way' — in Latin, *obiter dicta*.

Future judges in similar cases may use *obiter dicta* as guides to their own decision making.

They are persuasive in the reasoning of judges in future cases.

Precedent in operation

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 common law.

There are three essential elements of the operation of the doctrine of precedent:

1. *ratio decidendi* of judges in higher courts, with appellate jurisdiction, may create common law;
2. the precedents of higher courts bind lower courts within the same hierarchy; and
3. higher courts may be persuaded by the *ratio decidendi* and *obiter dicta* of lower or equivalent courts.

Finally, note that precedent found in *ratio decidendi* may be either binding or persuasive whereas *obiter dicta* are only persuasive. This will be discussed further in the next section.

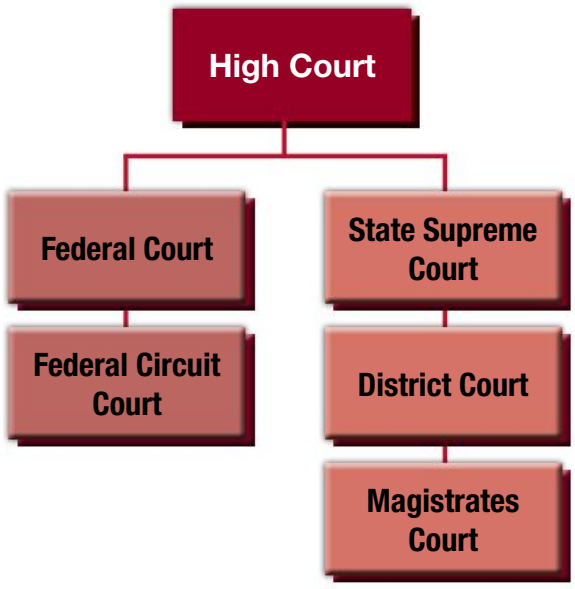
The court hierarchy

A hierarchy is an organisation in which members are ranked according to status or authority. A court hierarchy is an organisation of courts ranked according to jurisdictional and judicial authority.

Figure 6.21 shows the Australian federal and state court hierarchies. Figure 6.21 is greatly simplified as there are many more courts, but they all fit within this general hierarchical structure. Refer back to Figure 6.5 for a more detailed version of the Australian court hierarchy. Because Australia is a federation it has a division of judicial powers (vested in federal and state courts) that mirrors the division of legislative and executive powers.

Within the Australian court hierarchy there are:

1. **superior courts** with appellate jurisdiction (the High Court, Federal Court and state/territory Supreme Courts and other specialist superior courts such as the Western Australian Court of Appeal and Federal Family Court);
2. **intermediate courts** with appellate jurisdiction (District Courts and specialist courts such as the Children's Court of Western Australia); and
3. **inferior courts** with no appellate jurisdiction (Magistrates' Courts).



■ Figure 6.21 — A simplified Australian federal and state court hierarchy.
Source: Stephen King, 2018

Binding and persuasive precedent in court hierarchies

The doctrine of precedent is how common law works within the court hierarchy.

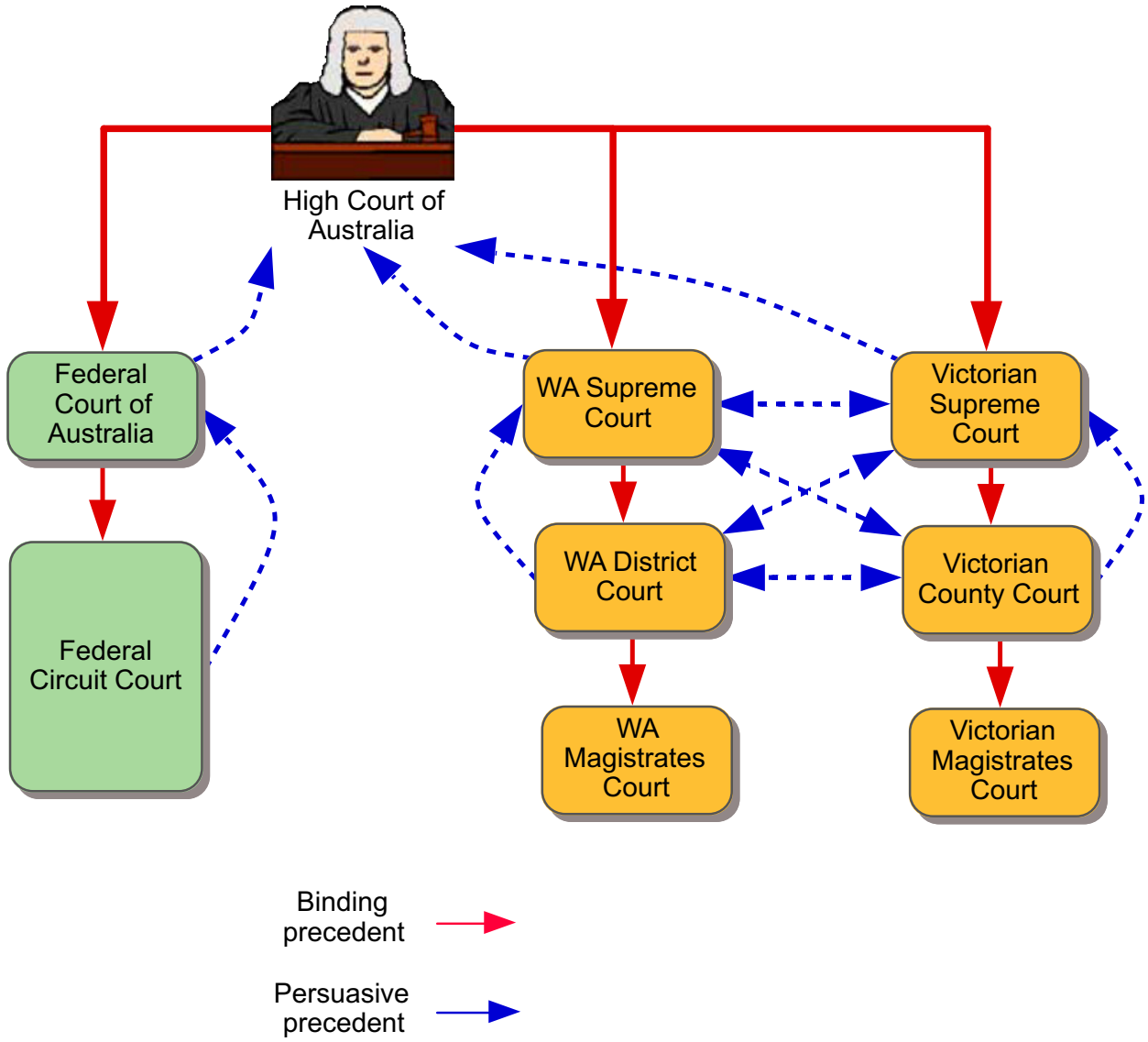
Hierarchies allow:

- fairness, predictability and consistency in the common law; and
- change within the common law.

Figure 6.22 shows the way binding and persuasive precedent operates within the Australian court hierarchy.

Binding precedent binds courts at a lower level in the court hierarchy than the court that made the precedent. Binding precedent requires these lower courts to apply the *ratio decidendi* of the higher courts. Lower courts may be persuaded and guided by *obiter dicta* from higher courts. This is demonstrated by the red arrows in Figure 6.22. Perceptive students will note the higher the court which sets a precedent (creating common law) in the hierarchy, the greater the number of lower courts that are bound by that precedent. 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 all state, territory and federal courts in Australia and being persuasive across the entire common law world.

Persuasive precedent influences courts above and equivalent to it in the court hierarchy in its own jurisdiction. It also influences courts at the



■ Figure 6.22 — The operation of binding and persuasive precedent within the Australian common law hierarchy. 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.
Source: Stephen King, 2018

same level or above it in the court hierarchy in other jurisdictions. Higher courts may be persuaded by the *ratio decidendi* and *obiter dicta* of lower or equivalent courts. The blue arrows in Figure 6.22 show the direction of influence of persuasive precedent. It does not bind equivalent or superior courts or courts in other hierarchies. However, it may be influential in guiding their judgments. Persuasive precedent increases fairness, predictability and consistency in resolving legal disputes both within and across common law systems, including interstate and international systems.

The fact that new precedents can be developed, replace old precedents and can adapt to changing circumstances enables the common law to evolve. The process of change is incremental and evolutionary. It happens on a case by case basis. Judges tend to resist 'legislating' by creating new precedents. The evolution of common law is therefore gradual and conservative. 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).

The capacity of 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.

How common law evolves

Common law can only come into being after 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 if a case is brought before their court by disputing parties. 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.

Courts must be able to avoid existing precedent if they are to create common law. Courts with appellate jurisdiction can avoid precedent in several ways by:

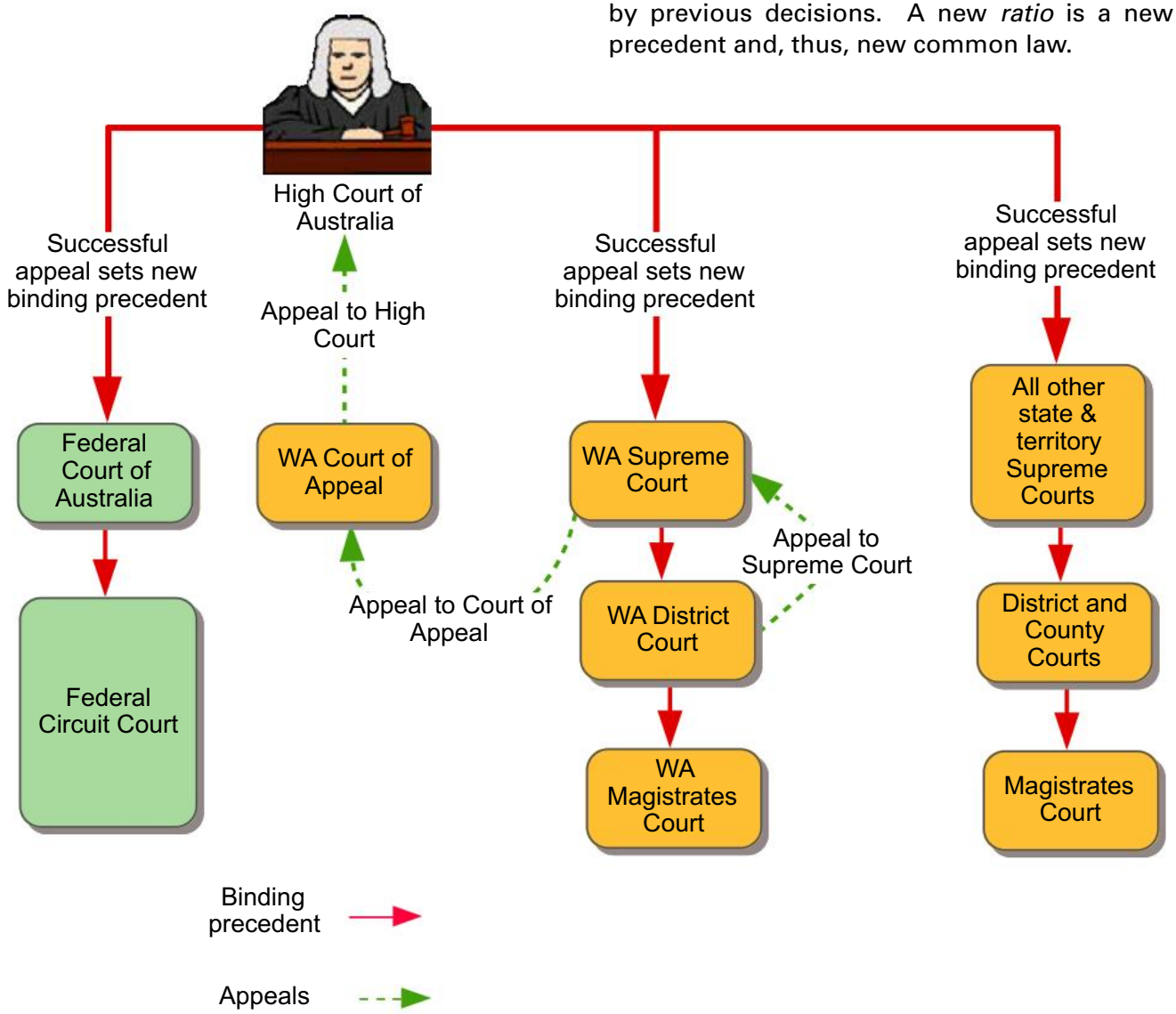
- **distinguishing** a case from any previous case;
- **overturning** an old precedent deemed out of date;
- **reversing** a lower court's decision on appeal; and
- **disapproving** a binding precedent.

Students should refer to Figure 6.23 as they read and study the following section.

Avoiding precedent — by distinguishing a case

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 reasoning, there is no precedent, no common law.

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.



■ Figure 6.23 — Appeals are heard by courts with appellate jurisdiction. An appeal (green arrows) 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. (The WA Court of Appeal is a specialised appeal court at the same level in the hierarchy as the Supreme Court of WA.)
Source: Stephen King, 2018

Donoghue v Stevenson (1932)

The famous case of *Donoghue v Stevenson (1932)*, heard by the British Privy Council is an example. It was a fundamental case that created the tort (or wrong) of negligence and established the legal 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[8] 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 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.*

> *"You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. This is now known as the 'neighbour principle'."*

Lord Atkins' *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. Atkins' new legal concept is now known as the 'neighbour principle' and illustrates how the law should reflect community values. Perceptive students will 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.

8 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.)

Avoiding precedent — by 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 *ratio decidendi* 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 *ratio* to apply.

Indeed, in some cases the doctrine of precedent would require an old *ratio* to be binding. However, societies change. New values 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.

Superior appellate courts have the power to **overrule** outdated precedents to overcome the problem of stagnation and injustice resulting from outdated common law.

Mabo v QLD (No. 2) (1992)

Mabo v Queensland (No.2) 1992[9] 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, 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.

> *Superior appellate courts have the power to overrule outdated precedents to overcome the problem of stagnation and injustice resulting from outdated common law.*

Perceptive students will recognise that *Mabo* 1992 was an activist decision because it 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.

9 Mabo v QLD (No. 2) (1992) HCA 23; (1992) 175 CLR 1. F.C. 92/01.

Avoiding precedent — by reversing precedent

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 test the original *ratio* in a higher court. Some cases have a winning party who wants a better outcome. Both parties to a case can appeal to courts with appellate jurisdiction to test if the original decision in their case was the correct or most just decision.

When superior appellate courts hear appeals, they do not re-run the entire trial. Instead, they review the evidence and the judicial reasoning, the *ratio decidendi*, used to make the initial judgment. If the appeal court decides the original decision was not correct, 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.

Wilson v Bauer Media Pty Ltd (2017 and 2018)

In 2017 Australian actor, Rebel Wilson, won a civil defamation case[10] 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.

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.

■ Figure 6.24 — Australian actor and comedian, Rebel Wilson. *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>*

10 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.

Avoiding precedent — by disapproving precedent

Lower court judges are bound by the precedents of higher courts within their hierarchy. This means that sometimes they 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. If the losing party appeals and wins, the act of disapproving will have indirectly contributed to a change in the common law.

A different form of disapproval may arise. A situation can occur where two courts at the same level in the hierarchy produce two conflicting *ratios* in similar cases. That is, they disapprove of each other. Both *ratios* will stand until the conflict is resolved. Conflicting law breaches the rule of law's requirement for legal consistency, so something has to be done to resolve the conflict. It will be up to a higher court in a future case to eventually resolve the conflict by finding in favour of one and overruling the other. Interestingly, courts cannot resolve the conflict until a new case arises because they can only act retrospectively. There will be confusion about the meaning of the law until this happens. Lawyers will not be able to predict how courts will interpret the two *ratios*, undermining the predictably of the law.

Statute and common law

The doctrine of precedent and statutory interpretation

Students should be aware that cases heard by courts may involve *any* type of law (including statutory and common) and may result in new precedents.

Common law develops through cases, as described in detail above.

Statute is interpreted in cases, also as described previously.

Students should note that a statutory interpretation may alter the meaning 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 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.

Statute and common law compared

Statute is *in futuro* **prospective** law made to represent the democratic will of the people through the Acts of a representative parliament. It can be changed rapidly through amendments to existing laws, repealing old laws and passing new laws. Statutes are superior to common law because of parliamentary supremacy.

Common law is *ex post facto* **retrospective** law made by judges in cases after the dispute arises. It develops incrementally through decisions made in courts with new facts that distinguish a case from previous cases or when judges avoid existing precedent. It is always inferior to statute.

Complementary interactions between courts and parliament

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. Deciding that Uber is providing taxi travel is an example.

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* 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.

Table 6.1 summarises some of the attributes of statute and common law.

	Statute	Common Law
Made by	Parliament	Judges in courts
Method by which law is made	Statutory (legislative) process	*Stare decisis* and the doctrine of precedent
Source of legitimacy	Democratic will	Judicial authority
Type of mischief/wrong the law deals with	*In futuro* (prospective)	*Ex post facto* (retrospective)
Focus	Broad and general to fit future circumstances	Specific and particular to unique cases
Rate of change	Capable of rapid change	Incremental and evolutionary
Relationships to the other	Superior to common law and creates statutes	Inferior to statute and interprets statutes
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 6.1 — Attributes of statute and common law.
Source: Stephen King, 2018

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 through the adversarial trial. Legal persons are parties to a trial. Judges are impartial adjudicators. Truth is revealed through contest and competition between the parties — which is assumed to bring out the best evidence and argument. Disputes may be civil (private), criminal (public) or constitutional (public). There are other types of dispute.
- 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.
- Courts interpret and apply general statutes written by parliament to specific cases. They apply maxims and rules of interpretation to ensure consistency in the way they read and interpret the law. *Ejusdem generis, noscitur a socii* and *expression unis est exclusio alterius* are examples of maxims which guide interpretation. The literal, golden and purpose rules are also used. Purposive interpretation 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.
- Courts also legislate by creating common law. 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.

continued overleaf

- 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.
- 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).
- Statute and common law are complementary. They work together and respond to each other to create one complete body of dynamically interacting law.

Activities

Short answer

1a) Explain how courts fulfil the judicial role in Australia's legal system.

1b) Distinguish the elements of a criminal case from those of a civil case.

1c) With reference to the High Court, sitting as the Court of Disputed Returns, justify the need for courts to interpret the law.

2a) Define the term 'statute law' and provide an example.

2b) Outline **two** advantages of statutes being *in futuro* and why this is important.

2c) Discuss **one** strength and **one** weakness of 'parliamentary supremacy'.

3a) Explain the term 'precedent' as it applies to common law systems.

3b) Identify **three** basic features of common law systems.

3c) Discuss **one** strength and **one** weakness of common law systems.

Source Analysis

Read the depth study: Uber and *A New Tax System (Goods and Services Tax) Act 1999* (GST Act), and respond to the following:

4a) Explain what is meant by the term 'statutory interpretation'.

4b) With reference to the source, explain the dispute between Uber and the Australian Tax Office.

4c) With reference to examples, discuss **two** advantages of statutory interpretation for Australia's legal system.

4d) Evaluate the power of judicial discretion.

Essay response

5) Discuss the extent to which Australia's federal and state court hierarchies provide for: the effective creation of common law; both binding and persuasive precedent to be applied; and a flow of appeals.

6) Analyse the types of laws made by parliament and the courts.

Investigation and discussion

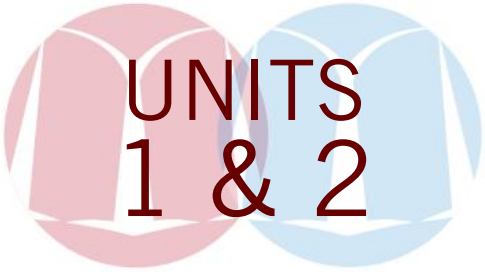
7) Working in groups, debate the topic: 'That because judges are not concerned about re-election, they make better laws than parliamentarians'.

8) Explore the adoption of the common law of negligence into Australian law by investigating the High Court case, *Grant v Australian Knitting Mills* (1933).

9) Mabo 1992 is possibly the most significant example of the High Court's ability to create common law.

   9a) 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) and *Wik Peoples v Queensland* (1996).

   9b) Provide a brief description of each case, covering the background, the decision, reasons for the decision and the significance of the case to precedent.



Finding the truth

Syllabus points:

- **Key processes in civil and criminal trials**
- **Essential to the understanding of democracy and the rule of law is judicial independence.**

Resolving disputes

Human societies are complex. They contain many individuals and groups who must all get along if society is to be cohesive and peaceful. Inevitably, there will be disagreements between individuals and groups within society.

The parties to a dispute can resolve most disagreements themselves through negotiation or sometimes with the help of a trusted and impartial third party — a mediator — who works with the parties to help them resolve their dispute. Most disputes resolved through negotiation or mediation are agreed to by the parties. The outcome is not legally binding on them, but is usually accepted by both.

Some disagreements are so serious that the parties must resort to law to resolve their dispute. Only courts can adjudicate disputes and resolve them according to law. Court decisions are legally binding on the parties (they are law). The power to make legally binding and enforceable decisions is called **judicial power**. Only courts have judicial power. Judicial power makes courts the ultimate dispute resolution mechanism in a political and legal system.

Courts are the third arm of government. Chapter 6 explained how courts are organised, and how they interpret and sometimes create law when they resolve disputes. Courts interpret statute law (statutory interpretation) and common law (doctrine of precedent) — or both — in the context of a specific case. The High Court of Australia (the High Court) interprets constitutional law.

Courts interpret general laws and apply them to specific circumstances in the context of a trial. Trials have strict procedures and are the courts' way of settling disagreements according to law. Merely settling disagreements is not enough, though. Trials must achieve justice and respect rights or else the public's confidence in the courts will suffer.

■ Figure 7.1 — Courts interpret laws and apply them to specific circumstances in the context of a trial.
Source: Carlotta Zampini, Judge, Noun Project, <https://thenounproject.com/search/?q=courts&i=63222>

Justice

Justice is an ancient concept. It is also a moral concept. Humans have an innate sense of what is right and wrong. Justice generally seems to be a natural law — a law of nature and not of humans.

Lex naturalis is Latin for 'natural law'. The Romans believed that some legal principles were self-evident and unchanging; they did not need to be explained or codified in law. They were obvious to any human being capable of reasoning — that is, a thinking or reasonable person.

Natural justice

The Roman idea of natural law has evolved into today's **principles of natural justice** which define a fair trial.

Natural justice comprises four principles:

1. impartial adjudication (judge and/or jury);
2. hearing both parties;
3. evidence based decisions; and
4. open trials, so there is public confidence in justice.

A fair trial must be one in which all four principles of natural justice feature. One can easily see that the absence of any principle of natural justice would make a trial unfair.

Trial processes must be designed around these four principles or they will fail to deliver justice, and public confidence in the judiciary will suffer.

■ Figure 7.2 — Trial by ordeal is an example of earlier forms of trial that today would not be considered fair.
Source: Diebold Schilling the Younger, 'Water ordeal', Lucerne chronicle, 1513, <http://www.medievalists.net/2017/03/weight-love-anglo-saxon-cold-water-ordeals/>, Public Domain, <https://commons.wikimedia.org/w/index.php?curid=5444002> and <https://en.wikipedia.org/wiki/Trial_by_ordeal#/media/File:Water-ordeal.jpg>

Legal rights

Parties to a trial have rights — **legal rights**. Both parties have a right to a fair trial. The accused party, who is in legal jeopardy, has additional legal rights enhancing their protection.

The accused party should be entitled to special protection because the consequences of losing a trial can have life-changing consequences. For example, they may have their rights severely limited by law. The **presumption of innocence** and the **right to silence** are legal rights to which an accused party is entitled. These rights are discussed in detail in this chapter.

Trial systems

There are two major trial systems in the modern world — the adversarial trial and the inquisitorial trial. Others have existed throughout history and in different parts of the world, but they have fallen from use because they fail to satisfy the principles of natural justice.

The adversarial trial

Chapter 6 introduced students to the adversarial trial, which is thought to originate in the contests between knights representing lords in disputes with each other. The English jury system, established by the *Magna Carta*[1] in 1215, may also have encouraged adversarial argument before a jury. What is certain is that the adversarial trial evolved in Britain, independently of European trial systems taking shape on the continent.

Figure 7.3 — A 1540s depiction of judicial combat in Augsburg in 1409. A duel between Marshal Wilhelm von Dornsberg and Theodor Haschenacker. "Dornsberg's sword broke early in the duel, but he proceeded to kill Haschenacker with his own sword".
Source: Jörg Breu d. Jüngere and Paulus Hector Mair, Judicial combat, c 1544, Bayrische Staatsbibliothek Cod. icon. 393, Public Domain, <https://commons.wikimedia.org/w/index.php?curid=2415624> and <https://upload.wikimedia.org/wikipedia/commons/e/e7/Gerichtskampf_mair.jpg>

1 Magna Carta (Latin for 'Great Charter'), signed by King John in 1215, is one of the most important 'constitutional' documents in English history. Among other things, it imposed the first legal limits to royal power and protected citizens from losing their liberty except by law and the 'judgment of their peers' — a jury.

Figure 7.4 — A 19th century depiction of Galileo appearing before the inquisition.
Source: Joseph-Nicolas Robert-Fleury, Galileo before the Holy Office, Public Domain, <https://commons.wikimedia.org/wiki/File:Galileo_before_the_Holy_Office.jpg>

The essence of the adversarial trial is a battle between the parties who aim to convince a passive judge of the truth by presenting their best evidence and countering (testing) the evidence of the other party. The parties are responsible for running the trial, using their wits and resources to reveal the truth.

The inquisitorial trial

The inquisitorial system originated in Europe. Its roots lie in the Roman civil law which was inherited by many new and emerging kingdoms following the collapse of the Roman Empire in western Europe in the 5th century CE.

The essence of the inquisitorial trial is a search conducted by inquisitors or investigators. In this system, inquiring judges discover the truth by locating evidence that supports one party's or the other's version of the truth. Students will return to the inquisitorial system of trials in Chapter 13.

Disputes

A dispute is a disagreement about something. Disputes can range from simple and straightforward disagreements within families or between friends, acquaintances or strangers. They may be more pressing matters involving arguments over money or obligations between parties. They may be severe, such as those where a party accuses another of severe wrongs against them. Disputes may even be constitutional arguments between governments within a federation about which level of government should have certain powers.

Political units (nation states and states within federations) have developed means of resolving disputes that preserve social cohesion and promote peaceful and safe societies. The

Figure 7.5 — A dispute is a disagreement between two parties.
Source: Jenie Tomboc, Fight, Noun Project, <https://thenounproject.com/search/?q=dispute&i=727790>

ultimate form of dispute resolution — and the only form that can bind the disputing parties to a legally enforceable resolution — is the third arm of government, the judiciary (the court system).

Most disputes are resolved before they get to court. There are many forms of dispute resolution. Some are discussed in detail in the next section to give students an overview of where court-based dispute resolution fits into a broader framework of dispute resolution. Perceptive students will seek an understanding of these other methods of solving disputes as they are useful in Unit 4 of the Politics and Law course where tribunals and the Australian Human Rights Commission are studied.

Private and public disputes

Disputes resolved through court action may be broadly classified as either private or public.

Private disputes involve alleged wrongs committed by one party against another, including:

- loss or damage caused by negligence (a failure to take sufficient care);
- loss of others' quiet enjoyment caused by excessive disturbance;
- loss or damage to another's reputation; and
- breach of contract.

Public disputes are about the meaning and application of statutes, constitutions or disputes involving the government, including:

- administrative disputes;
- taxation disputes;
- criminal disputes; and
- constitutional disputes.

Private law and civil trials

Private law concerns private relations between legal persons. Recall that legal persons may be natural or artificial persons such as corporations. Private disputes between legal persons usually involve an allegation that one party has wronged another. Another common form of dispute is over breaches of contract. A dispute between private parties has little consequence for the public, except if it creates new common law by setting a precedent. Even then it will only affect future parties in similar cases and not the public more generally.

The case of *Wilson v Bauer Media Pty Ltd* (2017) VSC 521 discussed in Chapter 6 is an example of a private law dispute.

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 7.6 — Defamation is a type of tort.
Source: Matt Golding, 2016, <www.threefingers.com.au/> and <https://www.pollbludger.net/2018/01/16/essential-research-53-47-labor-20/comment-page-59/>

Figure 7.7 — The Owen Dixon Commonwealth Law Courts Building. Disputes that appear in this court are a type of private dispute.
Source: user: Adz, Melbourne Federal Court, 2007, English Wikipedia, Public Domain, <https://commons.wikimedia.org/w/index.php?curid=4078967>

These are considered private law because their primary influence is upon the parties themselves and not the broader community.

Resolving civil law disputes

Civil trials resolve private law matters. *Donoghue v Stevenson* (1932) created the common law tort of negligence. *Wilson v Bauer Media Pty Ltd* (2017) VSC 521 is an example of the tort of defamation. These were civil trials in which both parties were private legal persons.

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.

Public law and criminal trials

Public law concerns disputes about the application of constitutional or statutory law or regulations made by subordinate authorities. Public disputes involve disputes between parties and the government or cases with a direct concern for the community. Public law has broader social consequences because it affects relations between people and groups throughout the community, not just the parties to the case.

Figure 7.8 — Donoghue v Stevenson (1932), often referred to as the 'snail in the bottle' case, established the legal precedent of negligence.
Source: Icons Producer, Snail Body, Noun Project, <https://thenounproject.com/search/?q=snail&i=1605638>

The case of *Uber B.V. v Commissioner of Taxation* (2017) discussed in Chapter 6 is an example of public law. It is a taxation case affecting many people beyond the parties to the case (for example, all Uber drivers will now pay the Good and Service Tax (GST) and Uber customers can expect to pay more for rides). It involved a dispute between artificial persons — Uber and the government, represented by the Australian Taxation Office — and it involved the application of the statute, *A New Tax System (Goods and Services Tax) Act 1999* (the GST Act).

Resolving criminal law disputes

Criminal trials resolve disputes about serious wrongs — wrongs more serious than private disputes. Wrongs like theft, drug use, assault, murder, fraud and vandalism are classified as crimes. Such wrongs concern everyone because they threaten social cohesion and public safety. Because crimes are of public concern, the prosecuting party in a criminal dispute is a representative from the executive arm of government. The Commonwealth and most Australian states, including Western Australia (WA), have codified criminal wrongs into statutes. In the states, they are often called the 'Criminal Code'.

Criminal disputes are public law because of:

- their direct concern for the community; and
- the involvement of the government as a party.

Criminal trials:

- resolve disputes between accused persons and the government representing the community;
- have a representative of the government as the prosecuting party;
- involve statute or regulations; and
- have implications for the community at large because they concern social cohesion and public safety.

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 are minor and dealt with by inferior courts such as the Magistrates Court. Offenders are dealt with by **summons** rather than arrest, and the trials are quick (*manus*

brevi, which is Latin for 'shorthand'). There are no juries. After the prosecution (which must present evidence) and the defence (which may provide evidence), the magistrate ensures a fair trial through deciding guilt based on the evidence presented. Sentences range from fines to community based orders. Littering is an example of a summary offence.

Indictable offences are more serious and are dealt with by intermediate and superior courts such as District and Supreme Courts. The **arrest** of the accused is common. Trials can be lengthy and complicated. A **jury** is frequently involved and jury members decide if the accused is guilty. The judge ensures a fair trial and decides the sentence. Sentences may range from fines to lengthy prison sentences.

Resolving civil disputes before trial

Most civil disputes are resolved informally. People talk through their differences and reach a compromise agreeable to both. An example might be a dispute between an employer and an employee that is resolved through an agreement over wages or work conditions.

Most disputes are resolved through negotiation between disputing parties or by some form of third party intermediary who helps the parties clarify the issues between them and reach a resolution.

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.

Figure 7.9 — Negotiationis the cheapest form of alternative dispute resolution. *Source: Robiul Alam, Handshake, Noun Project, <https://thenounproject.com/search/?q=agreement&i=1303467>*

> *"With mediation and conciliation, parties retain the power to resolve their dispute. Arbitration reduces this power by transferring decision making to the arbitrator."*

Mediation

Since 2010 mediation has been a compulsory precursor to Western Australian civil law trials. Mediation is fundamental to the civil pre-trial 'case management' described later in this chapter.

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. Perceptive students will be able to identify the principles of natural justice in the way mediation works.

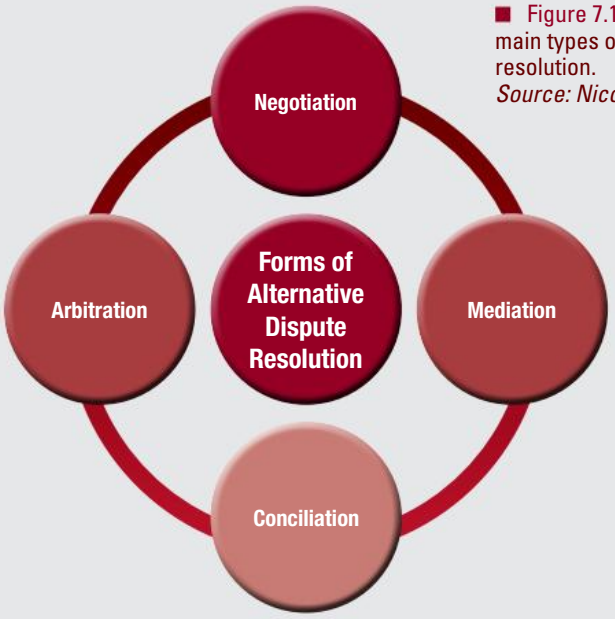
Mediation is useful when the relationship between parties has deteriorated to the extent that they may be unable to settle through negotiation. Family disputes are an example.

Mediation is flexible and non-binding. The power to resolve the dispute remains with the parties.

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.



■ Figure 7.10 — There are four main types of alternative dispute resolution.
Source: Nicol Davis, 2018

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.

Litigation

If Alternative dispute resolution does not have the desired outcome the next step is litigation through the court system. However, most Western Australian courts require and provide mediation in the context of a trial.

> *Litigation is the 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.*

To reach litigation parties must be unable to resolve their dispute using any of the other forms of ADR. They have to be prepared to bear the costs of legal action and legal representation by expert lawyers. They must be convinced they have a reasonable chance of success because court action is expensiveand losing may havethe significant consequences.

Litigation is the final form of dispute resolution. It involves the application of judicial power to impose a legally binding resolution upon the parties. Therefore, parties will have completely lost control of the dispute resolution process and surrendered it entirely to the court, unless they continue ADR during the trial.

Litigation 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.

A trial is a formal procedure used to resolve disputes in courts. Most trials have the following elements:

- an adjudicator — a magistrate or judge who presides over the trial procedures. This person is part of the judicial arm of government and must be free of any influence from the executive and legislative arms. Their position should be guaranteed and they should be paid sufficiently well to reduce the potential influence of wealth and power on their decisions. Adjudicators:
  - find the facts (decide the truth) based on evidence (in adversarial trials a jury may take this role);

  - ensure a fair trial by upholding procedures ensuring natural justice; and
  - determine sanctions and remedies.
- the parties — the legal persons whose dispute the court is seeking to resolve. Parties:
  - bring the dispute to court;
  - present evidence to the court;
  - test evidence before the court; and
  - make arguments concerning the law.
- legal representatives — experts with specialised legal training and skills. Legal representatives include:
  - solicitors, who assist and advise a party about their case and assist the court in determining the facts and interpreting the law; and
  - barristers, who present the case before the court on behalf of parties.
- procedures — formal rules that guide the process of trial, including:
  - procedures that reflect the four principles of natural justice and ensure a fair trial.
- a formal courtroom setting:
  - usually placing the adjudicator at the front with the parties arranged to face them; and
  - designed to provide a forum for dispute resolution and to impart respect for the judiciary, which is essential for public confidence in the courts.
- personnel — court orderlies, sheriffs and other court staff:
  - are not part of the judiciary; and
  - are employed by the executive to support the operations of the courts.

Adversarial trials

The adversarial trial is the trial system, originating in England, that is used throughout the common law world. Australia uses the adversarial trial in all but a few situations. Exceptions include the Coroner's Court and judicial inquiries such as Royal Commissions, both of which use an inquisitorial approach to find the truth.

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

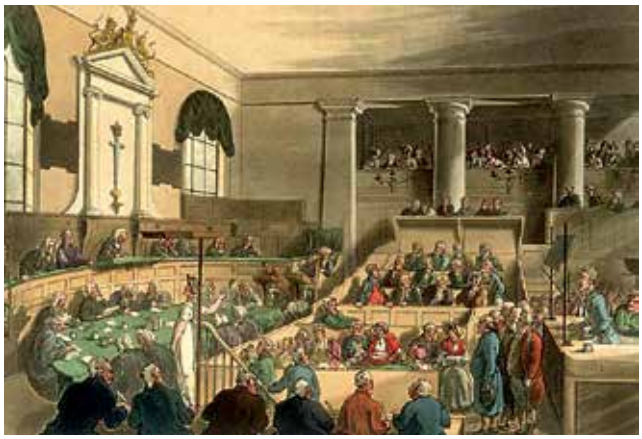


Figure 7.11 — The Old Bailey in London was the venue for more than 100,000 criminal trials between 1674 and 1834.
Source: Thomas Rowlandson and Augustus Pugin, Old Bailey, 1808, in Rudolph Ackermann, William Henry Pyne and William Combe, Microcosm of London, 1904, <https://en.wikipedia.org/wiki/Trial#/media/File:Old_Bailey_Microcosm_edited.jpg> and <https://commons.wikimedia.org/w/index.php?curid=566832>

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.

> *Standard of proof is the measure of how much proof is required to establish the liability or guilt of the accused.*

Standards of proof

A **standard of proof** is the measure of how much proof is required to establish the liability or guilt of the accused.

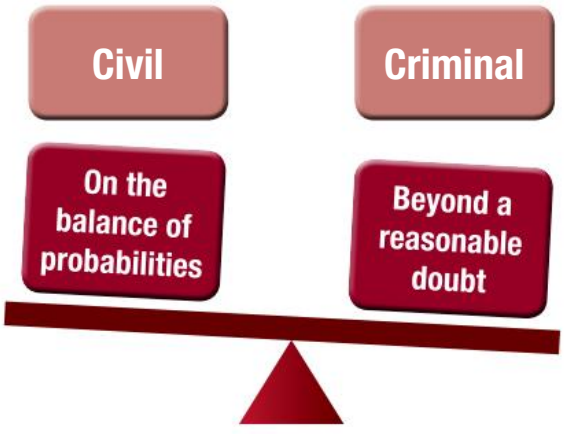
The plaintiff or prosecution must achieve the standard of proof required to win their case. Perceptive students will see that there is no standard of proof for the defendant because they have nothing to prove.

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

To prove on the balance of probabilities is less onerous than to prove beyond reasonable doubt. Proof on the balance of probabilities in a civil trial means the plaintiff must present the most likely or believable case. 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.



■ Figure 7.12 — A standard of proof is the measure of how much proof is required to establish the liability or guilt of the accused. *Source: Nicol Davis, 2018*

Beyond reasonable doubt

To prove beyond reasonable doubt means that any evidence that gives rise to doubt in the mind of a reasonable person[2] 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.

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.

Rights of the accused

The accuser bears the burden to prove to the standard of proof required. The defendant has no obligation to prove. However, there are additional protections for an accused person beyond not having to prove their innocence.

Right to silence

The defendant in a criminal trial does not have to provide evidence at their trial. They have a **right to silence**. Students should recall that each party is responsible for running their case in the adversarial trial. To expect the accused defendant to provide evidence against themselves — to self-incriminate — is the same as expecting the defence to assist the prosecution with its case. The burden to prove guilt is entirely the responsibility of the prosecution; the defence does not assist in proving guilt.

Historically, the right to silence evolved in England in times when the executive (the

2 A person of sound mind who is capable of ordinary rational thinking or 'reasoning'.

Figure 7.13 — The right to silence is an essential protection for individuals accused of a crime.
Source: Luis Prado, Silence, Noun Project, <https://thenounproject.com/search/?q=silence&i=9784>

'King's men' and the 'Star Chamber', a court infamous for its willingness to suppress political enemies of the monarchy) would torture accused persons to extract confessions to be used as evidence against them. As a way of preventing torture, judges of the time began refusing to admit a defendant's self-confessed evidence. There would be no point in the King's men torturing an accused person if their confession could not be used as evidence. Students may be thinking, haven't times changed? or, isn't it okay to ask a defendant under oath if they committed the crime? Students should remember that even in democracies executive governments can carry out actions that are later found to be torture. 'Waterboarding' terror suspects by the Government of the United States of America is an example from the 2000s. The right to silence makes such practices pointless and helps protect an accused's human right against torture.

Figure 7.14 — Constitutio Criminalis Theresiana (1768) outlined the approved methods of torture which could be used by Austrian legal authorities to arrive at the truth.
Source: Constitutio Criminalis Theresiana, 1768 Public Domain, https://en.wikipedia.org/wiki/Rack_(torture)#/media/File:Theresiana-Leiter.jpg

Figure 7.15 — Sir William Garrow coined the phrase 'presumed innocent until proven guilty', insisting that defendants' accusers and their evidence be thoroughly tested in court.
Source: Robert Dunkarton and Arthur William Devis, Sir William Garrow, 1810, <https://commons.wikimedia.org/w/index.php?curid=16963602>

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 a core right that protects a defendant from 'guilt by accusation'.

> *"The right to silence and the presumption of innocence are essential rights that protect people from unproven accusations."*

The right to silence and the presumption of innocence are essential rights that protect people from unproven accusations. These rights are fundamental to the adversarial legal system and not found to the same extent in an inquisitorial system.

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",[3] 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.

3 Harvard Law School Library, 'Sir William Blackstone', Words of justice, <http://library.law.harvard.edu/justicequotes/explore-the-room/south-4/>.

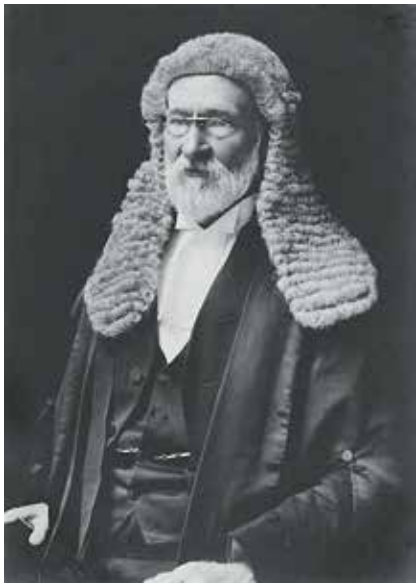


Figure 7.16 — First Chief Justice of the High Court of Australia, Sir Samuel Griffith.
Source: Sir Samuel Griffith, Public Domain, <https://commons.wikimedia.org/wiki/File:Chief_Justice_Samuel_Griffith.jpg> and <http://nla.gov.au/nla.obj-136699298-v>

Roles within adversarial trials

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.
- 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 and referees, 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.

Figure 7.17 — A jury is an impartial adjudicator of the facts in a criminal trial.
Source: John Morgan, The jury, 1861, Wikipedia (English), Public Domain, <https://commons.wikimedia.org/w/index.php?curid=4912282> and <https://en.wikipedia.org/wiki/Jury#/media/File:The_Jury_by_John_Morgan.jpg>

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.

> *Like the judge, juries are passive and impartial.*

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 are passive and impartial. Jurors do not ask questions or present evidence or make an argument.

Parties

The parties are legal persons — natural or artificial — who are in dispute about how the law should resolve their disagreement. 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;
- 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.

The parties must run their case without assistance from the court. The court is merely the venue for the contest with court officials who assist the judge and jury. Such personnel include court orderlies, who help with court functions, and sheriffs, who coordinate juries. Court officials are employees of the executive branch of government and have no role in the trial itself.

The judge and jury are the impartial adjudicators of the contest provided by the State (the political and legal system). Judges are paid by the executive, but are not employees of the executive. They are independent of government. It is the parties who are in a contest and who must 'fight their fight'.

Legal representatives

"He who represents himself has a fool for a client" — so the famous quote from Abraham Lincoln goes.[4]

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. Thoughtful 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.

Figure 7.18 — Legal representatives are the 'equalisers'. They bear the burden of running the case on behalf of a party, where expertise is the key to success. *Source: Miroslav Kurdov, Lawyer, Noun Project, <https://thenounproject.com/search/?q=lawyer&i=10320>*

Evidence

The principles of natural justice demand decisions based on evidence. Consider what a trial without evidence would be like — there could never be any proof, only accusations, assertions and guesswork. Such a trial would be incapable of delivering justice.

Not all evidence is equal. Weak evidence may merely suggest liability or guilt. High quality evidence may prove liability or guilt. Trials should rely on the latter, not the former, to uphold natural justice.

> *"Evidence must be firsthand. A witness (noun) must actually witness (verb)."*

Rules of evidence

The adversarial trial has strict rules of evidence. Rules of evidence ensure high quality evidence is admitted into trial and low quality evidence is excluded. In this way, decisions are based on high quality evidence alone, satisfying a fundamental principle of natural justice.

Some rules of evidence are listed below.

Relevance

Evidence must be applicable to the case. It must bear relevance to establishing the act or inaction alleged and, in some cases, the intent to commit the act. All evidence presented must be able to be tested and relate to the matters of fact in contention. Irrelevant evidence is excluded. It has no value in finding the truth.

Hearsay

Witnesses can only give evidence based on what they have witnessed themselves. Evidence must

4 Ahtirski, Eugene Andre, Abraham Lincoln had it right — "He who represents himself has a fool for a client", 2011, <https://www.avvo.com/legal-guides/ugc/abraham-lincoln-had-it-right---he-who-represents-himself-has-a-fool-for-a-client>.

be first hand. Evidence diminishes in quality with each re-telling. Evidence cannot be 'heard' from another person and then 'said' in court. It cannot be second hand. A **witness** (noun) must actually witness (verb).

Opinion

Witnesses can only report observed facts as evidence. They cannot express their opinions. The exception is with expert witnesses. Experts may be called to give evidence in their area of expertise and may be permitted to present their professional opinion.

■ Figure 7.19 — Witnesses are prevented from presenting 'hearsay' evidence in court.
Source: G Kamaksh, Ear, Noun Project, <https://thenounproject.com/search/?q=ears&i=150953>

Circumstantial evidence

Circumstances may allow a particular conclusion to be drawn by a reasonable person. People conclude from circumstances all the time. If a man, a woman and two children were standing together in a school carpark before school (a set of circumstances), a reasonable person may conclude they are parents and children — a family. In most cases that would be correct, but it would be unreliable. The four people may be two teachers and two unrelated students. The circumstances described in the example are not conclusive, they are only suggestive. That is not good enough evidence for a trial.

It is therefore necessary that when reaching a conclusion on liability or guilt in a case, the impartial adjudicator — the jury or judge — base this verdict on reliable and tested evidence.

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.

> *"The purpose of the trial is the discovery of truth."*

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 7.20. 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.

■ Figure 7.20 — Simplified District Court criminal trial processes in Australia.
Source: Rule of Law Institute, 'Step 3: Trial', Criminal Trial Process Booklet, 2015, <https://www.ruleoflaw.org.au/wp-content/uploads/2015/01/A3-Criminal-Trial-Process-Booklet.pdf>

The presentation of evidence by the plaintiff/prosecution commences and is tested by the defence.

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.

> *Only evidence that has survived scrutiny by the parties is admissible and may be used to reach a decision.*

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.

Evidence may be in the form of:

- **Witness testimony**. Witness[5] 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.

5 Some witnesses are called as 'expert witnesses'. Expert witnesses can give opinion evidence in their area of expertise. Doctors, engineers, scientists, electricians and other professions or trades may give opinion 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.

Civil procedure

Civil trial

The purpose of a civil trial is for each party to present evidence, test evidence, argue the interpretation of the law and convince the judge that its case is the stronger on the balance of probabilities.

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. Refer to Tables 7.1 and 7.2 respectively, for explanation of pre-trial and trial procedure for civil cases in the Western Australian District Court.

> *"The purpose of a civil trial is for each party to present evidence, test evidence, argue the interpretation of the law and convince the judge that its case is the stronger on the balance of probabilities."*

Civil pre-trial procedure

All pre-trial procedures aim to clarify the dispute and gather evidence. **Pleadings** clarify the issues in dispute, and **further and better particulars** gather evidence. Since 2010, cases are managed by the courts in WA to ensure that parties do not waste time and money preparing for trial. Case management includes compulsory mediation and ensures that increasingly complex cases are handled more efficiently, reducing both the demands on court resources and costs for the parties involved.

Students must note that a civil dispute may be resolved at any time during pre-trial or trial. During pleadings and further and better particulars, each party carries out pre-trial preparation and liaises with the other party to clarify the dispute and locate and assemble evidence. Pleadings and further and better particulars frequently result in parties becoming aware of the strength or weakness of their case, accepting mediation and settling out of court. An out of court settlement resolves the dispute and ends further litigation and is, by far, the most likely outcome.

Traditionally, courts had little role in the pre-trial stage, but a 2010 reform of the Western Australian civil pre-trial process introduced 'case management' by the court. Case management requires the parties to seek ADR through mediation. The court is now active in resolving civil disputes pre-trial — a nod to the inquisitorial principle of an active judiciary.

Case management — A civil trial reform

Case management is a 2010 reform to Western Australian civil pre-trial. It is used in the Supreme and District Court and has also been introduced into the Family Court.

Case management involves a judge (or a court registrar in less complex cases) taking control of the pleadings and further and better particulars phases. This reform idea is inspired by the 'active judge' concept of the inquisitorial system.

Parties are guided and directed in the clarification of disputes (pleadings) and the provision of evidence (further and better particulars). These procedures reduce the animosity between the parties, which can be inflamed by adversarial systems, and prevents either party from exploiting the financial or other weaknesses of their opponent.

The aims of case management are to:

- promote early dispute resolution — each year thousands of civil writs are issued, but the Supreme Court hears only about 50 cases a year. The vast bulk are settled before trial;
- promote timely resolution of cases — allowing less time for less complicated and more time for more complicated cases;
- incorporate the principle of proportionality where cost and time spent on a case is in keeping with the value and complexity of the dispute;
- increase public confidence in the judicial process; and
- maximise the efficient use of limited judicial resources.

As society gets more complex (economically, socially and technologically) so, too, has the complexity of cases dealt with by the courts. Today, there may be an enormous volume of documentary evidence from email, text messages, Facebook posts and other sources that may be admitted as evidence. There has not been an increase in the number of judges or courts to cope with massively increasing caseloads. Instead, the processes have to become more efficient to enable the machinery of justice to speed up. Case management is an example of a reform that increases efficiency.

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.
	FURTHER AND BETTER PARTICULARS	*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 7.1 — Civil pre-trial procedure used in the Western Australian District Court.
Source: Stephen King, 2018

Civil pre-trial procedures in the Supreme Court

Civil procedure in Western Australia follows the same basic procedures. There may be slight differences, but all rules of procedure are based on the *Rules of the Supreme Court 1971* and other subsequent legislation like the *Supreme Court (Court of Appeal) Rules 2005*. In addition to these rules, other courts in the hierarchy may introduce forms specific to their jurisdictions.

Both the Supreme and District Court implement case management. Case management stipulates that certain procedures must be completed within a particular period of time.

Letter of demand

A statement or **letter of demand** is technically not a legal document, but a letter to the other party outlining what the issue is and the solution being sought. This usually comes after meetings, phone calls and attempts at negotiation. While it is not a formal court document, case management will ask for evidence of this letter.

This statement or letter of demand will usually include the words 'without prejudice'. This means that the other party cannot use any information or concessions made in this letter against the providing party at 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 $1,318, and in the Magistrates Court of WA the cost is somewhere between $129 and $521.

Memorandum of appearance

Once served, a defendant must file a **memorandum of appearance** with the court. Failure to do so could result in a default judgment. The defendant must make sure that all the information contained in the writ is correct — for example, names, dates and alleged wrongs.

In the Magistrates Court, if you can show that the other party's case has no chance of succeeding, you can also apply for a **default judgment**.

> *4,628 writs for civil cases were lodged with the District Court of Western Australia in 2017, but only 142 of them were listed for trial, and only 47 of those actually went to trial.*

IN THE SUPREME COURT OF WESTERN AUSTRALIA
HELD AT PERTH

CIV 768 of 2018

B E T W E E N :

Mac Construction — Plaintiff

and

ABC Cranes — Defendant

GENERAL FORM OF WRIT OF SUMMONS

Date of Document:	14 August 2018
Filed on behalf of:	The Plaintiff
Date of Filing:	15 August 2018
Prepared by:	A+ Lawyers TELEPHONE: 9555 5555 REF: W123

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 20th day of August 2018.

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 Perth.

■ Figure 7.21 — Sample writ of summons.
Source: Lynette McGivern, 2018

Statement of claim

The **statement of claim** is the document containing all the facts and details of the claim. Sometimes the statement of claim is included in the writ of summons. If not, the statement of claim must be served on the defendant within 14 days of the memorandum of appearance being filed.

There were 4,628 writs for civil cases lodged with the District Court of Western Australia in 2017, but only 142 of them were listed for trial, and only 47 of those actually went to trial.[6]

> *2,134 conferences (158 mediation and 1,976 pre-trial conferences) took place in the District Court in 2017.*

IN THE SUPREME COURT OF WESTERN AUSTRALIA
HELD AT PERTH

CIV 768 of 2018

B E T W E E N

Mac Construction — Plaintiff

-and-

ABC Cranes — Defendant

STATEMENT OF CLAIM

Date of Document:	14 August 2018
Filed on behalf of:	The Plaintiff
Date of Filing:	15 August 2018
Prepared by:	A+ Lawyers TELEPHONE: 9555 5555 A+Lawyers@email.com REF: W123

1. The plaintiff is a construction business.

2. By contract dated 7 April 2016 the plaintiff purchased a crane from the defendant on the basis that it:
   (a) had the capacity to lift a 2 tonne load; and
   (b) included certification confirming the load limits.

Particulars

The purchase agreement is set out in an email dated 28 March 2016 from the plaintiff to the defendant and the defendant's email in response of the same date.

4. On 7 April 2016, the plaintiff paid the defendant the sum of $800,000 in consideration for the crane.

5. The defendant falsified the certification to the extent that:
   (a) the crane was actually only certified to lift a load of 1 tonne;

6. Via email dated 14 June 2016, the plaintiff informed the defendant that the crane was not as represented by the defendant and that they sought to terminate the contract for sale.

7. Despite request, the defendant has not paid any money to the plaintiff nor have they provided them with a replacement 2 tonne crane.

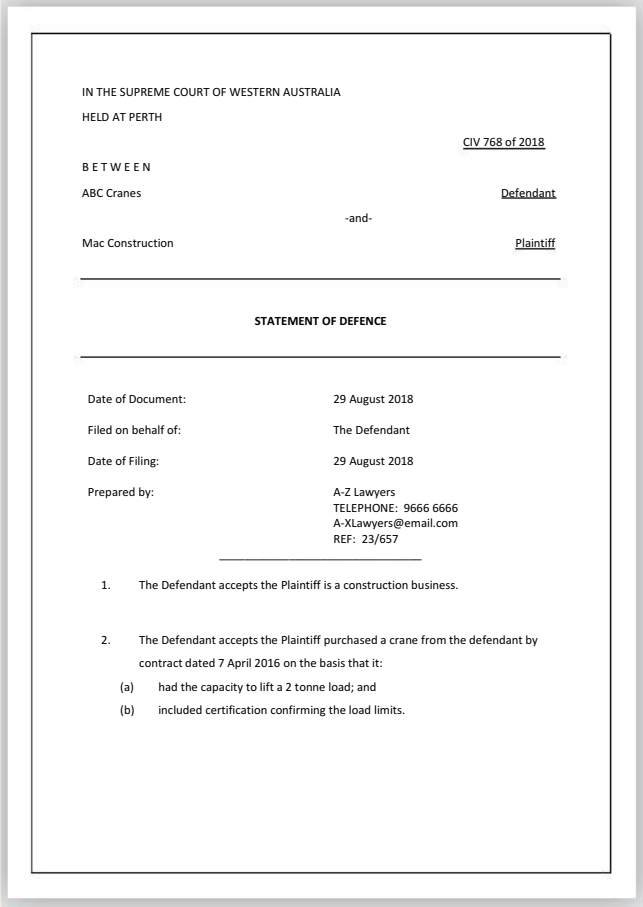
And the plaintiff claims:

(a) $800,000;
(b) interest pursuant to *Supreme Court Act 1935* (WA) s35 from 1 March 2010; and
(c) costs.

A. Lifter
Plaintiff

■ Figure 7.22 — Sample statement of claim.
Source: Lynette McGivern, 2018

6 District Court of Western Australia, 2017 Annual Review, Perth, p 13, <https://www.districtcourt.wa.gov.au/_files/2017_WADC_AnnualReview%20-%20Published.pdf>.



IN THE SUPREME COURT OF WESTERN AUSTRALIA
HELD AT PERTH

CIV 768 of 2018

B E T W E E N

ABC Cranes — Defendant

-and-

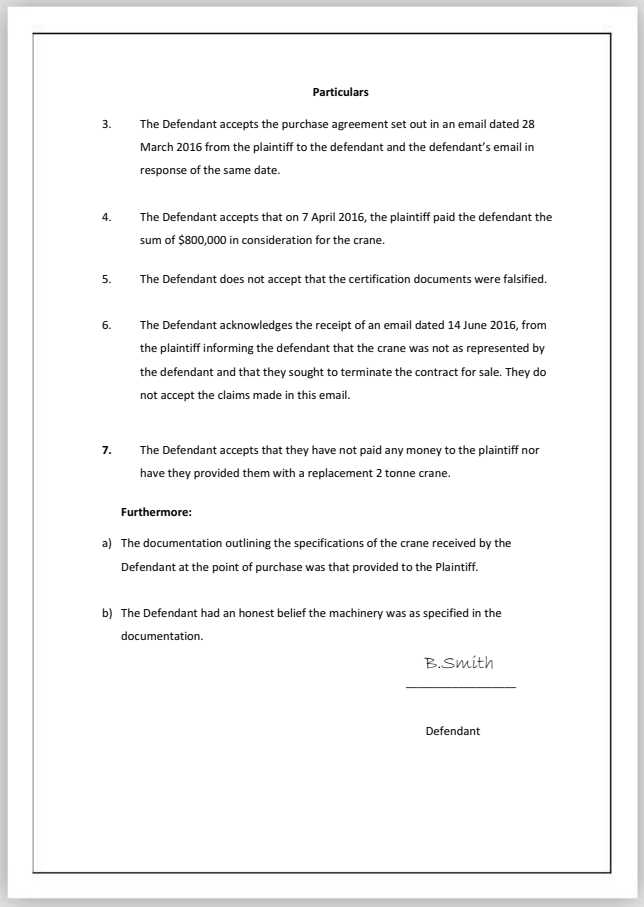
Mac Construction — Plaintiff

STATEMENT OF DEFENCE

Date of Document:	29 August 2018
Filed on behalf of:	The Defendant
Date of Filing:	29 August 2018
Prepared by:	A-Z Lawyers TELEPHONE: 9666 6666 A-XLawyers@email.com REF: 23/657

1. The Defendant accepts the Plaintiff is a construction business.

2. The Defendant accepts the Plaintiff purchased a crane from the defendant by contract dated 7 April 2016 on the basis that it:
   (a) had the capacity to lift a 2 tonne load; and
   (b) included certification confirming the load limits.



Particulars

3. The Defendant accepts the purchase agreement set out in an email dated 28 March 2016 from the plaintiff to the defendant and the defendant's email in response of the same date.

4. The Defendant accepts that on 7 April 2016, the plaintiff paid the defendant the sum of $800,000 in consideration for the crane.

5. The Defendant does not accept that the certification documents were falsified.

6. The Defendant acknowledges the receipt of an email dated 14 June 2016, from the plaintiff informing the defendant that the crane was not as represented by the defendant and that they sought to terminate the contract for sale. They do not accept the claims made in this email.

7. The Defendant accepts that they have not paid any money to the plaintiff nor have they provided them with a replacement 2 tonne crane.

Furthermore:

a) The documentation outlining the specifications of the crane received by the Defendant at the point of purchase was that provided to the Plaintiff.

b) The Defendant had an honest belief the machinery was as specified in the documentation.

B.Smith

Defendant

■ Figure 7.23 — Sample statement of defence.
Source: Lynette McGivern, 2018

Defence

The defendant must file a defence within the time limit set by the court. It must address each of the points made in the statement of claim. The defence statement can either accept or challenge the claims made in the statement of claim.

They may also want to include a **counter claim** in their response — a claim that they have been wronged.

All of the procedures outlined above are collectively referred to as the pleadings.

Further and better particulars

The pleadings will not give all the necessary particulars of the dispute; both sides will require further information to continue their case. These items are known as further and better particulars.

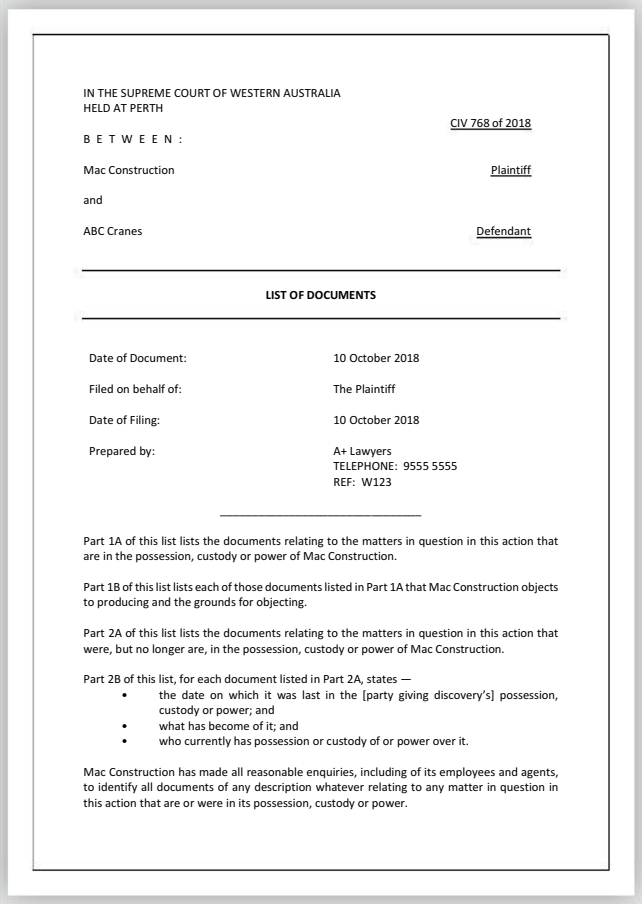
Discovery and inspection

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, times and a place where the documents may be inspected.



IN THE SUPREME COURT OF WESTERN AUSTRALIA
HELD AT PERTH

CIV 768 of 2018

B E T W E E N :

Mac Construction — Plaintiff

and

ABC Cranes — Defendant

LIST OF DOCUMENTS

Date of Document:	10 October 2018
Filed on behalf of:	The Plaintiff
Date of Filing:	10 October 2018
Prepared by:	A+ Lawyers TELEPHONE: 9555 5555 REF: W123

Part 1A of this list lists the documents relating to the matters in question in this action that are in the possession, custody or power of Mac Construction.

Part 1B of this list lists each of those documents listed in Part 1A that Mac Construction objects to producing and the grounds for objecting.

Part 2A of this list lists the documents relating to the matters in question in this action that were, but no longer are, in the possession, custody or power of Mac Construction.

Part 2B of this list, for each document listed in Part 2A, states —

- the date on which it was last in the [party giving discovery's] possession, custody or power; and
- what has become of it; and
- who currently has possession or custody of or power over it.

Mac Construction 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.

Neither Mac Construction nor its practitioner, nor any other person on its behalf, has now, or ever had, possession or custody of 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 this list.

The documents in this list, other than those listed in Parts 1B and 2A, may be inspected at — 666 City Street, Perth between 15 – 19 October between 10am and 4pm.

I certify that the statements in this document are true.

Signed: J. Doe Date: 10 October 2018

This list and its attachments were served on ABC Cranes on 11 October 2018 by P. Server.

Signed: P. Server Date: 11 October 2018

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 Construction are as follows —

No.	Description of Document	Date
1	Advertisement from *The West Australian*	20 March 2016
2	Email from Mac Construction to ABC Cranes	22 March 2016 9.25am
3	Email from ABC Cranes to Mac Construction	22 March 2016 10.00am
4	Email from Mac Construction to ABC Cranes	22 March 2016 10.05am
5	Email from ABC Cranes to Mac Construction	22 March 2016 10.10am
6	Crane specifications document	22 March 2016
7	Contract for Sale	7 April 2016

Figure 7.24 — Sample list of documents.
Source: Lynette McGivern, 2018

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".

> *The writ of summons, memorandum of appearance, statement of claim, statement of defence and counter claim are collectively known as pleadings.*

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.

Listing conference

If the parties are unable to come to a pre-trial settlement a **listing conference** will take place. The lawyers for both parties will hear from the court as to whether they think the case is ready to be heard, and a timeline will be set for the proceedings.

At this conference other items may be discussed, including planning for witnesses to be present (around other commitments), whether either party requires an interpreter and whether a video link will be necessary.

Callover conference

A few weeks before the trial, the lawyers from both parties will attend court and a judge will gauge their preparedness for trial. This is called a 'callover conference'. If appropriate, the judge may again ask the parties to attempt settlement in a pre-trial conference. The judge will also assess if there are any pieces of evidence that both parties agree upon that can be adduced (used as evidence) by consent. For example, a technical report on the specifications of the crane.

2,134 conferences (158 mediation and 1,976 pre-trial conferences) took place in the District Court in 2017. These were conducted by Registrars with the aim of resolving the case.[7]

Enforcing the judgment

If these lengthy and thorough procedures fail to encourage the parties to resolve the dispute then the case will proceed to trial. Following the trial phase a determination will be made on the balance of probabilities. At the completion of a case, the judge will give their reasons for deciding in a written judgment.

The successful party has to apply to the court for the judgment to be extracted. This means that an order may be drafted from the judgment so that the successful party can act; for example, to seek to enforce a cost order.[8]

Civil trial procedure

In civil trial procedure each party has the same opportunity to present their case and test the other party's evidence.

CIVIL TRIAL PROCEDURE		
TRIAL		**Purpose and Explanation**
Opening Addresses	*Plaintiff opening address*	Plaintiff outlines the case, explaining the alleged wrongs or breaches of contract, the evidence to be presented and the law they argue supports their case.
	Defence opening address	Defence outlines the case explaining why the alleged wrongs or breaches of contract are not true, the evidence to be presented and the law they argue supports their case.
Examination of Plaintiff Witnesses	*Examination-in-chief*	Plaintiff calls each of their witnesses to the stand. Witnesses take an oath. Plaintiff asks questions. Witnesses answer orally. Evidence should conform to the rules of evidence.
	Cross-examination	Defence tests plaintiff witnesses' evidence by asking questions attempting to highlight weaknesses, contradictions, reliability or other aspects that draw witness evidence into doubt.
	Re-examination (optional)	Plaintiff may ask further questions if cross-examination has undermined witness evidence.
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.
	Cross-examination	Plaintiff 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	*Plaintiff closing address*	Plaintiff sums up their case, the law and the evidence presented. They will argue they have proven their case on the balance of probabilities and the defendant should be found liable.
	Defendant closing address	Defence sums up their case, the law and the evidence presented. They will argue the plaintiff has failed to prove their case on the balance of probabilities and the defendant should be found not liable.
Verdict	*Judge(s) deliver verdict*	The judge considers the arguments and evidence. They determine a judgment in favour of one party on the balance of probabilities. The judge may determine the outcome and the remedy on separate occasions.

■ Table 7.2 — Civil trial procedure used in the Western Australian District Court.
Source: Stephen King, 2018

7 District Court of Western Australia, 2017 Annual Review, Perth, p 13, <https://www.districtcourt.wa.gov.au/_files/2017_WADC_AnnualReview%20-%20Published.pdf>.

8 Order 43, Rule 1, Supreme Court Act 1935 (WA), Rules of the Supreme Court 1971.

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. Costs are not punishment or damages awarded to right a wrong.

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 Liabilities Act 2002* (WA) governs the remedies for torts. It defines and limits the amount of damages that judges can award to plaintiffs.

The *Corporations Act 2000* is Commonwealth legislation that governs contracts.

Other Acts regulate private relationships that might be subject to civil trials.

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; and
  - 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**, 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.

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.

Lloyd Rayney's defamation win[9]

An edited extract from ABC Radio National *Law Report* on Tuesday 30 January, 2018.

Background

Western Australia police were found liable for defamation for statements made in press conference in 2007.

Shortly after the murder of Corryn Rayney, the police named the husband, barrister Lloyd Rayney as the 'prime' and 'only' murder suspect, which Mr Rayney vigorously denied.

In 2012, he was put on trial for the murder of his wife. Mr Rayney was found not guilty.

Transcript

Damien Carrick: Hello, welcome to the *Law Report*... First to Perth and the recent WA Supreme Court decision awarding $2.6 million in damages to barrister Lloyd Rayney for defamation.

Back in 2007, shortly after the murder of his wife Corryn Rayney, WA Police held a press conference where they named Lloyd Rayney as their 'prime' and 'only' murder suspect. Lloyd Rayney has at all times strenuously denied any involvement in his wife's murder. Five years later, Lloyd Rayney was put on trial for the murder of his wife. He was found not guilty.

Late last year, WA Police were found liable for defamatory statements made at that 2007 police press conference.

Professor David Rolph from the University of Sydney Law School is one of Australia's leading experts in defamation law.

David Rolph: Well, this is a very significant decision because, again, it's one of the multimillion dollar payouts last year in defamation cases. ... this is the largest defamation payout in [Western] Australian history, and it's significant because a significant component of the damages here were damages for economic loss, which is also relatively unusual. It's also a defamation case that follows on from an incredibly high profile unsolved murder case in Western Australia.

Damien Carrick: A murder case which has for the last 10, 11 years transfected WA. Tell me, who is Lloyd Rayney?

David Rolph: Lloyd Rayney is a former criminal prosecutor from Western Australia, so a barrister, and in August 2007 his wife Corryn Rayney, who was a registrar of the Supreme Court of Western Australia, was last seen leaving a boot-scooting class and disappeared, and about a week later her body was discovered in Kings Park with her burnt-out car close by. And so this then obviously led to a police investigation. And given the high-profile nature of the Rayneys as a couple, this generated a significant amount of publicity in addition to the fact that this was a murder case, which is always a matter of public interest.

> *"In 2007, WA Police held a press conference where they named Lloyd Rayney as their 'prime' and 'only' murder suspect."*

Damien Carrick: And on 20 September 2007, about a month after Corryn was murdered, WA Police held a press conference, and that's the press conference which, 10, 11 years down the track, has been the subject of this extraordinary defamation action. Tell me, what happened at that WA Police press conference?

David Rolph: So there was a significant amount of media interest in this, so the press conference was held and a diverse range of media outlets attended, and at the media conference the police officer Lee filled the media in on what had been happening in relation to the Rayney investigation. In the course of that, in the course of disclosing that there was an attempt to execute a warrant in relation to a surveillance devices offence, there was statements made by Lee that Lloyd Rayney was the only real suspect in the murder of his wife. This then has been the basis of this defamation case because of course this, as you say, was a press conference that occurred in September 2007, but it wasn't until December 2010 that Rayney was in fact charged with a criminal offence, so over three years passed between this press conference and the ultimate arrest and charge of Rayney with that offence.

Damien Carrick: And of course he did stand trial in 2012 and he was found not guilty in 2012, and that decision, the judge alone decision, was upheld on appeal as well. So he was found not guilty and that not guilty finding was upheld.

David Rolph: Yes, so the murder is still unsolved, and Rayney has been acquitted by two levels of court. So the murder is still...the murder of Corryn Rayney is still unsolved.

9 Broadcast at 5.30 pm and reproduced by permission of the Australian Broadcasting Corporation — Library Sales, 2018 © ABC, <http://www.abc.net.au/radionational/programs/lawreport/wa-supreme-court-decision-rayney-defamation/9369348#transcript>.

Damien Carrick: Okay, so going back to that press conference in September 2007, what damage did Lloyd Rayney allege as a result of the comments by Detective Senior Sergeant Jack Lee from WA Police at that press conference? What did he say happened as a result of him being named as the prime and as the sole suspect in his wife's murder?

David Rolph: So his allegation here, which was upheld by Justice Cheney and the defamation judgement handed down before Christmas last year was that this did irreparable damage to his reputation, both personal and professional, so that he suffered significant reputational harm, what other people thought of him, and injury to feelings. But also it had a decisive impact on his career as a barrister. So about two years prior to this, Rayney had established himself at the independent bar, so with these allegations being made about him, it became very much difficult for solicitors to brief him, particularly given his expertise in criminal matters. And so as a consequence of this, and Justice Chaney's judgement documents this at some length, there were a whole range of adverse reputational consequences for Rayney in his professional life, but also just in his day-to-day social interactions, not only with work colleagues and family and friends but even with complete strangers, and not simply strangers in Western Australia but across the rest of Australia and even internationally.

Damien Carrick: One event which was discussed where he was even travelling on the London Underground with some of his kids and he was recognised there.

> *"This did irreparable damage to his reputation, both personal and professional, so that he suffered significant reputational harm."*

David Rolph: Yes, and he extricated himself from that conversation by getting off at a stop and changing carriages, simply to avoid having that discussion. And so yes, the judgement details at some length the profound reputational consequences that this had on an everyday level but also in his professional life.

Damien Carrick: But also at events … he's kind of ostracised pretty dramatically and pretty unequivocally by a whole bunch of communities.

David Rolph: Yes, and the judgement sets out at great length evidence of this, so it's a very striking example of very significant adverse reputational consequences for publishing these sorts of statements suggesting that someone is in fact guilty, the prime and only suspect in their wife's murder.

Damien Carrick: So on 20 December, Lloyd Rayney is awarded $2.6 million by the WA Supreme Court as damages for that kind of defamation. Is this the first case of its kind where police have been held liable in defamation for what they say in the course of a police press conference?

David Rolph: To the best of my knowledge I think this is the first instance where the state has been vicariously liable for a police officer making statements at a police conference in a defamation case. I think there have been other instances where police officers have been sued, but on the handful of occasions where that's occurred they have tended to fail. So it is relatively unusual in the defamation context for this type of case to occur. But defamation is not the only form of liability that might arise in these sorts of scenarios.

Damien Carrick: What other kind of liability might arise or has arisen in the past in other cases?

David Rolph: Well, in this case the police officer was alive to the potential issues of sub judice contempt, which is obviously a live issue in these sorts of situations where you are sort of informing the media about ongoing police investigations or arrest and charge. So once someone is arrested and charged with an offence, the matter is sub judice, that is it's before the courts, and so that constrains what can be said about the matter. You can only report the bare facts from that time onwards. And so for police officers in the position of this police officer, they have to manage a range of legal risks, not limited to defamation but also potentially sub judice, and there was an issue of sub judice contempt here which the police officer was navigating.

And historically there have been examples of police officers being found liable for sub judice contempt from media conferences. So there's a decision from 1990 in New South Wales in a case called Attorney-General and Dean where a police officer who was giving an update about the murder investigation and the fact that a suspect had been arrested and charged with some fairly grisly murders, and in the course

of that press conference disclosed that the accused had purportedly confessed during police interviews. That sort of evidence would be excluded at trial, and so that was prejudicial to his right to a fair trial. That then exposed the police officer in that particular case to a finding of sub judice contempt.

> *Lloyd Rayney is awarded $2.6 million by the WA Supreme Court as damages.*

So it's not only the legal risk of defamation that you're juggling in that sort of live environment where you are providing information about a matter of public interest, you also have the possibility of sub judice contempt as well to manage at the same time.

Damien Carrick: Police have to be really, really careful about what they do and don't say in these press conferences. I'm really interested, what were the defences in this case? After all, he was the prime and the only suspect, wasn't he? Did the police argue that in fact he was actually the prime and only suspect, so this was a statement of fact? What did they argue?

David Rolph: Well, the difficulty here turns upon the interaction between the meaning that was found and the available defences. So the state of Western Australia argued that the meaning here was that it was simply a matter of suspicion, whereas Rayney here argued and Justice Chaney found that it in fact imputed that he was guilty of the murder. And so the difficulty of course is if the meaning is that he is guilty of the murder and he has been acquitted of that murder, it becomes impossible then for the state of Western Australia to justify that particular imputation, that is to prove that it is in fact true.

Damien Carrick: Lloyd Rayney is awarded $2.6 million in damages. Some of that was for economic loss, but for what period of time over which he sustained economic loss?

David Rolph: Justice Chaney found that the cut-off here for the significant component of economic loss was the time that Rayney was arrested and charged with murder because the consequences of the press conference then had really been terminated by the fact that there had been the arrest and charge, that that really was a new act intervening to break the chain of causation, and so that any economic loss sustained after that was not really preferable to the press conference but to the much more significant fact that he had been arrested and charged with a very serious indictable offence.

Damien Carrick: … Is this the largest defamation payout in WA history?...

David Rolph: Yes, I think that's right, by a court, yes.

Damien Carrick: So in light of this decision, what do you think are the take-home messages?

David Rolph: Well, I think [… in Rayney's] case the cap on non-economic loss damages, which is such a feature of the national uniform defamation laws, has been set aside. So … [the judge] found that the conduct of the publishers were such that aggravated damages were warranted, so they set aside the cap, which is why in Rayney's case he was awarded in addition to the damages for economic loss $600,000 damages for noneconomic loss.

> *In Rayney's case the cap on non-economic loss damages, which is such a feature of the national uniform defamation laws, has been set aside.*

So I think in these sort of high-profile cases where there has been widespread publication or republication, there's going to be the real possibility that courts are going to take the view, so long as there are other circumstances that warrant a finding of aggravated damages to set aside the cap and to award damages in excess of that. I think it also highlights, as we were discussing earlier, the fraught nature of police officers in particular doing live press conferences and taking questions from the media. Obviously it's a matter of public interest, but the difficulty quite often is that it can range over issues you might want to be a bit more circumspect about in that sort of public forum.

Damien Carrick: The state of WA has until the end of this week to lodge an appeal to the ruling in favour of Lloyd Rayney, although sometimes parties do seek an extension to strict court timelines.

I'm Damien Carrick and you're listening to the *Law Report*, available as a podcast from the ABC Listen app or anywhere where you download your podcasts.

Criminal procedure

Offences

Pieces of legislation codify crimes and also govern sentencing. In most cases, in WA, this is the ***Criminal Code Compilation Act 1913 (WA)*** and ***Road Traffic Act 1974 (WA)***. Most crimes in WA are codified in the Criminal Code. Traffic offences are codified in the *Road Traffic Act 1974* (WA). These statutes, amongst others, define crimes — and establish the severity of offences.

It is the seriousness of the wrong that classifies criminal offences. They are either:

- summary offences, which are less serious and dealt with by summons before a magistrate in the Magistrates Court; or
- indictable offences, which are more serious, often involving an arrest, with the offender having a right to a trial by jury before a judge in either the District Court or Supreme Court.

The pre-trial procedure is more complicated for indictable offences and may include **remand** or **bail** and a more detailed **police investigation**.

> *Both a prosecuting police officer and the DPP are part of the executive branch of government. In other words, the State is a party to all criminal trials.*

Summary and indictable criminal trial processes are almost identical except that trials for indictable offences may include a jury as the finder of facts. The prosecutor in a summary trial is usually the police officer who detected the offence. The prosecutor in an indictable trial is the **Director of Public Prosecutions** (DPP) — a government department staffed by legally trained expert prosecutors. Both a prosecuting police officer and the DPP are part of the executive branch of government. In other words, the State is a party to all criminal trials.

Criminal pre-trial procedure

As part of the executive, the **police** enforce laws. They may observe an offence being committed and intervene by issuing a summons to the alleged offender or arresting them if they are a danger to themselves or others. In more serious offences the police may **arrest** an alleged offender to prevent further offending or escape.

Figure 7.25 — Police, as part of the executive, enforce laws. *Source: Nachoman-au, Western Australian Police motorbike, 2007, CC BY-SA 3.0, <https://commons.wikimedia.org/w/index.php?curid=3018232> and <https://commons.wikimedia.org/wiki/File:WA_Police_Motorbike_ST1300a.jpg#/media/File:WA_Police_Motorbike_ST1300a.jpg>*

Some crimes may not be detected immediately and are discovered after the passage of time. In these circumstances the crime must first be reported to police. Police may carry out an investigation, which may last many years in some cases (think of the Claremont serial killer case).

After a detailed investigation, a suspect may be arrested and **charged** with an indictable offence.

Students must note that a criminal dispute can be resolved at any time during pre-trial or trial. Pre-trial investigations may cause the police and DPP to believe they do not have sufficient evidence to prove guilt beyond reasonable doubt. If so, they will abandon the case. An alleged offender, in good conscience or in the knowledge that evidence is accumulating against them (from the hand-up brief explained below), may change their plea from not guilty to guilty, ending the dispute.

Traditionally, courts have little role in criminal pre-trial other than deciding if a defendant should stand trial once the police or DPP decide to commit an alleged offender to trial.

> *A criminal dispute can be resolved at any time during pre-trial or trial.*

Pre-trial procedure — Summary offences

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 (e.g. 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.
	Plea	The alleged offender is required to enter a plea.
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.
Proceed to trial	No trial Proceed to post-trial sentencing	Guilty plea means no trial. Proceeds directly to post-trial sentencing. Not guilty plea goes to trial.

■ Table 7. 3 — Criminal pre-trial for simple offences.
Source: Stephen King, 2018

Criminal trial

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; it is contained in the hand-up brief given to them at the committal mention.

Pre-trial procedure — Indictable offences

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.
Brought before Magistrates Court for hearing		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 case proceeds directly to post-trial sentencing. The suspect may be released on *bail* or held on *remand*.
DPP prepares prosecution case in collaboration with police		The DPP prepares a case by collaborating with the police to gather evidence. DPP needs to be convinced there is a reasonable chance of proving guilt beyond reasonable doubt or it will abandon the case. 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.
Committal mention		A hearing in a Magistrates Court. Defendant enters a plea. Magistrate assesses prosecution evidence against the defendant to see if the case has a likelihood of success.
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*	No trial 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.
Source: Stephen King, 2018

A significant difference between 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.

■ Figure 7.26 — Indictable offences are crimes for which people may be sentenced to a gaol sentence if found guilty.
Source: Hopkins, Jail, Noun Project, <https://thenounproject.com/search/?q=jail&i=930404>

CRIMINAL TRIAL PROCEDURE (INDICTABLE OFFENCES)		
TRIAL		**Purpose and Explanation**
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.
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 of 10–2 or greater.

■ Table 7.5 — Criminal trial procedure for indictable offences.
Source: Stephen King, 2018

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.

The onus of proof and standard of proof with respect to defences is different from the same for the initial charge. In some cases the prosecution will bear the burden to disprove the defence, while in others the burden rests with the accused to prove the defence. When the accused has the burden to prove, the standard of proof is usually on the balance of probabilities. This is one notable departure from the operation of presumption of innocence in state and commonwealth legal systems.

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'.

As can be seen in Figure 7.27, 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.

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 selfdefence 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 selfdefence 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 selfdefence 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 selfdefence 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 7.27 — Section 248 of the Criminal Code Compilation Act 1913 (WA) establishes self-defence as both an absolute defence and partial defence to crimes in WA.
Source: Section 248, Criminal Code Compilation Act 1913 (WA)

Jury duty — A criminal trial reform — *Juries Legislation Amendment Act 2011* (WA)

On 14 April 2011, the Western Australian Parliament passed the *Juries Legislation Amendment Act 2011* (WA) (the Amendment Act) to reform the processes and procedures through which citizens were selected for jury duty. The Act was designed to amend the *Juries Act 1957* (WA) (the Juries Act) and the *Criminal Procedure Act 2004* (WA). The legislation was granted assent by the Governor of Western Australia on 2 May 2011 and came into force by July 2011.

This recently implemented reform was a result of the recommendations made by the Law Reform Commission of Western Australia (the Commission) in their final report, *Selection, eligibility and exemption of jurors*, in April 2010. In this report the Commission proposed 68 recommendations to improve the jury system to enable juries to be impartial, independent, competent, randomly selected and broadly representative of the community.

One of the main areas of focus of the Amendment Act was to increase participation in the legal system 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.[10] It can be argued that this lack of participation resulted in juries being unrepresentative of the community and, therefore, risked public confidence in the courts.

The amendments to the Juries Act can be summarised as:

- removing the excuse 'as of right' and replacing it with a process by which jury duty can be deferred;
- reducing the categories under which individuals are ineligible for jury duty;
- implementing harsher penalties for individuals and companies who attempt to avoid their civic responsibilities; and
- reducing the number of peremptory challenges available to each party.

Removal of 'excuse of right'

The Amendment Act removed the 'as of right' excuse category from the Juries Act. Previously, excuse as of right granted potential jurors the automatic right to avoid participating in jury service if they fell into one of the following categories:

- emergency services and health occupations;
- a person currently teaching or preaching in a religious congregation;
- family circumstances, including pregnancy, caring for children under the age of 14, and being a full-time carer for a person who is aged or infirm; or
- if a juror was over the age of 65.

> *"The main areas of focus of the Amendment Act was to increase participation in the legal system by restricting the ability of potential jurors to avoid jury duty."*

The Commission found that 18 per cent of those summoned for jury service in Perth were excused as of right, totaling over 9,500 people.[11] This affected a jury's ability to be representative of the whole community.

While excuse as of right has been removed, the Amendment Act included the addition of allowing applications for 'Certificates permanently excusing people' from jury duty due to physical disability or mental impairment.

Introduction of deferral of jury service

To enable higher participation rates and broader representation, the reform included introducing the ability of jurors to defer their jury service for up to six months. Under the newly inserted Section 34H (2) of the Juries Act, 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.

The benefits of the ability of jurors to defer jury duty are immense. It increases 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. In particular, deferring allows people time to get their personal and professional affairs in order to avoid the potential inconvenience posed by being required to serve on a jury.

10 Law Reform Commission of Western Australia, Selection, eligibility and exemption of jurors. Final report, Government of Western Australia, Perth, 2010, p 7, <http://www.lrc.justice.wa.gov.au/_files/P99-FR.pdf>.

11 Law Reform Commission of Western Australia, Selection, eligibility and exemption of jurors. Final report, Government of Western Australia, Perth, 2010, p 7.

Reduction in categories of people who are ineligible

There are still circumstances where it would be inappropriate for citizens to be jurors. However, these have been significantly reduced under the Amendment Act reforms. As a result of these reforms the classes of persons deemed ineligible have been reduced to only include the following:

- 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.

The age at which a person is deemed ineligible has also increased from 65 to 75 years.

The reforms also included adjusting the circumstances under which people were disqualified from jury service due to their criminal history. Before 2011 there had been some anomalies, such as people who were unsentenced offenders (such as a person remanded on bail) being able to serve on juries. The Amendment Act has attempted to rectify these.

> *The number of potential jurors excused from jury duty had dropped from 72 per cent in 2010–2011 to 27 per cent in 2012–2013.*

In relation to disqualification due to criminal history, a person is still permanently disqualified from jury duty if they have been convicted of an offence in WA or elsewhere and been sentenced to death, life imprisonment or imprisonment for a term exceeding two years. Additionally, a person who is not 'mentally fit to stand trial' is also disqualified.

A person is temporarily disqualified if they have been convicted of a criminal offence within the last five years (not including a conviction which has been spent, quashed or pardoned).

People can still apply to be excused from jury duty if they cannot be indifferent between the two parties (for example, conflict of interest or bias) or if they do not understand spoken or written English.

By reducing the number of categories under which potential jurors are made ineligible, the reform has drastically increased the number and range of people who now have the opportunity to complete their civic duty and participate in the legal process.

Increased penalties

Jury duty is an important civic responsibility and the new fines for those who fail to uphold this duty aim to reflect that. The reform has increased the minimum fine from $200 to $800 for those who fail to attend court when summoned. The reform also allows for court action should an employer act in a prejudicial manner against an employee who has been summoned for jury duty. Under Section 56 of the Juries Act, prejudicial actions include reducing employees' pay or terminating their employment, with the penalty for an individual set at a maximum of $10,000 and at $50,000 for a company.

Reduction of peremptory challenges

Peremptory challenges are those whereby a party can challenge a juror's participation in a trial without giving a reason. The Amendment Act amended the number of peremptory challenges available to both parties from five to three. It also entitles the State to the total number of challenges available to the co-accused in trials involving multiple accused.

The number of peremptory challenges is now one of the lowest in Australia. There have been claims that it reduces the possibility of 'jury stacking' and, therefore, increases the overall impartiality and representative nature of juries.

Interestingly, this amendment was made despite the Commission's recommendation that it remain at five.

Impact

The benefits of this reform are immense. A media statement made by the Attorney-General's office in 2013 revealed that the number of potential jurors excused from jury duty had dropped from 72 per cent in 2010–2011 to 27 per cent in 2012–2013. The number of people attending court when summoned also increased from 24 per cent to 34 per cent.[12]

The Commission stated that the objectives of juror selection in a liberal democracy should be representation, random selection, participation, competence and impartiality — almost all of which have been improved as a result of the *Juries Legislation Amendment Act 2011* (WA).

12 Hon Michael Mischin MLC, Govt's overhaul of jury duty laws a success, 2013, <https://www.mediastatements.wa.gov.au/Pages/Barnett/2013/08/Govt's-overhaul-of-jury-duty-laws-a-success.aspx>.

Post-trial

A prosecution that fails to prove its case beyond reasonable doubt loses the case. 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 2017–2018, for all 512 Supreme and District Court cases that proceeded to trial, 63 per cent (324 trials) resulted in a conviction whilst 27 per cent (138 trials) resulted in an acquittal. 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.[13] These cases would likely lead to a re-trial.

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. Time is usually given for both parties to prepare submissions to the court on the appropriate sentence. The prosecution will usually argue for a harsher sentence and the defence for a more lenient one.

Sentencing and judicial discretion

Judges are bound by the *Criminal Code Compilation Act 1913* (WA) and *Road Traffic Act 1974* (WA) which provide explicit statements on the maximum penalties available when sentencing a convicted person.

> *313. Common assault*
>
> (1) Any person who unlawfully assaults another is guilty of a simple offence and is liable —
>
> (a) 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
>
> (b) in any other case, to imprisonment for 18 months and a fine of $18 000.

■ Figure 7.28 — Section 313(1) of the Criminal Code Compilation Act 1913 (WA) identifies the maximum possible sentence for 'common assault'.
Source: Section 313, Criminal Code Compilation Act 1913 (WA)

> *"Mandatory sentencing removes the power of judges to use their discretion to flexibly tailor sentences to the specific circumstances of the crime and offender."*

Judges are also bound to apply other laws passed by the parliament regarding sentencing and sanctions, such as the Sentencing Act 1995 (WA) (the Sentencing Act). This Act specifies minimum and maximum sentences and factors that judges must take into account when sentencing. The Sentencing Act allows for **judicial discretion** so that judges can make a sentence fit both the nature of the crime and the nature of the offender.

Mandatory sentencing is a controversial component of WA's sentencing laws. For certain types of offences the judge is required to impose a sentence that the parliament has codified in the Sentencing Act. Mandatory sentencing removes the power of judges to use their discretion to flexibly tailor sentences to the specific circumstances of the crime and offender. For example, judges may be compelled to jail third-time offenders even for minor offences.

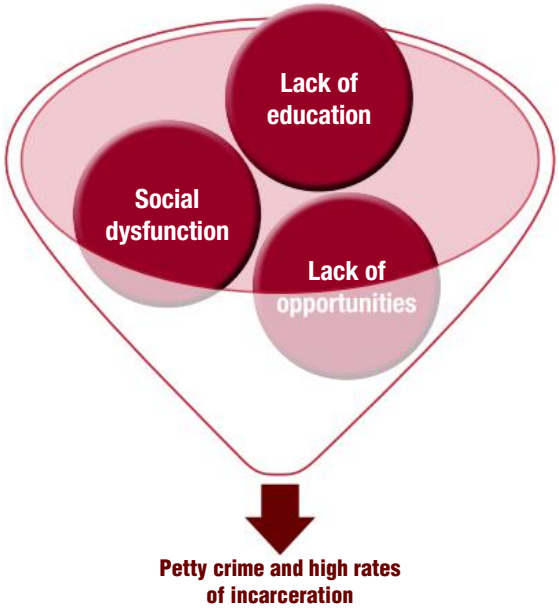
> *"Critics argue mandatory sentencing lacks proportionality and targets lower socioeconomic and disadvantaged sections of society disproportionately."*

It is controversial because simple offences committed by young offenders can result in jail sentences, which is a breach of the principle of proportionality.[14] Critics argue mandatory sentencing lacks proportionality and targets lower socioeconomic and disadvantaged sections of society disproportionately. 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

13 Office of the Director of Public Prosecutions for the State of Western Australia, Annual Report 2017–2018, Perth, p 21, <https://www.dpp.wa.gov.au/_files/annual-reports/ODPP-Annual-Report-2017-2018%20.pdf>.

14 Proportionality is the principle that the sanction should fit the crime and the criminal offender. 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.

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.[15]



■ Figure 7.29 — Mandatory sentencing leads to high rates of indigenous incarceration.
Source: Nicol Davis, 2018

Sentencing aims

Judges seek to achieve one or more of the following outcomes when sentencing a convicted offender:

1. retribution (punishment);
2. deterrence (specific and general);
3. community protection; and
4. 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.

Deterrence is designed to make potential offenders think twice before committing a crime. Specific deterrence is aimed at the convicted offender to prevent future offending. General deterrence aims to deter the entire community. 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.

Community **protection** is aimed at dangerous offenders. Repeat dangerous offenders have obviously not been deterred by past sentences aimed at prevent 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.

"Specific deterrence is aimed at the convicted offender to prevent future offending. General deterrence aims to deter the entire community."

Sentencing factors

Judges consider two factors when sentencing:

1. the offence (its 'degree of criminality'). How serious is the offence? What was the impact on the victim? What is the impact on the community? and
2. the offender. Is it a first or a repeat offence? Are there mitigating or aggravating circumstances? Is the offender remorseful? Is there a good chance of rehabilitation? Does the offender have dependents who would be affected by any sentence?

These two factors are used by judges to pass sentences that aim to match the nature of the criminal and the crime. For example, an offender with multiple past convictions for serious assault should probably be jailed. The aim in this scenario would be for retribution, community protection and deterrence. A young first-time dangerous driving offender will likely receive a hefty fine and have to attend driving lessons — the aim to deter and rehabilitate.

15 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>.

Sentencing options

WA courts have a range of sentencing options.[16] These are listed below in order of severity, from most to least severe.

> *85 per cent of appeals to the Supreme Court in 2017-2018 were initiated by the accused. Only 13 per cent of those cases were successful.*

1. **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.
2. **Community based sanctions**. 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.
3. **Home detention**. An offender may be sentenced to remain in their home with only short breaks for essential outings such as medical visits.
4. **Fines**. Fines can be imposed alone or in combination with any of the above.

The above sentences can be used in combination. Judges may even pass a severe sentence such as a jail term and then suspend the sentence on condition of good behaviour. **Suspended sentences** coupled with **good behaviour bonds** provide powerful deterrence and rehabilitation tools because 'bad behaviour' automatically triggers the harsher sentence.

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 verdict and/or the sentence they received.

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.[17] 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.[18] 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. 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. For example, the DPP appealed the initial verdict of not guilty in *The State of Western Australia v Rayney* [No 3] (2012) WASC 404. Prosecution appeals from the District and Supreme courts in WA are very rare, numbering one or two annually. When the prosecution does appeal, it generally has a more successful record in its appeals than offenders have. However, in the case of the Rayney appeal, the DPP was unsuccessful.

16 Townsend, Christopher, Sentencing process in WA, Lewis, Blyth and Hooper, 2014, <http://www.lewisblythandhooper.com.au/article/criminal-law/sentencing-process-in-wa/>.

17 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>.

18 Office of the Director of Public Prosecutions for the State of Western Australia, Annual Report 2017–2018, Perth, p 26.

Summary

- The judicial arm of government interprets law when resolving disputes. It is the final form of dispute resolution and involves the exercise of judicial power which binds the parties to the case. There are several alternative, less formal types of dispute resolution such as mediation, conciliation and arbitration.
- Trials are the method used by judicial systems to find the truth and resolve disputes. There two different types of trial in common use. The adversarial trial is derived from England and is used in Australia and other countries once part of the British Empire. The inquisitorial trial is derived from the Roman civil law and is used in Europe and countries colonised by European powers.
- The adversarial trial is built on the assumption that a contest between parties reveals truth. The inquisitorial trial is built on the assumption that inquiry will discover the truth.
- All trials have strict procedures to ensure fairness. Fairness delivers justice.
- Justice is a natural law. It requires procedural fairness in respect of:
    - impartial adjudication;
    - opportunities for both parties to present their cases;
    - outcomes determined by evidence alone; and
    - transparent trial processes to ensure public confidence in the courts.
- Legal rights protect the parties in a trial. Both parties have a right to a fair trial. The accused party has a right to silence and a presumption of innocence.
- Common disputes include civil disputes between private parties (private law) and criminal disputes between the State and the accused party (public law). Other forms of dispute include administrative law cases and constitutional cases.
- Civil trials resolve torts such as negligence, nuisance and defamation. Contract disputes are also private civil cases. Criminal trials resolve simple summary offences and serious indictable offences.
- Trials have an adjudicator (judge or jury), disputing parties (accuser and defendant), strict procedures and formal settings. Parties usually have expert legal representation (barristers and solicitors) because knowledge of the rules and procedures is essential to engaging in the adversarial contest. Courts are assisted by staff, such as court orderlies and sheriffs, who are employed by the executive.
- In adversarial trials, the accuser bears the onus (or burden) of proof. Standards of proof vary according to the type of trial. Plaintiffs in civil cases must prove on the balance of probabilities. Prosecutors in criminal trials must prove beyond reasonable doubt, which is a higher standard because of the consequences for a convicted criminal defendant.
- Roles in an adversarial trial are:
    - judges who are passive. Their role is to uphold strict rules of evidence and trial procedures that ensure procedural fairness and, thus, a fair trial. In civil cases and summary criminal cases the judge is also the finder of facts. A jury is the finder of facts in an indictable criminal case;
    - parties who run their case and are responsible for the presentation and testing of evidence, and legal argument;
    - legal representatives who assist the parties and the court; and
    - strict rules of admissibility that ensure high-quality evidence.

continued overleaf

- Trials have three phases:
  - pre-trial phase clarifies the dispute and gathers evidence;

    civil — pleadings and further and better particulars procedures. Mediation is compulsory in Western Australian civil pre-trial; and

    criminal — police investigation, committal hearings and pleading. Remand and bail are part of indictable criminal pre-trial;
  - trial phase follows strict procedures ensuring fairness. The procedures of trial provide natural justice and are almost the same in both civil and criminal trials; and
  - post-trial phase is often defined by Acts of parliament or common law. The aim is to:

    remedy plaintiffs by righting wrongs with damages, court orders or other remedies; and

    sanction criminal offenders by balancing the aims of retribution, deterrence, rehabilitation or community protection

Activities

Short answer

1a) Explain what is meant by the term 'justice' as it applies to the legal system.

1b) Briefly explain **two** rights of the accused party in a criminal case.

1c) Identify and discuss **two** elements of trials.

2a) What is alternative dispute resolution (ADR) as it applies to civil law?

2b) Distinguish between 'public' and 'private' disputes.

2c) Discuss **one** positive and **one** negative aspect of 'mediation' as an alternative to court procedures in settlement of civil disputes.

3a) Explain the role of the judge in a criminal trial when a jury is used.

3b) Distinguish between 'examination-in-chief' and 'cross-examination' in the criminal trial procedure.

3c) Justify the lengthy compulsory case management which occurs as part of civil pre-trial proceedings.

Source Analysis

Read the source below and respond to the questions that follow.

Lloyd Rayney: Defamation trial by judge, not jury

In Western Australia, an accused person has the right to choose a trial by jury or a trial by judge alone. Section 118 (4) of the *Criminal Procedure Act 2004* (WA) permits this choice. It says that the court can order a judge only trial, "…if it considers it is in the interests of justice to do so but, on an application by the prosecutor, must not do so unless the accused consents". The law requires that if a judge alone hears a trial, they are expected to apply the same principles that would apply in a jury trial.

In 2016 Lloyd Rayney brought a defamation case against the State of Western Australia following a 2012 criminal trial which found him not guilty of the murder of his wife, Corryn Rayney. On 20 September 2007, Detective Senior Sergeant Jack Lee said in a public statement that Mr Rayney was the "prime" and "only" suspect in the murder of his wife, Corryn Rayney. Also, the murder of Corryn Rayney, the arrest of Lloyd Rayney and the murder trial of Mr Rayney all received significant media attention. Mr Rayney chose to waive his right to a trial by jury in his defamation case due to concerns regarding the potential predisposition or prejudice members of the jury may have brought to the trial.

Mr Rayney was successful in his lawsuit, demonstrating that Detective Senior Sergeant Jack Lee defamed him on 20 September 2007. Mr Rayney was awarded just over $2.62 million.

4a) Explain the role of a jury in a civil trial.

4b) Using the source, explain why Lloyd Rayney chose to waive his right to a trial by jury in his defamation case.

4c) Discuss **two** advantages and **one** disadvantage of the use of juries to determine the verdicts in criminal trials.

4d) "The adversarial system provides the opportunity for both sides to present their version of events and, therefore, ensures the truth is revealed". Evaluate the validity of this statement.

continued overleaf

Essay response

5) "The adversarial system ensures the elements of natural justice are fulfilled". With reference to at least **two** trials, discuss the validity of this statement.

6) Evaluate the strengths and weaknesses of Western Australia's pre-trial, trial and post-trial procedures for civil disputes.

7) "The jury is a crucial component of the legal system because jurors represent the people in the court". Assess the role and effectiveness of juries in Western Australian trials.

Investigation and discussion

8) In 2014 the third trial for accused murderer Ronald Pennington was aborted because a juror disregarded the instructions of the judge.

   8a) Using this as a starting point, research this case and others;

   8b) Debate the topic: 'While juries can make mistakes, they are an essential element in the Australian legal system'.

9) Investigate the adversarial system in action by examining the trials of Anthony Evans, who was charged with the murder of his girlfriend, Alana Dakin.

   9a) Watch the ABC's On Trial programme — Episodes 3 and 4 may be useful. These can be accessed at: http://www.abc.net.au/tv/programs/on-trial/ (Use Click View to access this url). Please note: Episode 3 of this programme is rated M for Mature Audiences and does contain information and images which viewers may find disturbing.

   9b) Create a timeline of events regarding Anthony Evans and the outcomes of the trials.

   9c) Investigate the 'defence' that he claimed and which party was responsible for presenting evidence on this matter.

   9d) Discuss how this case demonstrates the elements of natural justice at work

Representation and justice

Syllabus points:

- **Essential to the understanding of representation and justice are the principles of fair elections, participation and natural justice.**

Representation and justice are vital concepts in a liberal democracy.

The Latin word *liber* is the root word for 'liberal'. It means freedom. *Liberalism* is a political philosophy emphasising the importance of individual rights, freedoms and liberty. People expect to be treated justly by their government in matters concerning rights, freedoms and liberty. Reasonable people understand they have obligations to respect the rights, freedoms and liberties of other people, and expect others to fulfil their obligations to them in turn.

In liberalism, the individual is at the heart of political life, and rights and obligations are at the heart of justice through its legal systems.

Unit 1 of this course argued that 'democracy' is the only political system compatible with liberalism. Democracy is the only form of government where individuals' rights, freedoms and liberties are directly present (direct democracy) or indirectly represented (representative democracy) in the legislative and executive branches of government. Self-government by the people is the best guarantee that a government will respect people's rights, freedoms and liberties. After all, people will not oppress themselves.

Figure 8.1 — In liberalism, the individual is at the heart of political life.
Source: Blake Thompson, Individual, Noun Project, <https://thenounproject.com/search/?q=individual&i=192876>

For a 'representative democracy' to work in the interests of citizens, there must be **fair elections**. Elections are processes by which citizens choose their law makers and governors. Elections must accurately reflect electors' choices and also deliver stable government and accountability.

Figure 8.2 — Political rights are amongst the rights, freedoms and liberties to which individuals are entitled in a liberal democracy.
Source: Hayley Warren, Voting, Noun Project, <https:// thenounproject.com/search/?q=voting&i=188134>

Students will be aware that 'political rights' are amongst the rights, freedoms and liberties to which individuals are entitled in a liberal democracy. The right to vote in elections, and the freedoms to associate and to assemble in groups are examples of political rights. Voting, associating and assembling are political rights and freedoms that enable citizen **participation** in government. Citizens can participate individually and collectively by exercising their political rights.

Unit 1 also argued that legal systems must resolve disputes and interpret laws in ways that are 'fair'. The word 'fair' is a synonym for 'just'. Courts use procedures designed to be fair. Unit 1 covered trial procedures in detail, and perceptive students may have noted how **natural justice** is built into the pre-trial, trial and post-trial phases of these procedures.

Representation

Representation is the critical idea that distinguishes modern democracies from the democracy of ancient Athens. Athenian democracy was direct democracy. All citizens participated directly in their government by presenting themselves in person at the citizens' assembly (the *Ekklesia*). All citizens voted on laws and took turns in the executive. To achieve direct democracy in their sizeable city-state, the Athenians had to impose strict limits on citizenship or else their system of government would be unwieldy. No women, no foreign born residents and no slaves were entitled to present themselves in the *Ekklesia*. These strict rules limited the number of people allowed to directly participate in government. Such limits to citizenship are unacceptable in modern democracies.

The **Enlightenment** was an era of intense questioning of accepted knowledge and beliefs, beginning in 18th century Europe. Courageous European men and women started questioning almost everything about society. The government and church authorities oppressed those brave people who challenged conventional ideas. Galileo is perhaps the most famous example of an Enlightenment thinker persecuted by the authorities for questioning conventional scientific wisdom, especially in astronomy and physics.

Old customs, traditions and beliefs that had formed the basis of European medieval society began to crumble under the weight of doubt, inquiry and questioning. Arab scholars and Christian monks preserved ancient texts through

Figure 8.3 — The Ekklesia in Athens convened on the Pnyx, a hill near Athens.
Source: CC BY-SA 3.0, <https://commons.wikimedia.org/w/index.php?curid=701621>; and <https://upload.wikimedia.org/wikipedia/commons/5/54/Pnyx-berg2.png>

the Dark Ages.[1] Books written by ancient Athenians such as Aristotle and Plato, and Romans such as Cicero, re-emerged into the light (hence, Enlightenment). Athenian and Roman ideas inspired Enlightenment philosophers in science, engineering, art, literature, history, politics and much more. Rediscovering ancient ideas sparked new thinking and set 18th century Europe ablaze with the possibility of transforming the world. The modern world, with its science, respect for individual rights, great art and engineering was born at this time. It replaced a crumbling medieval worldview that included absolute monarchy as the natural form of government.

> *Citizens 'delegate' or 'entrust' these representatives to re-present them in a parliament.*

The questions for political philosophers of the time were: 'which system of government is best for individual liberty?' and 'what should replace absolute monarchy?' The British philosopher John Stuart Mill realised that Athenian direct democracy could not work in modern societies; there were simply too many citizens for a modern version of the *Ekklesia* where everyone needs to be present. Mill wrote a book called *Considerations on representative democracy* in which he argued for a new form of democratic government. He suggested a solution to the problem of too many citizens. Instead of all citizens 'presenting' themselves in person at a citizens' assembly, Mill proposed many citizens choose a few to 're-present' them in a representative assembly. In other words, many citizens would present their concerns to one citizen they have chosen to re-present them to a representative assembly of limited and practical size. In this way, a large population of citizens could participate in their government, which is the essence of democracy. Mill's great idea was to replace citizens being physically present in an assembly with being re-presented by someone chosen by them.

In Mill's form of representative democracy, a large number of citizens choose one, or a small number, of representatives. Citizens 'delegate' or 'entrust' these representatives to re-present them in a parliament.

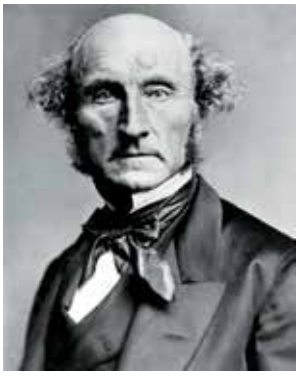


Figure 8.4 — British philosopher, John Stuart Mill.
Source: Hulton Archive, London Stereoscopic Company, John Stuart Mill, c 1870, Public Domain, <https://commons.wikimedia.org/w/index.php?curid=30913285> and <https://en.wikipedia.org/wiki/John_Stuart_Mill#/media/File:John_Stuart_Mill_by_London_Stereoscopic_Company,_c1870.jpg>

Delegation and trusteeship are the links which bind a body of citizens to their representatives:

- to **delegate** is to give authority for someone to act on your behalf; and
- 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.

Representation and fair elections

The need for electoral systems

Mill's idea of representative democracy requires citizens to choose representatives. The need to choose representatives created the need for a new political invention — electoral systems. Electoral systems are the means by which citizens delegate or entrust representatives to stand for them in parliament.

Electoral systems are more than merely methods for delegating and entrusting representatives; they are also the primary tool for holding each of them accountable for their job as representatives. Electors can remove poor representatives by electing others to replace them. Or they can keep them by re-electing them.

1 The Dark Ages is the common term for the European medieval period from approximately 500 CE to 1500 CE.

Electoral systems are critical to representative democracy. Electoral systems are mechanisms that 'transform individual votes into seats in the representative assembly', that is, the parliament or congress. Thoughtful students can see how important this is.

Essential characteristics of fair electoral systems

As electoral systems are so important, they need to be effective or 'good'. But what makes a good electoral system? A set of criteria is needed to evaluate an electoral system.

Good electoral systems must have the following characteristics. They must:

- provide political choice;
- value votes equally and be fair to political parties;
- create a stable government; and
- facilitate accountability.

There are many different electoral systems throughout the world. Combining all four ideal characteristics in one electoral system is almost impossible. Therefore, not all electoral systems are equally effective; some are much better than others. Critically, there is no ideal or perfect electoral system in the world. The consequence is that people who design liberal democratic systems (for example, Australia's 'Founding Fathers' or other legislators who pass electoral Acts) must carefully design the electoral system. Some of the most common failings of democratic systems around the world stem from the electoral systems used to choose representatives and governments.

Representation and participation

Participation is what makes democracy democratic. Participation can take many forms, but all are dependent on 'political rights'.

Rights are 'universal freedoms and entitlements' which enable people to flourish. Rights are classified into different types — civil, political, economic, social and cultural rights. Respect for rights is a crucial feature of liberal democracy and a key component of the rule of law. Rights are essential for citizens if they are to participate in governing themselves.

Figure 8.6 — Australia Day Aboriginal Tent Embassy protest.
Source: Somaya Langley, Australia Day Aboriginal Tent Embassy protest, 2012, <https://www.flickr.com/photos/somayalangley/6764172077/in/photostream/>; CC BY-SA 2.5, <https://commons.wikimedia.org/w/index.php?curid=20911456> and <https://en.wikipedia.org/wiki/Australia_Day_2012_protests#/media/File:Australia_Day_Aboriginal_Tent_Embassy_Protest.jpg>

Political rights are a subset of human rights. They belong in the category of civil rights. Civil rights include equality and freedom from discrimination. Political rights are those freedoms and entitlements that enable a citizen to participate in government.

The most fundamental political rights are the:

- right to vote;
- freedom to associate with other people;
- freedom to assemble in groups which have a political purpose;
- freedom of access to political information through a free press/media; and
- freedom of political communication, which is a form of freedom of speech.

Political rights fit within the broader category of civil rights. People must have civil rights, like freedom from discrimination, or their political rights cannot exist. The need to have *all* rights in order to have *any* rights is an example of the 'indivisibility of rights' — a concept that becomes important in Unit 4. As far as political participation is concerned, political rights are essential. It is useful to know that citizens must enjoy all their rights before any of their rights can exist in full.

Figure 8.5 — Characteristics of an effective or 'good' electoral system.
Source: Nicol Davis, 2018

Participation through elections

The right to vote is essential for fair elections. To be enfranchised is to have the right to vote. The term suffrage is also used to mean the right to vote. In a fully fledged liberal democracy, there should be the broadest possible franchise, with few qualifications to vote — that is, **universal suffrage**. In contemporary Australia the only qualifications needed to vote are:

- Australian citizenship;
- being 18 years old or older;
- being resident at an address for more than one month;
- being enrolled to vote; and
- not currently serving a prison sentence of greater than three years.

In the past, gender qualifications also existed, and only men were allowed to vote. 'Universal manhood suffrage' is the term used to describe this limited franchise. The quest for the equal right to vote was a feature of early 20th century democracy around the world. New Zealand was the first jurisdiction in the world to grant women the right to vote; South Australia was the second.

Figure 8.7 — It doesn't 'unsex' her — A women's suffrage postcard from 1915.
Source: Katherine Milhouse, 1915, <http://digital.lib.uh.edu/u?/p15195coll33,1069>, CC0, <https://commons.wikimedia.org/w/index.php?curid=17377130>; <https://en.wikipedia.org/wiki/Women%27s_suffrage_in_the_United_States#/media/File:Milhousdrawing.jpg> and <http://digital.lib.uh.edu/u?/p15195coll33,1069, CC0>

Before universal manhood suffrage, only men with property could vote — if a man owned two properties, he got two votes (called **plural voting**). Property qualifications and plural voting still applied in Western Australia's Legislative Council until 1963.

> *To be enfranchised is to have the right to vote.*

Universal suffrage is a crucial requirement of a fair electoral system. Any discriminatory suffrage, such as manhood suffrage or plural voting, is inconsistent with electoral fairness because it limits participation, and should be abolished.

Twenty-two countries,[2] Australia among them, go further than universal suffrage. Instead of regarding voting as a right, they treat it as a 'duty'. The idea that all citizens have a duty to participate in their democracy justifies **compulsory voting**. There are many arguments in favour and many against the idea of compulsory voting. Strictly concerning participation, there is no doubt whatsoever that compulsory voting enhances universal suffrage and results in very high numbers of electors voting at elections.

Universal suffrage with a broad franchise maximises citizen participation. Combined with compulsory voting, it ensures exceptionally high levels of citizen participation in elections.

Voting must be secret so that electors cannot be intimidated or pressured when making their personal political choice. Australia invented the **secret ballot**, which is now universally used in all representative democracies.

Informed choice and the right to vote

As electors, citizens need to access political information. 'Freedom of political communication' ensures political information is freely available. Access to information is necessary so electors can learn about issues and participate in discussions with other citizens. Citizens engage with each other face to face or through various channels such as traditional and social media.

2 For these twenty-two countries, see: Santhanam, Laura, '22 countries where voting is mandatory', PBS Newshour, 2014, <https://www.pbs.org/newshour/politics/22-countries-voting-mandatory>.

Learning about issues and discussing them with others is essential for making an 'informed political choice'. The more informed and engaged citizens are the healthier their democracy will be.

Participation through association and assembly

Voting is a personal and individual act of participation that only occurs at election time. Nevertheless, there are other ways citizens, particularly those with higher levels of political motivation and engagement, can participate in politics and government. They can use their 'freedoms of association and assembly' to form political groups and collaborate with each other in the public sphere. The aim of collective political action is to influence law making or win seats in parliament.

> *'Freedom of political communication' ensures political information is freely available.*

Groups that act in the broader public sphere with the intent of influencing law making are called **pressure groups**. Pressure groups represent interests or causes, and tend to use advocacy techniques like lobbying or direct action to influence parliament or government. Their advocacy aims to change law or policy to benefit their interest or cause.

Members of a pressure group share the same interest, such as membership of a profession, industry or trade. Alternatively, they share the same cause, such as conservation of the environment or refugee rights. Pressure groups gain effectiveness through individuals collaborating. The pooling of resources, expertise and effort enhances their chances of gaining influence.

Figure 8.8 — Likeminded people will associate over issues, such as the plight of refugees, to influence election results and government policy.
Source: Matt Golding, 2017, <www.threefingers.com.au/> and <https://www.pollbludger.net/2017/05/20/bludgertrack-52-5-47-5-labor/comment-page-25/>

Pressure groups act all the time, not just at election time. They enable citizen participation to be constant, rather than periodic.

Groups that aim to win seats in parliament and influence law making from within the legislature are called **political parties**. A political party represents a particular worldview or ideology. A set of interrelated ideas about how to govern a country is called a political ideology. Liberalism is one ideology. Socialism is another ideology. A 'liberal' party believes in a limited role for the government as that maximises private individuals' liberty. A 'socialist' party believes in equality for all and, thus, a more prominent role for government in redistributing wealth.

Ideology provides a framework for developing policies in all aspects of governing a nation — health, education, welfare, immigration, taxation, housing and so on. It guides a political party in answering the question, 'how should we govern?' Because ideology is a 'complete worldview' it guides a party's policies, which makes them consistent and coherent. Ideally, a party's health and education policies should be designed around the same principles. A liberal party might have policies for private hospitals and support for private schools, whereas a socialist party might support government hospitals and public schools.

People who share an ideological worldview may cooperate by forming or joining a political party. By cooperating, individuals maximise the chance that their point of view will influence law making and policy, and, thus, make the nation fit their worldview.

Smaller parties aim to win parliamentary seats and have a say in law making through the legislative process. A party with widespread electoral support may aim to win a majority of lower house seats and form government. Being a 'party of government' is the most powerful position within the system of government from which to influence law making.

Both pressure groups and political parties exploit freedom of political communication through the free press/media to **get their message out** to the public.

Pressure groups use communication to put pressure on parliament and government by influencing public opinion. Political parties use communication to try and convince the public to support their worldview.

In this way, citizens become more knowledgeable about the interests, causes and ideologies that make up the issues of the day. They can then make informed political choices at election time or even join a pressure group or political party with whom they agree.

Figure 8.9 — Citizens in Tasmania began to pressure their government as the increased prevalence of people letting out properties via Airbnb led to a rise of homelessness in Hobart. *Source: Matt Golding, <www.threefingers.com.au/> and <https://www.domain.com.au/news/murray-cox-the-australian-pricking-airbnbs-global-bubble-20170120-gtulnp/>*

Justice

Justice has been described as "the first virtue of social institutions".[3] The term 'social institutions' includes all the parts of government — legislatures, executives and judiciaries. Even electoral systems, outlined in the previous section, are social institutions that must be 'just' if they are to be fair.

This broad way of thinking about justice makes it an essential quality of a liberal democracy. Many, if not most, people think of justice as related to the judicial branch of government alone, but students should recognise that it must be a quality of all parts of a liberal democratic political and legal system. In theory, liberal democracy places individual liberty as the core value of government. If liberty is to work in practice, then individuals must be treated justly by the government. Injustice denies equality of rights and freedoms.

Figure 8.10 — The scales of justice. *Source: Joni, Justice, Noun Project, <https://thenounproject.com/search/?q=justice&i=1655460>*

Theory of justice

In the 6th century CE, a Roman legal code developed by Emperor Justinian, called the *Institutes of Justinian,* defined justice as "the constant and perpetual will to render to each his due".[4] In plain English, this means people should get what they deserve. To be treated deservingly is to be treated justly.

The following ideas should be kept in mind when learning about justice within a system of government. When reading each idea, think of the Justinian definition above.

1. People deserve their rights to be respected. **Rights** are due to each person. Rights are universal entitlements due to each human being.
2. People deserve to have contracts, duties of care and obligations enforced. Enforcement of **obligations** is the 'will to render', which involves both parties — the person undertaking the obligation and the person receiving it. People enter formal contracts. For example, when people pay taxes in return for government services, there are duties owed by everyone to everyone else. Governments must be willing to give or provide (to render) to each party what is owed to them by such agreements.
3. People deserve **impartial** administration of the laws. There must be a 'constant and perpetual' environment within which rules and laws are applied without bias. A government must make fair laws and then apply and interpret them without favour at all times. No arbitrary decisions should ever be allowed.

3 Rawls, J, A theory of justice, Belknap Press, Harvard University Press, Cambridge, Mass., 1971.

4 'Justinian I', The legal dictionary, <https://legal-dictionary.thefreedictionary.com/Justinian+I>.

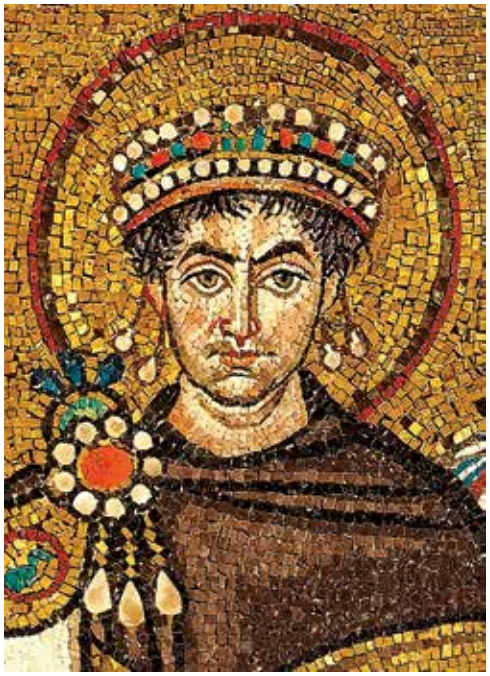


Figure 8.11 — The Corpus Juris (or Iuris) Civilis ('Body of Civil Law') is the modern name for a collection of fundamental works in jurisprudence, issued from 529 CE to 534 CE by order of Justinian I, Eastern Roman Emperor.
Source: Petar Miloševi, San Vitale (Ravenna) - Mosaic of Iustinianus I, 2015, CC BY-SA 4.0, <https://commons.wikimedia.org/w/index.php?curid=40035957> and <https://en.wikipedia.org/wiki/Corpus_Juris_Civilis#/me>

Justice and judicial processes

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 focus on justice.

The trial is the primary procedure of the judiciary. Trial procedures can be evaluated according to how well they achieve Justinian's ideals of:

- protection of rights;
- enforcement of obligations; and
- impartiality and fairness.

Natural justice

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 were first introduced in Unit 1 when describing adversarial trial processes:

1. impartial adjudication;
2. 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.

Any system of trial should incorporate all of these principles or be at risk of producing arbitrary and unjust outcomes.

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. Perceptive students will recognise the following about China's judiciary:

1. China's legal system is not based on the protection of individual rights. Its core purpose is the perpetuation of CPC rule;
2. China's legal system is not about the enforcement of obligations. It is about the enforcement of CPC power; and
3. China's most senior judges are CPC members. The CPC can exert power over them to influence trial outcomes.

China's trial system would have difficulty delivering just outcomes according to the definition above because it cannot adequately render to each his due.

Figure 8.12 — As the General Secretary of the Chinese Communist Party, Xi Jinping exercises considerable power over the Chinese legal system.
Source: Extracted from: Prime Minister Narendra Modi with Chinese President Xi Jinping.jpg, 2016, ID 85097 and CNR 83750, CC BY-SA 2.0, <https://commons.wikimedia.org/w/index.php?curid=69948764> and <https://en.wikipedia.org/wiki/Xi_Jinping#/media/File:Prime_Minister_Narendra_Modi_with_Chinese_President_Xi_Jinping_(cropped).jpg>

Summary

- Citizen participation in government is the essence of democracy. Democracies may be either direct or representative. In representative democracies, many citizens choose (by election) a few to act on their behalf in a representative legislature.
- Representatives act as delegates or trustees, or both, for those they represent. In this way the worldviews, values and concerns of citizens are represented in law making.
- Representative democracy requires elections. Elections are the means by which citizens choose their representatives and hold them to account for how they act as their delegates or trustees.
- A fair electoral system is critical to representative democracy. A fair or good electoral system must:
  - provide political choice;
  - value all votes equally and be fair to political parties;
  - create a stable government; and
  - facilitate accountability.
- Citizens must have political rights and freedoms. Rights and freedoms enable political participation and, thus, representation. Essential rights and freedoms are the:
  - right to vote;
  - freedom to associate;
  - freedom to assemble;
  - freedom of access to political information through a free press/media; and
  - freedom of political communication.
- The right to vote must be as broad as possible and equal for all citizens. A universal franchise is essential to maximise participation. Some countries, Australia among them, have compulsory voting, which maximises participation even further. Voting must be secret to prevent voter intimidation.
- Pressure groups enable greater representation by providing ways for citizens with shared interests or causes to collaborate. Interests and causes can be represented to legislators and governors more effectively when people pool their resources and act collectively.
- Political parties also enable greater representation by providing ways for citizens who share a worldview or ideology to collaborate. People's worldviews and ideologies can be represented powerfully in law making if their parties succeed in winning seats in the legislature itself. If a party can win a majority of seats in the lower house and form government, it can influence law making more powerfully than any other agent.
- Justice is achieved when government is able to render to each person what they deserve.
- People have rights and obligations. A just system of government must respect rights, enforce obligations and administer laws impartially. Non-democratic systems usually fail to be just systems because they cannot meet these criteria. Democratic systems are more likely to be just systems.
- The judiciary is the branch of government most concerned with justice.

Activities

Short answer

1a) Define the term 'representative democracy' as it applies to electoral systems.

1b) Outline **three** characteristics of fair or good electoral systems.

1c) Discuss the effectiveness of **two** characteristics of Australia's electoral system.

2a) Explain what is meant by the term 'franchise'.

2b) Distinguish between 'pressure groups' and 'political parties'.

2c) Discuss **one** advantage and **one** disadvantage of Australia's use of compulsory voting.

3a) Explain how 'natural justice' contributes to effective judicial processes.

3b) Briefly explain **three** elements that can be used to evaluate trial procedures.

3c) With reference to one non-democratic country, such as China, justify the statement that 'judicial independence is limited'.

Source Analysis

Read the following case study and respond to the questions that follow.

> In March 2011, Animals Australia investigators collected footage in eleven Indonesian abattoirs which showed the cruel and degrading treatment of Australian cattle. The ABC's *Four Corners* program aired the footage on 30 May 2011. Public outcry followed. Many Australians were unhappy with the Australian Government's failure to impose regulations around the treatment of Australian animals once they left Australian shores. Public pressure forced a response from the Gillard Government which imposed an immediate ban on live animal exports from Australia to Indonesia. While reflecting the wishes of many Australians, the quick response failed to address the short- and long-term ramifications of a ban on Australia's agricultural industry. The government lifted the ban in July 2011 following the introduction of an Export Supply Chain Assurance System, a review of animal exports and Senate inquiries. Since then, Animals Australia has provided footage of inhumane treatment of Australian sheep on export ships transporting them to the Middle East. Animals Australia continues to film the mistreatment of Australian animals around the world and publish this footage on its website. Also, the group continues to work closely with MP Andrew Wilkie and the Greens political party. Since 2011, three Private Members' and three Private Senators' Bills have been introduced to ban live animal exports. None have passed.

4a) Define the term 'pressure group'.

4b) Using the source, explain **two** ways that pressure group, Animals Australia, has provided political representation.

4c) Discuss **two** advantages and **two** disadvantages of pressure groups in modern democracies.

4d) Compare the challenges faced by a pressure group in achieving representation of their supporters with those faced by political parties.

Essay response

5) 'The will of the Australian people is upheld through the political rights of a liberal democracy, namely the right to vote and the right to political communication.' Analyse the validity of this statement.

6) Discuss the extent to which Western Australia's judicial processes uphold the principle of natural justice.

Investigation and discussion

7) 'Universal suffrage is a key requirement of a fair electoral system'. Investigate the extent to which universal suffrage is applied in Australian federal elections.

8) The #BantheBag movement gained significant momentum in 2017 and early 2018, so much so, that the Western Australian Government, led by Premier Mark McGowan, made the executive decision to ban lightweight plastic shopping bags. Investigate the relationship between pressure groups wanting to ban the use of plastic bags and the various political parties active in Western Australia in 2018.

9) Investigate an issue of representation:

   9a) mirror representation and the extent to which this is achieved in the Commonwealth Parliament; or

   9b) pre-selection processes used by political parties when choosing their candidates for election. How do these pre-selection processes impact on the representation achieved in the parliament?

UNIT 2

Representation and elections in Australia

Syllabus points:

- **The Western Australian and Commonwealth electoral and voting systems since Federation**
- **Advantages and disadvantages of the electoral and voting systems in Australia**
- **A recently implemented or proposed reform (the last ten years) to the electoral and voting systems in Australia**

Democracies are either direct democracies or representative democracies.

Direct democracies allow citizens to make laws and govern themselves. Citizens do not choose representatives, they self-represent. Everyone who is qualified as a citizen is automatically entitled to a position (a seat) in the legislature and can participate in debates and vote on proposed laws. Ancient Athens invented direct democracy. The city-state had a law making assembly called the *Ekklesia*. There were no *Ekklesia* elections because every citizen was a member.

Representative democracies enable citizens to participate in law making and governing, but not all citizens do so directly. Citizens are not automatically entitled to a seat in their country's legislature. Citizens are represented by a smaller number of citizens they choose to make laws and to govern on their behalf. Representative democracy made it necessary to invent a way to choose representatives. That invention was the electoral system.

Australia was created as a representative democracy. Electoral systems have been used to choose representatives for state and Commonwealth parliaments since federation. Indeed, the six pre-federation colonies were broadly self-governing representative democracies subject to the British parliament. They, too, had electoral systems. Australia has a long electoral history dating back as far as

Figure 9.1 — New York polling place circa 1900, showing the adoption of the 'Australian ballot'.
Source: E. Benjamin Andrews, New York polling place circa 1900, showing voting booths on the left, Public Domain, 1912, <https://en.wikipedia.org/wiki/Secret_ballot#/media/File:1900_ New_York_polling_place.jpg>

1856. Australia has also been at the forefront of the world's democracies in electoral system innovation and reform. For example, the secret ballot was invented in Australia and is used in every representative democracy today. Other countries sometimes refer to the secret ballot as the 'Australian ballot'.

It is fair to say that Australia has one of the best electoral systems in the world today. So much so that the Australian Electoral Commission (AEC) is asked by emerging democracies to help them run their elections.[1]

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Parliament — Our representative assembly

Australians elect the Commonwealth Parliament directly. There are no direct elections for the Prime Minister and Cabinet. It is Westminster convention that determines who forms government. The executive government is formed by the party that commands majority support in the lower house, and the leader of this party becomes the Prime Minister.

There is no minimum time between elections. The *Commonwealth of Australia Constitution Act 1900* (the Constitution) limits the term of a parliament to three years. Thus, at least every three years Australians need to exercise their political right to vote in elections to fill their parliament with representatives to act as law makers and govern on their behalf.

There are also elections for state and territory parliaments, each of which has its own electoral laws. Western Australia (WA) has a fixed four-year parliamentary term. Western Australian governments are formed in the Legislative Assembly following Westminster convention. The majority party leader becomes the Premier.

Federal and state governments are representative because they are formed by an elected and representative lower house — the people's house.

1 The AEC assists other countries by providing technical assistance and trained staff for election observation missions. These missions build electoral capacity and prevent electoral fraud and corruption in developing democracies outside Australia.See: Australian Electoral Commission, 'International electoral services', <https://www.aec.gov.au/About_AEC/AEC_Services/International_Services/>

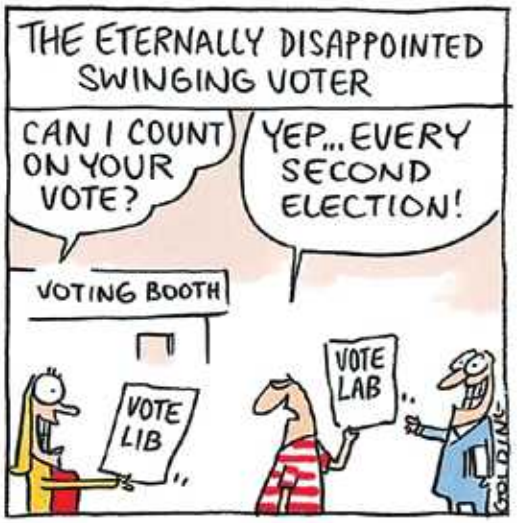


Figure 9.2 — Australians have the opportunity to elect their representatives every three years (even if they are not always happy about it).
Source: Matt Golding, The eternally disappointed swinging voter, 2014, <https://twitter.com/stansteam2/status/523594376631418882> and <http://www.threefingers.com.au/>

Parliamentary representation — What the Constitution says

Elections should be regular and frequent enough to ensure parliament remains responsive to the will of the people and accountable to electors. The Commonwealth Parliament is a fully democratic bicameral parliament. Both houses are 'directly chosen by the people'.

There are different rules governing the nature of representation in each house:

- Section 24 of the Constitution specifies that members of the House of Representatives (MHRs) have maximum three-year terms. All 151[2] electorates must be re-elected every three years. MHRs represent people in electorates. Each state has electorates in proportion to its population, so New South Wales (NSW) has the most (47) and Tasmania has the least (five) because of their populations, with some guarantees for minimum levels of representation for Original states; and
- Section 7 of the Constitution specifies that senators have six-year terms, with half the Senate elected alongside the House of Representatives every three years.[3] Senators represent people in states. All states have equal representation, currently 12 senators for each state. The two territories have two senators each. There are 76 senators in total.

> *There are no direct elections for the Prime Minister and Cabinet.*

A **Senate rotation** is a feature of Australian upper house elections. Electing only half the Senate every three years ensures the parliament retains 'elders'[4] who have experience of the last parliament — a feature designed to provide continuity and stability in governance. The idea of a Senate rotation came from the United States of America (US). The US Senate rotation is one third of the Senate being re-elected every two years.

Figure 9.3 — The Australian Senate chamber.
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>

2 From the 2019 election the number of House of Representatives electorates increase to 151 seats. Prior to this increase, and since 2001, the House of Representatives had 150 seats.

3 Except for a Section 57 double dissolution election — a particular type of election designed to break a deadlock between the two houses. A double dissolution election elects all 76 senators.

4 Senex is Latin and means 'older person'. The Roman Senate was a house of 'wise elders' whose wisdom came from long experience.

Calling an election

Less than three years after the first sitting of a parliament the Prime Minister must advise the Governor-General to dissolve the House of Representatives. The Governor-General then issues **writs** for a **general election**. Section 24 of the Constitution gives the Governor-General the power to carry out these legal formalities, but the real power to call an election rests with the Prime Minister. The Governor in each respective state possesses the power to issue writs for Senate elections.

On occasions when the two houses are deadlocked over legislation, the Prime Minister may advise the Governor-General to dissolve both houses. In such cases, the Governor-General uses powers specified in Section 57 of the Constitution to issue writs for a **double dissolution election**.

Figure 9.4 — Occasionally, the Prime Minister will advise the Governor-General to dissolve both houses — as Malcolm Turnbull did, calling the 2016 election.
Source: Alan Moir, Turnbull backfires, 2016, <https://twitter.com/moir_alan/status/749437230960087040>

House of Representatives — The people's house

The House of Representatives has 151 representatives representing 151 electorates around the country. States with larger populations have more electorates than those with smaller populations. As mentioned earlier, NSW has 47 seats and Tasmania has five. There is approximately the same number of enrolled electors — approximately 107,000 — in each electorate.[5] The House of Representatives represents the people equally — one representative for every 107,000 electors. Equal representation makes this house a 'popular chamber', or people's house, because everyone's vote has the same value. There is an equality of the political right to vote.

Note that each electorate elects one representative. They are single-member electorates.

At a general election, all 151 seats are declared vacant. Electoral contests take place in all 151 electorates. Many candidates compete for each seat. There are few qualifications for candidates. Citizens only need to be eligible to be enrolled to vote to be qualified to run in an election.

Candidates come from:

- major parties (the Liberal Party of Australia and the Australian Labor Party);
- minor parties (such as the Australian Greens, the Nationals and Pauline Hanson's One Nation);
- micro parties (such as the Justice Party and the Central Alliance); and
- independents.

Senate — The states' house

The Senate has 76 representatives for eight electorates around Australia. The six states are electorates with 12 representatives each. The two mainland territories[6] are electorates with two representatives each. Each state electorate has the same number of representatives no matter how large or small its population. The Senate is a 'federal chamber' because of the equal state representation.

At a general election, 36 of the Senate's 72 state senators and all four of its territory senators are elected. At a double dissolution election, all 76 senators are elected. As for the lower house, candidates come from political parties or are independents. All candidates contest the election within their state or territory.

Note that each state electorate elects 12 representatives. The territory electorates elect two each. They are multi-member electorates.

5 Section 24 of Constitution states that each Original state 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, significantly less than all other electorates. Tasmanians, therefore, have more voting power in the House of Representatives than other Australians. The Original states are the six states at the time of federation.

6 The Northern Territory and the Australian Capital Territory are mainland territories. Australia has other territories off shore, such as Norfolk Island. External territories do not have representation in the Senate.

Electoral systems

An electoral system is a mechanism for choosing representatives to occupy elected positions in a legislative assembly (for example, Australian parliaments and US congresses). Some countries also directly elect their executive, usually called a President. Australia does not use a separate election to choose its executive government. Instead, a single parliamentary election produces a parliament of representatives, a majority of whom (according to Westminster convention) choose the executive government and hold it accountable until the next election.

Electoral systems can be used to fill other public positions. For example, some US states elect judges rather than have the executive appoint them. In the US many officials are elected to school boards, public service agencies and so on. Australians also elect local governments, for example, shire councils, town councils and city governments.

Electorates

Electorates are the basis of all electoral systems. They are also called **electoral divisions**. An electorate is a geographical area containing many citizens who elect either one or several individuals to represent them in their representative legislature.

As noted earlier, electorates may be **single-member electorates** which elect only one candidate to represent the district. Alternatively, they may be **multi-member electorates** which elect more than one person to represent them.

Types of representation

Electors in electorates always retain the power to govern, which is referred to as **popular sovereignty**. However, they temporarily delegate their sovereignty to elected representatives. Representatives may represent their electors (called **constituents**) in several ways:

- **Delegate representation** occurs when the constituents present their values, concerns and interests to their representative who then re-presents them to parliament. Delegate representatives have close links, through meetings or communications, with their constituents. They translate their constituents' desires directly through law making. Their personal views do not count.
- **Trustee representation** occurs when constituents entrust their representative's judgment to represent their best interests in parliament. Trustee representatives are less directly linked to their constituents and are less reliant on frequent communication with them to discern the issues that matter or their opinions on the issues. Trustee representatives may rely on the commands of their own conscience rather than the dictates of constituents.
- **Partisan representation** occurs when representatives are members of disciplined political parties. They act in parliament according to the dictates of their party, not so much the directions of their constituents or their own conscience. Partisan representation is justified because the overwhelming majority of electors intentionally vote for candidates based on a candidate's political party membership, not their personal attributes. They, therefore, expect their representatives to 'toe the party line'.[7]
- **Mirror representation** occurs when a legislative chamber's composition reflects the composition of the society it represents. For example, parliament should reflect society's composition in terms of gender, ethnicity, indigeneity, age and other types of diversity. The Australian population is 49 per cent male and 51 per cent female. If the Commonwealth Parliament truly mirrored Australia, it would be 49 per cent male and 51 per cent female.

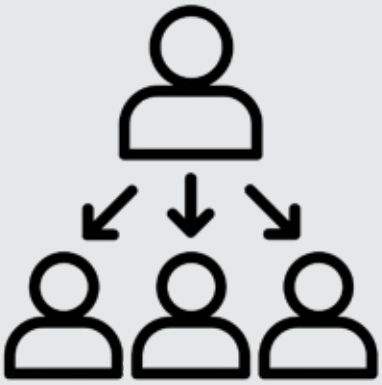


Figure 9.5 — Acting as a delegate is one of the theories of representation.
Source: Vectors Market, Delegate, Noun Project, <https://thenounproject.com/search/?q=delegate&i=1333651>

7 Political parties expect partisan representatives to support the party's position on issues. It means representatives must sometimes vote against their conscience and even against their constituents' interests. For example, many MPs resisted voting for marriage equality until 2017 — because their parties would not allow them to, even though constituents and their conscience may have been telling them to do so.

How electoral systems work

Electoral systems work by presenting electors with a choice of candidates on a **ballot paper**. Electors secretly express a preference for one or more candidates from amongst those listed on the ballot paper. Ballot papers are collected and counted. The preferred candidate is elected to fill a position (called a 'seat') in parliament.

In short, electoral systems are mechanisms for converting electors' votes into seats in parliament.

Electoral systems are critically important

Perceptive students will note that electoral systems are critical for representative democracy. A poorly designed electoral system will severely compromise the operating principles of a liberal democracy by undermining the principles of majority rule, equality of political rights, participation and the political freedoms of citizens. Therefore, the adoption of a particular electoral system is an important choice for a democratic country. The choice will affect political representation, majority rule and other fundamental democratic principles.

There are many different types of electoral systems. Each one converts votes into seats differently. Knowing that different electoral systems result in different outcomes is fundamentally important for understanding what follows.

Some electoral systems are also fairer than others. Some are of questionable value.

> *Electoral systems are mechanisms for converting electors' votes into seats in parliament.*

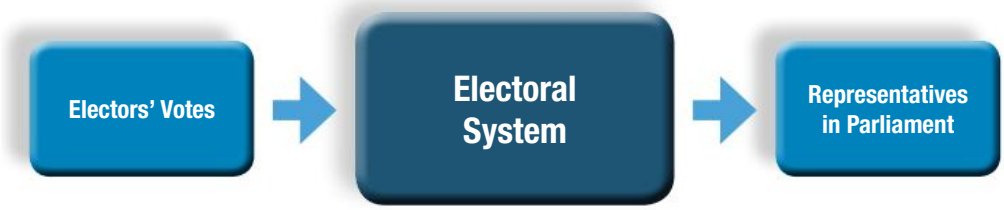


Figure 9.6 — Simple diagram showing how electoral systems convert votes into seats in parliament. 'Electoral system' is shown as a darker box because there are many different systems and each system converts votes into seats in a different way.
Source: Stephen King, 2018

Fair elections

Fairness is the most critical aspect of an electoral system.

Fairness in electoral systems applies to electors, candidates and political parties in that:

- all citizens must have a political right to vote;
- electors must not be intimidated or pressured when voting;
- electors' voting power must be equal;
- nominations for candidates should be as open as possible, maximising political participation for citizens and political parties; and
- political parties must be treated equally.

Fairness also necessitates upholding the democratic principles that:

- a majority of votes must result in a majority of seats. Majority rule is a fundamental democratic principle;
- the rights of minorities must be respected. Political rights and freedoms are fundamental liberal principles;
- no distortion or manipulation in the conversion of votes into seats should occur. Equality of political rights and participation is an operating principle of a democracy;
- elections must be regular enough to make government responsive to the peoples' will. Majority rule and popular participation are principles of a democracy; and
- elections must be frequent enough to allow electors to have a political choice and to hold representatives accountable through the ballot box.

All of the above can be summed up in four essential fairness criteria. Note how the four criteria below match the operating principles of democracy. A fair electoral system will:

1. produce effective and stable government, reflecting the freely expressed will of the majority (majority rule);
2. provide accountability of representatives who have direct links to electors, ensuring the parliament remains representative

and responsible to electors (majority rule, participation);

3. be fair to electors, candidates and political parties (equality of political rights and participation); and
4. represent society's diversity in gender, age, ethnicity, social values and so on (equality of political rights, political freedoms and participation).

Figure 9.7 — Fairness criteria for political systems.
Source: Nicol Davis, 2018

An ideal electoral system

An ideal electoral system would achieve all four of the above criteria. There are many electoral systems; some are simple while others are complex. Each electoral system may emphasise different elements of the four essential criteria. Despite the diversity of electoral systems, no system yet devised can achieve all the essential criteria for fairness. These criteria collectively represent an 'ideal' — desirable and perfect, yet perplexing to achieve in full in reality.

In short, there is no ideal electoral system. Some systems are good at achieving stable government and accountability. Others are good at achieving fairness for participants and representing diversity. It is challenging for any system to achieve stable government and fairness for participants. Accountability and diversity are also difficult to achieve in one system.

The best way to have an electoral system that is as close to the ideal as possible is to compromise between different types of electoral systems. Australia achieves such an **electoral compromise** by using two different systems.

Electoral systems can be classified into categories and an electoral compromise is achieved by using systems from each category.

Classifying electoral systems

Electoral systems fall into two broad categories:

1. majoritarian systems; and
2. proportional systems.

Majoritarian systems are always based on single-member electorates and are very effective at achieving:

- majority rule; and
- strong representational links between elected members of parliament and their constituents.

Majoritarian systems suffer from several weaknesses. They:

- distort the size of the winner's margin (the winner's bonus) both in individual electorates and in parliament; and
- reduce political participation by minimising minor party representation.

Proportional systems are always based on multi-member electorates and are very effective at producing:

- fairness for political parties; and
- representation of diversity.

Proportional systems suffer weaknesses, too. They tend to:

- undermine majority rule; and
- weaken the links between representatives and their constituents.

Fair electoral systems can only be achieved using both types of systems in some form of combination — either as two complementary systems or blended into one hybrid system. Fair electoral systems use complementary systems that are able to compensate for each other's weaknesses.

Australia uses two complementary systems to elect each house separately. The remainder of this chapter looks at the three electoral systems used to elect the Commonwealth Parliament

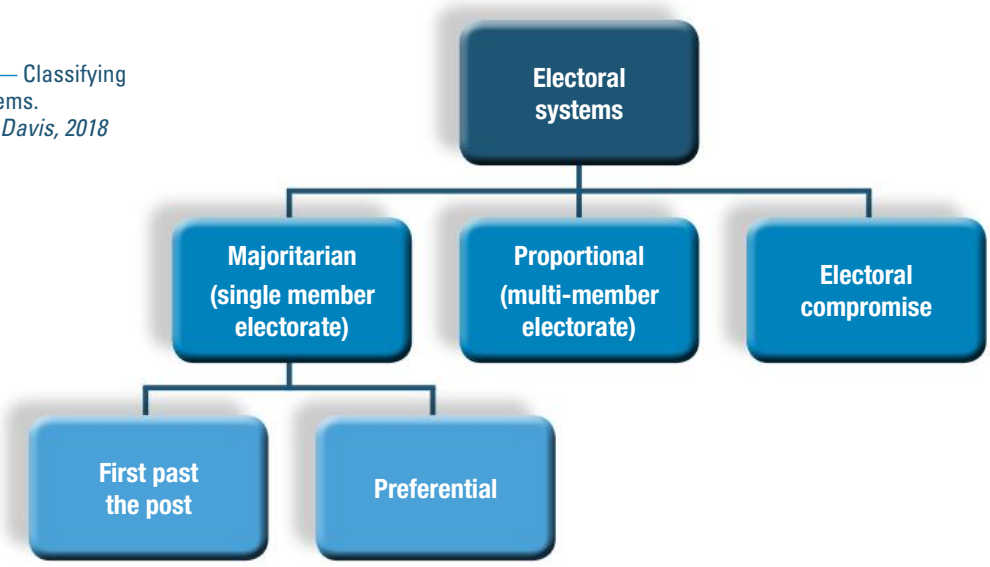


Figure 9.8 — Classifying electoral systems.
Source: Nicol Davis, 2018

since federation in 1901 and how Australian electoral reform has created an effective **electoral compromise**.

New Zealand blends two systems into a hybrid electoral system to elect its unicameral parliament. New Zealand's electoral compromise is the subject of Chapter 10.

Majoritarian electoral systems

All majoritarian electoral systems are based on single-member electorates that return one candidate to sit in parliament as the electorate's representative.

First past the post

First past the post (FPP), also called **plurality voting**, is the most straightforward electoral system. It has the following key features:

- a simple majority is needed to win (a plurality); and
- electors choose one candidate from amongst those on the ballot paper.

Advantages

FPP's virtue is its simplicity. Electors can easily cast a ballot. It is quick and easy to count. There are no complicated calculations to find out who won. FPP effectively creates majority rule because it amplifies the winner's margin to produce an exaggerated majority in the parliament. The exaggerated majority occurs because FPP gives the successful candidate and party a **winner's bonus** (see Figure 9.9). The winner's bonus occurs because all single-member electoral systems have a 'winner takes all' bias. This occurs because there is only one seat to win in each electorate, so if a candidate wins a plurality of votes, they win the electorate.

Another advantage is the fact that only one candidate represents electors. Electors know who to hold responsible for the quality of representation they receive. They know who to delegate their interests to or who to entrust to act for their welfare. Their representative is under intense scrutiny because they are the only one representing the electorate as its delegate or trustee. It is, therefore, easier for the electorate to hold their representative **accountable** for the quality of the representation they deliver.

> *"All majoritarian electoral systems are based on single-member electorates that return one candidate to sit in parliament."*

Disadvantages

FPP creates **a two party system**. There is one winner and one loser. Minor parties rarely win seats in parliament. Typically, anyone who votes for a minor party wastes their vote.

Vote wastage occurs when an elector's vote does not contribute to electing a representative. Such electors are unrepresented in the parliament. Their vote did not count. (See Figure 9.9).

Vote splitting occurs when the two or more similar political parties compete for the same electors. A third party with less voter support might win because neither of the similar parties win enough votes on their own. The popular

parties lose because they divide the vote between them. Vote splitting is a grave flaw in FPP elections where there are more than two candidates. (See Figure 9.9).

In summary, winner's bonuses might be useful for creating majority rule, but they severely undermine representation and participation. Electors who waste their votes will get no representation at all from an FPP system. FPP is not fair to political parties and can result in a less preferred candidate or party winning.

First past the post — A simple example

Imagine an FPP election with the following results:

First Past the Post	
Required to win = plurality	
Party A1	25
Party A2	30
Party C	45
Total Votes	**100**

Table 9.1 — First past the post voting example

Party C is the winner with a simple majority of votes. The 'A vote' has split between two similar parties and all A electors have wasted their vote. A majority of electors (55 per cent) do not want

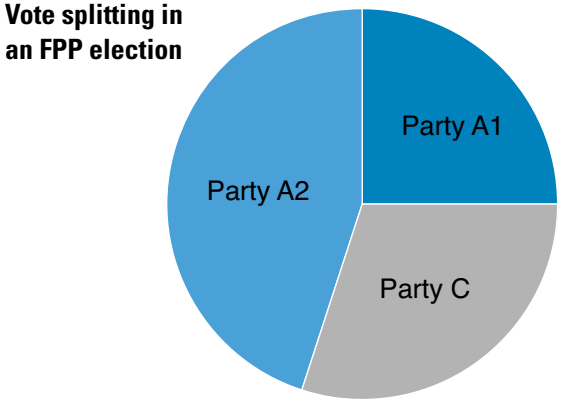


Figure 9.9 — Vote splitting in a first past the post election.
Source: Stephen King, 2018

Party C. Party C is the most popular, but not the most preferred. How fair is this simple system?

In Figure 9.9, parties A1 and A2 are similar and attract the same electors (those who prefer A). A votes have split between the two A parties. A majority of electors prefer A, yet C wins. Vote wastage is very high. A votes are wasted because no A candidate is elected to represent those who voted A. Only a single member is elected using FPP and that member represents C. Party C has enjoyed a hefty winner's bonus because its 45 per cent of votes becomes 100 per cent of the seats available. It has won the only seat in the single-member electorate.

First past the post in Australia

The first Commonwealth Parliament in 1901 was elected using colonial electoral systems because there was no electoral Act governing federal elections.[8] Two of the earliest Acts of the first parliament were the *Commonwealth Franchise Act 1902* and the *Commonwealth Electoral Act 1902,* which established the electoral procedures for electing future parliaments. The House of Representatives and the Senate both used FPP from 1902. FPP remained in use until the *Commonwealth Electoral Act 1918* replaced both of the 1902 Acts.

First past the post, representation and the Commonwealth Parliament

The use of FPP to elect both houses was efficient and quick, but resulted in strong majorities in both houses. The Senate was usually dominated by the same political party that held the governing majority in the lower house. Occasionally it was controlled by the party in opposition.

A government dominated Senate meant the executive controlled both houses. Government controlled Senates tended to rubber stamp government legislation. Negotiation and consensus were hampered by the lack of alternative parties. Scrutiny of bills and debate were ineffective. Captured by the governing party, the Senate was unable to effectively represent the states or act as a house of review. Therefore, both its constitutional and Westminster roles were undermined by FPP.

Opposition controlled Senates tended to be obstructionist. The power of the Senate, which is co-equal to that of the House of Representatives, gave the opposition tremendous power. Such power could be used to frustrate a government by rejecting its legislation and moving anti-government motions in the upper house. Obstructionist Senates undermined majority rule in the lower house.

Preferential voting

While preferential voting (PV) is slightly more complicated than FPP, it is still a simple electoral system with many of the advantages of FPP, but without several of its flaws. Its key features are:

8 There was no Commonwealth Parliament to pass a federal Act before 1901. Each colony had different systems, so the first Commonwealth Parliament was unique for the variety of electoral systems used to elect its members. Only Western Australia and South Australia allowed women to vote in the first election for the Commonwealth Parliament. See: Australian Electoral Commission, 'Events in Australian electoral history', <https://www.aec.gov.au/Elections/Australian_Electoral_History/reform.htm>.

- an **absolute majority** (of '50 per cent plus one vote' of the formal votes or 50% + 1) is needed to win;
- electors number candidates from most preferred ('1' indicates a **primary vote**) down to least preferred (all other preferences from '2' onwards); and
- if no candidate wins an absolute majority of primary votes, **preferences** are distributed until a candidate achieves an absolute majority.

Some PV systems require preferencing every candidate. Numbering all the candidates is called **exhaustive preferential voting** (or full preferential voting) because electors have to exhaust all the options. The House of Representatives uses exhaustive preferential voting. Others require the voter to number only as many candidates as they wish. These systems are called **optional preferential voting**. Some states have used optional PV — Queensland is one such example.

Advantages

The requirement for an **absolute majority** enhances majority rule by ensuring a majority preferred candidate is elected. In the FPP example in Figure 9.9, a majority of 55 per cent preferred candidates other than Party C, yet Party C was more popular than any other party and won. Such an outcome is not possible with PV. The example of PV in Figure 9.12 shows how 55 per cent of electors elect a majority preferred candidate.

Like FPP, PV produces exaggerated majorities due to a winner's bonus and is, therefore, strong at producing **majority rule** if used to elect a lower house — a house of government.

Because electors can vote for alternative candidates[9] **vote splitting is eliminated** between related political parties. For example, if an elector votes for a political party that gets eliminated their vote is distributed to their second preferred candidate. Their vote will follow their preferences until someone is elected.

The requirement for an absolute majority **reduces vote wastage**. At least 50 per cent of all electors plus one more must have contributed to electing a representative, meaning no more than half the votes can ever be wasted. In FPP, a vote for a defeated candidate is wasted. In PV, preferences mean that a primary vote for a defeated candidate will keep on counting until an absolute majority is reached.

9 Preferential voting is also known as the 'alternative vote'.


House of Representatives
Ballot Paper

Victoria
Electoral Division of Higgins

Number the boxes from 1 to 8 in the order of your choice

O'BRIEN, Rebecca
MARRIAGE EQUALITY

TREGEAR, Jessica
DERRYN HINCH'S JUSTICE PARTY

O'DWYER, Kelly
LIBERAL

BALL, Jason
THE GREENS

KENNEDY, Robert
LIBERAL DEMOCRATS

KATTER, Carl
AUSTRALIAN LABOR PARTY

BASSETT, Nancy
NICK XENOPHON TEAM

GULLONE, Eleonora
ANIMAL JUSTICE PARTY

Remember... number **every** box to make your vote count

■ Figure 9.10 — Exhaustive preferential voting requires electors to number their preferences from most to least preferred.
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> and <https://en.wikipedia.org/wiki/Electoral_system_of_Australia#/media/File:2016-ballot-paper-Higgins.png>

As with FPP, PV is a single-member system which promotes **accountability**. It means only one candidate represents electors. Citizens can easily know their delegate or trustee and, thus, who to hold responsible for the quality of representation they receive. They know who to contact with their interests and issues. They know who to reward for effective representation and who to punish at the next election if they are not satisfied.

Disadvantages

The need for electors to number candidates in order of preference is more demanding than merely choosing one candidate — but not significantly so. PV does result in a higher number of **informal votes** by electors who have misunderstood how to vote, but the rate of informal voting is still low.

Vote wastage occurs since anyone whose vote does not contribute to electing a representative has wasted their vote. That number can be as high as 50 per cent less 1 vote. However, there can never be a majority of votes wasted, which can happen under FPP.

The winner's bonus in PV is less extreme than in FPP, but it still promotes **overrepresentation** of major political parties. It prevents electors who vote for losing parties getting any representation in the legislature — this is **underrepresentation**. There is some compensation because smaller

parties or candidates can trade their preferences to other candidates in return for some policy commitments from them.

Arrangements between candidates over preferences are called **preference deals**. For example, in Figure 9.12 candidate A1 knows he is likely to lose, but also knows A2 needs his second preferences if she is to win. A1 gets some bargaining power with A2. A2 will want to make a preference deal in which she agrees to some of A1's policies in return for his second preferences. Preference deals work because many voters follow the preferences suggested on **How to Vote Cards**. In this example, A1's How to Vote Card will have '2' next to A2, encouraging all his supporters to give their second preference to A2. Preference deals allow smaller parties with little hope of winning seats an opportunity to get their ideas represented in parliament. But preference deals are not enforceable contracts. A2 has only promised to consider some of A1's policy ideas when she gets elected; she is not bound to. Political parties may also arrange preference deals across more than one electorate, and between the lower and upper house. This elaborate preference deal arrangement may benefit these political parties in the areas where they need it.

Another type of winner's bonus operates in both FPP and PV. An even distribution of its supporters across many electorates benefits a party. It may win more electorates by small margins. A party with many supporters concentrated in fewer seats is disadvantaged. It will win fewer electorates by large margins. In extreme cases, such as the 1998 federal election, it is possible for a party with fewer votes overall to win a majority of seats and form government. Kim Beazley's ALP won 50.98 per cent of the national vote, but only 67 seats. Prime Minister John Howard's Liberal National Party Coalition won 80 seats with only 49.02 per cent of the vote — giving him a majority of the 150 seats in the House of Representatives. The concentration of ALP electors in fewer seats disadvantaged Kim Beazley. The ALP won fewer seats by larger margins. The distribution of the coalition's vote across more seats enabled John Howard to win more seats by slim margins. It is the number of seats a party wins that matters in forming government.

■ Figure 9.11 — Adam Bandt, Greens member for the federal seat of Melbourne since 2010, has not been disadvantaged by preferential voting. *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>*

Lastly, PV does not reflect society's diversity very well. Two party representation resulting from all single-member systems excludes many parties. Worse still, the 'winner takes all' nature of single-member systems results in parties selecting 'conventional' or 'safe' low risk candidates. In such high stakes win or lose contests 'diversity candidates'[10] tend not to be selected because of a fear they may divide popular opinion and alienate parts of the electorate. Well-founded or not, the fear is that 'unconventional candidates' are a higher risk. The result is the overrepresentation of white, middle class, tertiary educated males in parliament — conventional and safe candidates, in other words. Quotas for women have been used by the ALP to force the election of more Labor women to the House of Representatives. The Liberal Party does not have quotas and had a much greater gender imbalance in 2018, with only 21 per cent of its parliamentary membership being women. Students can draw their own conclusions about the merit of quotas to address the 'diversity issue' in the House of Representatives, but the fact remains — without interventions like quotas, single-member electoral systems are biased towards conventional and safe candidates.

There is one complication to a simple two party system in Australia. The Nationals are a minor party that PV does not disadvantage. The Nationals have about the same support as the Greens across Australia. The Greens vote is spread thinly throughout the 151 electorates, so they do not win an absolute majority of votes in any seat, except the inner-city electorate of Melbourne which the Greens won in 2010. The Nationals' vote is concentrated heavily in rural seats in both NSW and Queensland. The Nationals can achieve an absolute majority of the votes in these agricultural electorates and, thus, win lower house seats. Australia's system is a **'two and a half party system'** because of the lower house representation of the Nationals.

10 'Diversity candidates' can be thought of as candidates who are not from the mainstream of Australian society. Indigenous people, migrants with non-English speaking backgrounds, non-European minorities, LGBTIQ people and others are in this category. Women, although a majority of the population, can also be considered in this category because of the bias toward male representation in parliament.

Preferential voting — A simple example

Imagine the same election results as in Figure 9.9, but this time in a PV election.

Preferential Voting	
Required to win = absolute majority (51 votes)	
Party A1	25
Party A2	30
Party C	45
Total Votes	**100**

Table 9.2 — 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.

Counting the votes — Distribution of preferences

In order to proceed, the candidate with the least number of votes is eliminated from the count. Therefore, Party A1 is eliminated and their votes are examined by independent electoral officers to find out where the second preferences were allocated on each individual ballot paper (for those electors who had voted for candidate A1).

Second preferences from A1 ballots are distributed to candidates for Party A2 and Party C. 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 9.3 — 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.

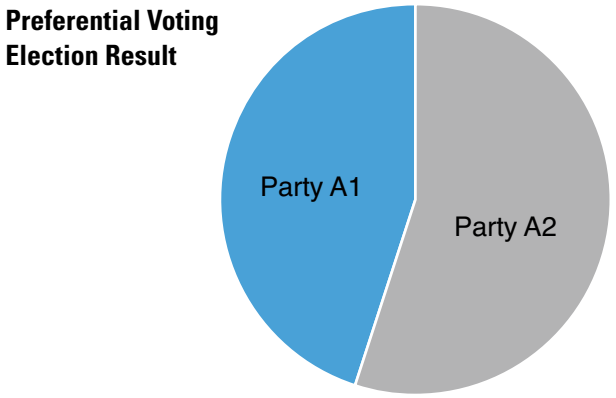


Figure 9.12 — After elimination, Party A1's second preferences are distributed.
Source: Stephen King, 2018

In Figure 9.12, A2 has achieved an absolute majority and won the electorate. There is no vote splitting between the A parties because A1 electors' votes have flowed through to A2 to form an A majority. 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 one out of one available seats (or 100 per cent of the seats). A **preference deal** between A1 and A2 has allowed A1 to influence A2's policies and, therefore, achieve indirect representation via A2 so long as A2 keeps to the deal.

Preferential voting in Australia

Federal elections have used exhaustive preferential voting since 1918. Preferential voting replaced FPP as the electoral system for both houses. It continues in use today for the House of Representatives. The Senate voting system stopped using PV in 1949.

Preferential voting, representation and the Commonwealth Parliament

PV is a majoritarian single-member electoral system like FPP. Consequently, there was little change in the composition of the houses in the period after FPP was discontinued. There were still large majorities created by winner's bonuses in both houses, minor parties were underrepresented and adversarial partisanship continued. It continues to this day in the House of Representatives, but less so in the Senate since the 1949 electoral changes.

Large majorities in the House of Representatives created stable governments that dominated the House. Stable government is a positive outcome because the House of Representatives is the house of government and a democratic

Figure 9.13 — The Howard Government enjoyed strong majorities through its time in office.
Source: Alan Moir, Democracy, <www.moir.com.au>

government needs to embody the operating principle of majority rule. PV's single-member electorates continued to create strong links between the people and their representatives — also a good thing for the house of the people.

A **majority government** is a firmly established characteristic of the Australian political system. The Turnbull Government had a one seat majority and the Abbott Government enjoyed a 14 seat majority. The Howard and Hawke/Keating Governments always enjoyed majorities (sometimes very significant ones) over their long periods in office.

The Gillard Government (2010–2013) was the first **minority government** in decades, an event so rare in Australian history that the hung House of Representatives was unable to form a government for 17 days after the election. During this time Julia Gillard conducted negotiations with a small number of independents and the single Greens' MHR in a bid to gain their support on confidence and supply[11] and so form a government.

Under PV, Senates continued to be captured by the two major parties. Most Senates were government dominated, rubber stamp chambers with reduced potential for effective review or state representation. Alternatively, they were obstructionist opposition dominated chambers. PV did little to enhance the Senate's review function or its capacity to represent states, be fair to all political parties or fairly reflect society's diversity.

A major positive change was increased electoral fairness for electors. Popular minority parties could no longer win by splitting the majority preferred vote of allied rival parties. Furthermore, absolute majorities in each electorate meant parliamentary representation more accurately reflected the preferred will of a majority of electors in the legislative branch of government. The House of Representatives, enhanced with absolute majorities behind every member, formed more representative executive governments, enhancing the principle of majority rule in the executive branch of government, too.

There also was a small increase in fairness to minor parties because of opportunities to trade their preferences and make policy deals with major parties. However, there was no way for a losing party to force a winning party to abide by a preference deal when in parliament. Swapping second preferences is more like a promise than a contract. Breaking promises is easy in the rough and tumble of parliamentary politics, especially after an election passes into history. However, minor party voters may hold major parties to account at the next election if they break preference promises.

Figure 9.14 — The use of preferential voting meant that the Australian Senate's exhaustive preferential voting was not capable of fulfilling its function as a house of review.
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>

11 'Confidence' refers to non-party MHRs offering to support a minority government on the floor of the House of Representatives by voting with it on confidence motions. 'Supply' refers to money bills, which every government must be able to pass through the lower house. In line with the Westminster conventions of responsible government, a government's failure to win confidence or supply would lead to its resignation. Majority governments have no trouble with confidence or supply. Minority governments are much more vulnerable.

Proportional representation systems

Proportional representation (PR) systems aim to reflect the proportion of the vote received by a political party as a proportion of seats gained in the parliament. For example, if a party received 30 per cent of the vote in an election it would receive 30 per cent of the seats in the chamber.

Note the difference between majoritarian and proportional systems — majoritarian systems are high stakes 'winner takes all' systems, whereas proportional systems are 'get what you deserve' systems. Perceptive students will note that PR systems are much fairer to political parties than majoritarian systems. Major parties are the winners under PV because winners' bonuses cause exaggerated majorities. Under PR systems, minor parties get seats in proportion to their electoral support and there are no winner's bonuses for a successful party.

The key to proportional electoral systems is their multi-member electorates. Each PR electorate elects multiple candidates to parliament.

PR systems tend to elect more diverse chambers with a greater variety of parties and independents being represented. PR systems are also better at representing society's diversity.

Figure 9.15 shows proportional representation is fairer for parties. They have no winner's bonus or vote splitting and little vote wastage. A parliamentary chamber elected using a PR system will be more diverse than a house elected under either FPP or PV.

Single transferable vote proportional representation

From 1949 the Senate has been elected using single transferable vote proportional representation (STV/PR). It was the first time in Australian federal history that the House of Representatives and the Senate had different electoral systems. It would mean the composition of future Senates would come to be quite different from that of the House.

STV/PR is a complicated electoral system. It has the following key features:

- a quota, rather than a majority of votes, is needed to win a seat;
- there is one quota per seat to be filled and multiple quotas because there are multiple members to elect per electorate;
- electors rank candidates (below the line) or political parties (above the line) in order of preference;
- when a candidate's votes exceed a quota (that is, they receive **surplus votes**), all votes are distributed to other candidates according to electors' preferences, but at a reduced value (known as the **transfer value**); and
- preference distributions continue until the last quota fills the final seat. A flow of lower order preferences, rather than first preferences, usually makes up the final quota.

> *Proportional electoral systems are characterised by their multi-member electorates which elect multiple candidates to parliament.*

Students should note the relative unimportance of a majority in STV/PR. Candidates do not have to win either a simple majority or absolute majority. To win requires a quota of votes instead. A **quota** is a fixed share of votes (or more correctly, a set proportion of the formal votes cast) which, once achieved, results in winning a seat. There are several quotas for each electorate, which means that several candidates represent the same electorate. Hence the term, 'multi-member' electorate. Quotas are composed of far fewer votes than that of majorities. For example, at the 2016 federal election, a quota in Tasmania was approximately 20,000 while a quota in NSW was approximately 350,000. Interestingly, the quota for NSW is equivalent to the total number of voters in Tasmania.

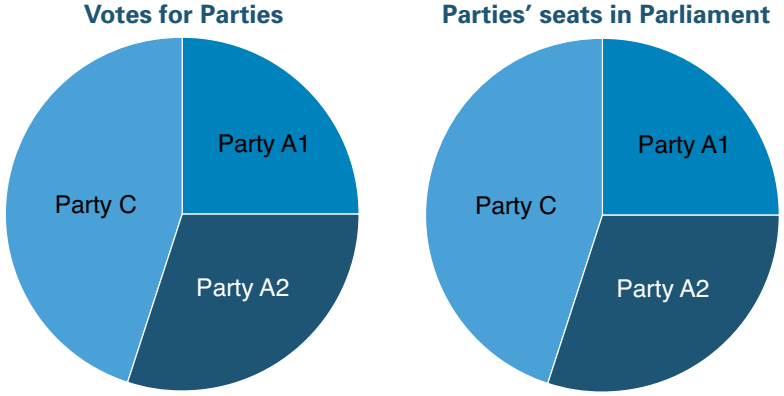


Figure 9.15 — Proportional representation systems fairly allocate seats to parties based on the percentage of the vote they received.
Source: Stephen King, 2018

By replacing a majority with a quota, STV/PR can elect candidates from different parties to the same electorate — an impossibility under single-member systems with only one representative per electorate.

Advantages

STV/PR is much **fairer** to electors, candidates and political parties because all candidates and parties that can achieve a quota can win a seat. Quotas are much lower than absolute majority (50% + 1) or even simple majorities (more votes than any other candidate). In a federal general election for the Senate in each state, a quota is equivalent to approximately 14.3 per cent of the formal votes. When a double dissolution election occurs and all twelve senators for a state are to be elected, this quota is effectively halved. This results in minor political parties like the Greens, Nationals and One Nation being elected. Other micro parties have been successful, as have some high profile independents. Electors benefit in that their will is reflected in the election results.

STV/PR creates a **multi-party system**. A Senate elected this way more accurately mirrors the diversity of society. It helps achieve mirror representation. Moreover, STV/PR reduces the incentive for parties to pick 'conventional' or 'safe' candidates. Electors tend to vote for political parties rather than vote directly for individual candidates. Indeed, most electors have no idea who the candidates are — they focus on the party they want. Parties can, therefore, nominate 'diversity candidates' with less fear of alienating segments of the voting public. Examples of diversity candidates include candidates from indigenous or ethnic backgrounds, with different sexual orientations, ages and so on. Far more women get elected under STV proportional representation than preferential voting.

Figure 9.16 — Polling officials counting Senate ballot papers. *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>*

STV/PR tends to produce a **'hung' Senate** because there is no winner's bonus to exaggerate a winner's margin. A hung house is one in which no party has a majority in its own right. No party can control the procedures of a hung Senate or be guaranteed victory when voting on motions or bills. The result is a house in which multi-party negotiation and consensus building are essential. Compromises must be reached to achieve success in a hung Senate, a useful feature for a **house of review** when scrutinising lower house government legislation. It is also effective when the upper house reviews estimates of government spending during the budget process. In other words, hung Senates are much more likely to check and balance a government dominated lower house and the government itself. Hung Senates can be powerful institutions for accountability.

The combination of mirror representation, diversity and the need for compromise makes an STV/PR chamber a good protector of rights and freedoms, especially for minority groups that may well have representation in the Senate. Where the government dominated House of Representatives is a majority ruled, democratic house, the Senate is a philosophically liberal chamber because it protects rights. Some of the Senate's powerful committees guard against excessive executive power.

Elected in different ways and with different aims in mind, the House of Representatives and the Senate together make for an effective **liberal democratic** bicameral parliament.

Disadvantages

Electors find it almost impossible to understand how their votes are counted or candidates are elected using STV/PR. The reason is its **complexity**. The method used between 1949 and 1984 to fill in the Senate ballot paper was identified as tedious and led to rates of informal voting rising up to 10 per cent.[12] **Above the line voting**, introduced in 1984, drastically reduced the informal vote, but introduced new complications. Recent reforms, discussed below, have simplified voting, but introduced new problems.

Hung Senates produced by STV/PR can lead to an **impasse in parliament** — between the houses or the government and Senate — if parties cannot

12 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>.

achieve a compromise or reach consensus. In a system with strong bicameralism, such as Australia's, it means the powerful upper house can block government bills transmitted from the lower house. Arguably, a non-majority Senate blocking bills passed by a majority controlled House of Representatives undermines the principle of majority rule.

The link between voter and representative is much weaker than in single-member systems such as FPP and PV because electors tend to vote for parties (an option since 1984) rather than individual candidates. Equally, direct accountability is weaker because there are multiple representatives per electorate. Many electors know their House of Representatives member of parliament (MP), but few know who their Senate representatives are. In the case of the Senate, electors have 12 representatives instead of just one. Electors would struggle to answer questions such as, "who is my representative in the Senate?" "Who do I write to, or go and see about my issues?" and "How do I know which representatives to reward or punish at the next election?" Because of the difficulty answering such questions, STV/PR **weakens direct representation and accountability**. All multi-member systems, especially those that use a 'party vote' instead of a 'candidate vote', suffer this problem. It makes delegate and trustee forms of representation almost unworkable in such a system.

> *As many as 85 per cent of electors vote above the line (for a party) rather than below the line (for candidates).*

Single transferable vote proportional representation in Australia

When STV/PR was first introduced electors had to number every box on the ballot paper — they were required to make a 'candidate vote'. Due to the size of the electorates and increasing numbers of parties and independents seeking election, the number of candidates rose. According to the law, no errors in numbering the sequence of preferences were allowed. In NSW, Senate ballot papers sometimes had 100 or more candidates listed on a huge and cumbersome ballot paper. Other states' ballot papers were similar. The result was many informal votes. The complexity of STV/PR proved to be a barrier for many citizens trying to exercise their political rights to vote and participate.

STV/PR was adopted in 1949 and has had two significant reforms since to address its weaknesses. The reforms were:

1. 1984: Introducing an option to vote for a 'political party vote' or **group ticket voting** (GTV) was added to the ballot paper; and
2. 2016: Reducing political party control over preferences.

Group ticket voting and 'preference whispering'

Group tickets allowed parties to:

- pre-register a list of candidates (a **party list**) with the Australian Electoral Commission (AEC) before an election; and then
- determine how the preferences of electors who vote for their political party would be allocated.

Parties' group tickets were publicly available so electors could research the distribution of each party's preferences. On the ballot paper, electors had the option of choosing the party they preferred (rather than individual candidates) OR numbering all the individual candidates. If a voter chose a party instead of preferencing all the candidates, the party controlled how their preferences were counted.

Hence, ballot papers from 1984 onwards contained two voting options. A heavy black line separated the ballot paper horizontally.[13] **Above the line voting** allowed electors to vote for a party by placing a '1' in the box next to their preferred party. In return for ease of voting, electors surrendered control of their preferences to the party they chose.

Below the line voting allowed electors to vote by numbering all the candidates listed, as in the past. Below the line voting was much more complicated, but it meant the elector controlled their preferences. The 1984 reforms relaxed the strict counting rules by allowing up to three breaks in the numbering sequence of candidates and only 90 per cent of the boxes to be filled before a vote was declared informal.

Perceptive students will note that group ticket voting is more straightforward, but has its problems. As many as 85 per cent of electors vote above the line (for a party) rather than below the line (for candidates). Above the line voting further weakened the already weak link between electors and representatives by obscuring the

13 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.

names and personalities of the candidates. Above the line voting made delegate and trustee models of representation virtually impossible in the Senate. Secondly, surrendering control over preferences to political parties permitted inter-party preference trading in complicated deals brokered by specialists who were expert in trading preferences, but had little regard for electors' intentions. The result was electors often ended up contributing to the election of Senators they would have never chosen themselves. At best, inter-party preference trading undermined the Australian upper house democracy. At worst, it corrupted it.

> *Group ticket voting made voting easier for electors but they had to surrender control over their preference distribution. GTV undermined the intentions of electors.*

The 2013 election of Ricky Muir from the Australian Motoring Enthusiast Party is a recent example of preference trading undermining democracy. Muir received 0.51 per cent of the primary vote, yet won a seat via preference flows from 23 other minor and micro parties' group tickets. The 24 parties concerned had hired the services of Glenn Drury, the so called 'preference whisperer', to construct complex preference trades between them. Drury's method guaranteed at least one of the 24 minor parties' candidates would win the 6th quota through harvesting the preferences of other minor and micro parties. Muir's victory was a Senate election record for the lowest primary vote ever for a successfully elected senator. Put another way, Muir won a seat with 100 times less primary vote support than a member of the House of Representatives needs to win their seats under the preferential voting system. His election was the result of preference harvesting, which is an exploitation of the voting system by putting too much power in the hands of political parties and backroom deal makers with too little power in the hands of electors.

■ Figure 9.17 — Ricky Muir from the Australian Motoring Enthusiast Party was elected to the Senate in 2013 as a result of preference deals.
Source: Matt Golding, 'Ricky Muir is awarded an OA... Ordinary Australian', 2014, <http://professional.fairfaxsyndication.com/archive/Matt-Golding-colour-cartoon---illustration---illo---toon---artwork-Captioned--Ricky-Muir-is-awarded-an-OA...Ordinary-Australian--2ITHRGT5C802.html>

Reducing party control over preferences

In 2016 the preference harvesting corruption of the STV/PR preference system was addressed. Through the *Commonwealth Electoral Amendment Act 2016* group ticket voting was abolished, the way electors cast their vote was changed and party identification was improved. Electors can still vote for political parties (above the line) or candidates (below the line), but political parties can no longer determine how electors' preferences flow.

> *Political parties can no longer determine how electors' preferences flow.*

The 2016 electoral reform puts electors in command of their preferences, whether they vote above or below the line. Instead of just placing '1' next to their party of choice when voting above the line, electors must now number parties from '1' to '6' in order of their preference. Below the line voting was simplified by adopting **optional preferential voting**. Electors no longer have to preference all the candidates. Instead, they must now preference a minimum of 12 candidates by numbering them from '1' to '12'. In both above and below the line voting electors can number more preferences than they are required to, if they wish to ensure their vote is not exhausted in the count.

Above the line preferencing by electors replaced group ticket preferencing by parties. Electors now control their preferences. Moreover, simplified below the line voting encourages more electors to vote for real people instead of parties because filling in 12 boxes is not as daunting as numbering several dozen.

The 2016 electoral reforms also led to the introduction of political party logos on

ballot papers for the Senate and House of Representatives. This was done to reduce elector confusion between political parties with similar names — such as the Liberal Party of Australia and the Liberal Democrats.

Single transferable vote proportional representation — An example

There are eight Senate electorates in Australia — the six states and two territories. There are 12 representatives for each state and two for each territory. At a general election, six of each state's 12 senators are elected and all of the territory senators (note, a normal general election is a whole House of Representatives and half Senate election).

Calculating the quotas

Senate quotas are calculated mathematically using the following formula:

- the number of formal ballot papers divided by the number of seats to be elected plus one, plus one vote equals one quota; or
- *(number of formal ballot papers/number of seats to be elected +1) +1 = one quota*

In a hypothetical STV/PR election for a state with 2,000,000 electors the formula for a quota is:

- *(2,000,000/6 +1) +1 = 285,715 votes comprising one quota*

A quota for an ordinary half-Senate election is 14.3 per cent of the entire electorate, while for a double dissolution election the quota is 7.7 per cent — very much less than an absolute majority vote needed to win a PV election. The low threshold is what makes Senate seats winnable for minor parties and independents.

Counting votes

Candidates who win a quota are immediately elected.

Surplus votes

An elected candidate's votes exceeding the quota are called surplus votes and are calculated as follows:

- Total number of votes received by the candidate minus the quota required equals the number of surplus votes; or
- *Total number of votes — quota = surplus votes*

In our hypothetical STV/PR election the candidate received 385,242 total votes. As surplus votes are votes received in excess of the quota, this means the candidate has 99,527 surplus votes.

Votes are secret and an elected candidate's votes 'in the quota' compared to those which are 'surplus' cannot be known. Therefore, all of their votes are transferred, but at a reduced value called the **transfer value**.

Transfer value

The transfer value is calculated as follows:

- Surplus votes divided by total votes for the candidate equals the transfer value; or
- *Surplus votes/total votes = transfer value*

In our hypothetical STV/PR election the candidate received more votes than the required quota:

- *99,527/385,242 = 0.25835 transfer value*

In this scenario all the votes received by this candidate — who has already achieved quota and will be elected — are redistributed at a value of approximately one quarter of a vote.

The transfer value is a way of keeping all votes flowing according to electors' preferences and in the ongoing count without the problem of any votes counting more than the value of one vote.

Once all candidates who have achieved a quota are elected the process of elimination of candidates, distribution of preferences and transferring discounted surplus votes continues until all quotas and seats are filled.

Finalising the count

If no further quotas are reached the candidate with the least votes is eliminated (after the transfer of surplus votes) and their votes are distributed to remaining candidates according to electors' preferences. This process of elimination, distribution of preferences and transferring discounted surplus votes continues until all quotas and Senate seats are filled.

Note: This method is very complicated and this is the reason why the average elector has no idea how their votes are counted and how candidates get elected!

Single transferable vote proportional representation, representation and the Commonwealth Parliament

STV/PR transformed the Senate by breaking the 'two party system' and the ability of major parties to capture the upper house. Prior to the 1984 reforms, the upper house was either a government controlled rubber stamp or an opposition controlled obstructionist house. Now it is a multi-party chamber with a reduced likelihood that either major party can control a majority of seats.

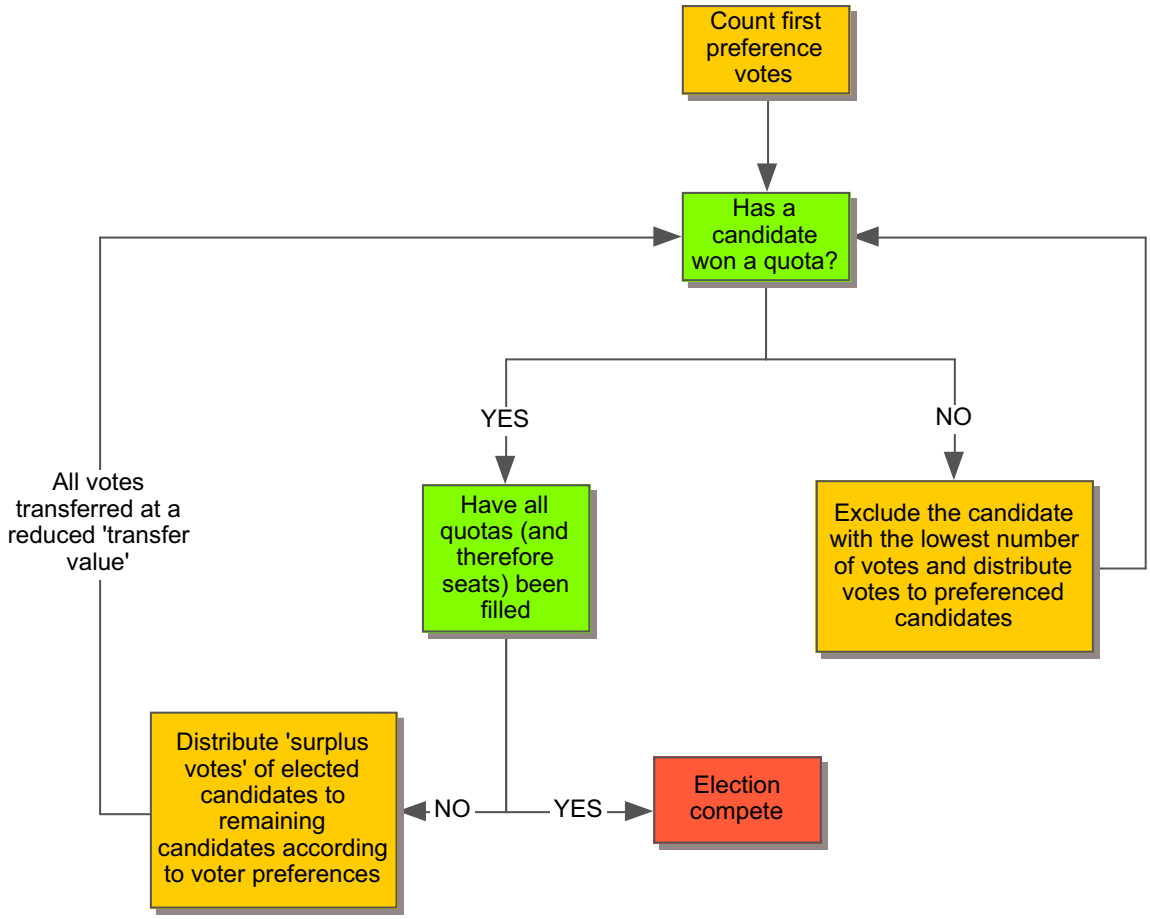


Figure 9.18 — Single transferable vote proportional representation in action. Count first preference votes. If no candidate achieves a quota, exclude the candidate with the least votes and distribute their votes according to electors' second preferences. Repeat until a quota is reached. Candidates who win a quota are elected to the Senate.
Source: Stephen King, 2018

The Senate 'balance of power'

Since the 1980s, except for the period of 2005 to 2007, the Senate has been a hung house in which a **crossbench** composed of minor party and independent senators have held the **balance of power**. Crossbenchers are in a strong position to influence law making and hold government accountable because of the combination of Senate power[14] and the STV/PR electoral system.

The crossbench balance of power enhances the Senate's ability to check and balance the House the Representatives and the government formed in that place. There are several ways that governments can be accountable to a powerful 'balance of power' Senate in that:

- governments must persuade either the opposition or enough members of the crossbench to agree with its bills or motions before a government vote in the chamber can succeed;
- the opposition may persuade enough crossbench senators to vote against the government to defeat bills or motions;
- with crossbench support, oppositions may also force through motions to establish Senate inquiries into matters the government opposes; and
- Senate committees form a robust and independent system of checks and balances within the political system. They can scrutinise legislation thoroughly and conduct inquiries against the wishes of the government.

The above are all aspects of Senate power and enhance the Senate's 'house of review' role. The Senate can scrutinise government legislation or inquire into estimates of government spending. Ultimately, it can use its power to check executive dominance of the parliament.

The Treasury Laws Amendment (Enterprise Tax Plan) Bill 2016 clearly illustrates the power of the Senate crossbench. The Turnbull Government's planned reform to corporate taxes was defeated in the Senate when government senators could not persuade Senator Tim Storer, an independent from South Australia and a member of the crossbench, to agree to the proposed tax cuts.

14 Recall that Australia's political system is characterised by 'strong bicameralism'. The Senate has co-equal powers (Section 53) to the House of Representatives except in relation to money bills. The power of the Senate to resist the House of Representatives, which is government controlled and, therefore, dominated by the executive, is a distinguishing feature of Australia's Washminster hybrid system of government.

Another example demonstrates the power of the Senate to uphold rights — the liberal part of liberal democracy. The *National Security Legislation Amendment (Espionage and Foreign Interference) Act 2017* was amended by the Senate to prevent the proposed law limiting press and media freedoms. The government agreed to soften its proposed law by changing the original wording of the bill requiring journalists to be 'fair and accurate'. The words 'reasonably believe that a story is in the public interest' replaced the original words, reducing the risk for journalists publishing stories about national security. The Senate amendment reduced the threat of journalists being criminally prosecuted and, thus, protects the freedom of the press/media.

Australia's two system electoral compromise

Figure 9.19 illustrates how two complementary electoral systems combine to elect the Commonwealth Parliament. Each system creates a pattern of representation and power that is suited to the functions of the house it elects.

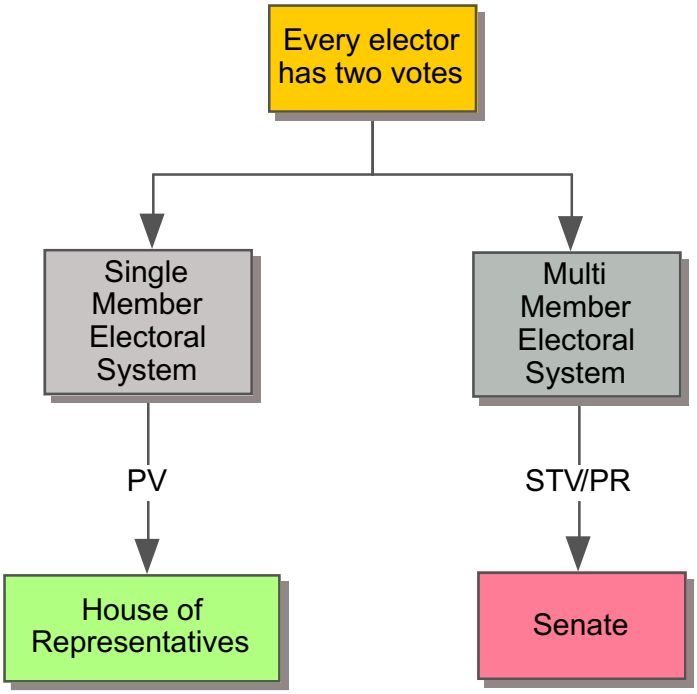


Figure 9.19 — Australia's combined PV + STV/PR electoral system uses two complementary systems to elect each house.
Source: Stephen King, 2018

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 • 'Diverse 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 (FPP 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 9.4 — Comparison of the majoritarian and proportional voting systems.

Compulsory voting

Compulsory voting is a significant feature of Australia's electoral system. Compulsory enrolment of eligible electors has been law since 1911. Successive amendments to the *Electoral Act 1902* added further compulsory elements to encourage political participation. In 1915 Queensland introduced the first compulsory voting laws requiring electors to attend a polling place, get their name marked off the **electoral roll** and receive ballot papers.

In a rare example of a private member's bill becoming law, the *Commonwealth Electoral Act 1924* amended the *Electoral Act 1902* by introducing compulsory voting for federal elections.[15] The effect was a spectacular increase in **voter turnout** from 60 per cent in the 1922 election to 91 per cent at the 1925 election. Turnout has been very high ever since, and is much higher and more consistent than turnout in comparable democracies such as the United Kingdom, US, Canada and New Zealand. In the years that followed, all the states introduced compulsory voting. Western Australia adopted it in 1936.

Figure 9.20 — Senator Payne from Tasmania introduced the private member's bill which resulted in compulsory voting becoming a feature of the Australian federal electoral system. Voting is every citizen's political right. Compulsory voting makes it every citizen's duty.
Source: Psephos, Adam Carr's election archive, Herbert Payne, Senator for Tasmania, c1930s, Public Domain, <https://en.wikipedia.org/wiki/Herbert_Payne#/media/File:Herbert_Payne.jpg>

Advantages of compulsory voting

The main advantages of compulsory voting are:

- increased voter turnout, resulting in increased political participation;
- increased education and understanding. Citizens know more about their democracy;
- enhancement of the liberal democratic operating principle of majority rule;
- increased democratic legitimacy and authority of parliaments and governments, that is, stronger **mandates**;
- reduced electoral impact of extreme political ideologies; and
- a greater focus on issues and policy.

The fundamental operating principles of a liberal democracy — studied in Unit 1 — are all enhanced by compulsory voting. Majority rule is better established if more people vote and there is an increase in political participation, that is, if more people exercise political freedoms and rights.

Parliaments and governments can claim to be enacting the true **democratic will** of the majority if all eligible electors have cast a ballot. This also means that governments have a stronger claim to legitimacy and authority when they try to persuade crossbench senators to pass their proposed laws. A government's claim to a 'will of the majority **mandate**' is stronger after an election in which people voted on specific policy promises. For example, when Tony Abbott won the 2013 election with a 14 seat majority after campaigning vigorously to 'axe the tax' it was difficult for opponents to argue he did not have the authority to pass the Carbon Tax repeal bills. The Senate eventually passed them.

A significant benefit is the 'drowning out effect' compulsory voting can have on extreme political views. In any society there are always highly motivated and well organised minority groups whose views are outside mainstream public values and opinions. These groups are more likely to vote because of their passionately held beliefs. Moderate mainstream electors are less motivated to turn out on election day. Extreme views can be overrepresented in systems with voluntary voting. Arguably, the election of Donald Trump in the US and the British 'yes' vote in the Brexit referendum are examples of this distorting effect. If all moderately minded US and British electors had cast ballots in these polls the results might well have been different. Additionally, Australia has a less polarised political climate because Australian political parties must not only win their core voter base, they must also win unconvinced swinging electors. American political parties tend to 'play to their base', with more extreme policies than their Australian counterparts as a result. Australian political parties that stray too far into the extremes of the pollical spectrum tend to get punished at elections.

Another positive effect of compulsory voting is the **enhanced quality of political debate**. Political parties do not have to spend resources

15 The bill was only the third successful private member's bill to pass into law 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>.

trying to motivate supporters to turn out on election day. There is less focus on light weight, commercial style advertising. Parties can rely on high turnout rates and devote more effort to winning policy arguments against their political opponents. The pre-election contest of ideas is more rigorous because political advertising does not have to focus on encouraging electors to vote.

Disadvantages of compulsory voting

Disadvantages of compulsory voting include:

- politically uninterested or disengaged electors, who often cast donkey votes, may affect election outcomes;
- increased informal votes;
- because voting is a right, to compel people to vote is seen as wrong by libertarians;
- the creation of predictably 'safe seats', which parties may ignore knowing they will win them; and
- a great focus on 'marginal seats', where elections are won and lost.

> *Donkey votes are formal votes and are counted. They may affect the outcome in a close contest.*

The biggest criticism of compulsory voting is its compulsion. Citizens of democracies generally do not like being told what to do by governments, especially when it affects their rights.

Forcing uninformed or uninterested electors to cast a ballot can result in high rates of informal votes. Worse, it can result in **donkey votes**. A donkey vote is a randomly filled in ballot paper, usually numbered in order from '1' at the top down the ballot to the last candidate. Donkey votes are impossible to separate from formal votes because the voter may have considered their vote carefully and filled in their ballot the same way. Donkey votes are formal votes and are counted. They may affect the outcome in a close contest. Donkey votes are especially problematic because they are much more likely to be influential in the few marginal seats that can change government.

Certain demographic groups who tend to vote in predictable ways may dominate some electorates. For example, lower middle class and working class electors clustered in lower socioeconomic suburbs near industrial or commercial areas tend to vote for the ALP. Farmers are clustered in rural areas and are more likely to vote for the Nationals. Expensive coastal and river suburbs are populated by professionals and business people, who tend to support the Liberal Party. Compulsory voting can make these areas 'safe seats'. **Safe seats** are predictable and are very unlikely to be tightly fought electoral contests. Parties may take them for granted or not bother running a candidate in a seat they know they cannot win. These decisions reduce political choice for electors living in safe seats. Two 2018 by-elections in the Western Australian electorates of Perth and Fremantle provide contemporary examples. The Liberal Party did not run candidates in either of these safe Labor seats. In the 2016 election, there were 35,000 electors in the Perth electorate and 31,000 in Fremantle who voted for the Liberal Party. These 66,000 electors had no candidate espousing their world view to vote for in the 2018 by-elections.

Voluntary voting would reduce the tendency to create safe seats because particular issues may reduce the predictability of who will turn out to vote.

The integrity of Australian elections

Elections are very easy to get wrong. Sometimes they are just poorly designed. Sometimes they are deliberately rigged in non-democratic countries.

The Australian Electoral Commission

The best guarantee of electoral integrity is to remove the power to organise and run elections from those who benefit from elections. Political parties and members of parliament are the beneficiaries of elections so they should have nothing to do with running them.

The AEC is an independent statutory authority established by law. The AEC's role is "to deliver the franchise: that is, an Australian citizen's right to vote, as established by the *Commonwealth Electoral Act 1918*".[16] This Act gives the AEC powers to run all aspects of Australia's electoral system. Employees of the AEC cannot be members of political parties. The AEC manages federal elections and referendums. Such is the integrity and reputation of the AEC that it is asked to assist with other countries' elections.

16 Australian Electoral Commission, 'Overview of the AEC', <https://www.aec.gov.au/About_AEC/>.

Each state has its own electoral commission. The Western Australian Electoral Commission (WAEC) runs local government and state elections, state referendums and is sometimes called upon to manage elections for significant non-government organisations like unions and other pressure groups.

The AEC ensures fair elections by being entirely apolitical, independent and disinterested in election outcomes. It maintains electoral rolls and recruits, and trains thousands of temporary staff to work in polling places on election days. It redistributes electorate divisions to maintain the equality of the political right to vote (one vote, one value) according to law. It counts the votes and declares the winners.

The AEC eliminated gerrymandering and other forms of electoral distortions and corruptions.

Malapportionment

Equality of political rights is an operating principle of a liberal democracy. All citizens should have the right to vote, but this is not enough in itself. The values of citizens' votes must be equal too.

> *The AEC ensures fair elections by being entirely apolitical, independent and disinterested in election outcomes.*

The principle of **one vote, one value** is fundamental for the equality of the political right to vote. It means that the quantum (or amount) of voting power is the same. For example, in an electorate of 100,000 electors represented by one MP, electors have twice the voting power of those in an electorate of 200,000 represented by a single MP. There is a severe **malapportionment** of voting power in this simple example. For this system to be fair, the larger electorate should be divided into two, and the new electorate should have one MP — then three electorates would each have 100,000 electors and one MP each.

Australia has very little malapportionment in **House of Representatives** electorates. The *Commonwealth Electoral Act 1918* requires that electorates be within 10 per cent of the average elector population[17] within a state or territory. A redistribution will be triggered if more than one third of divisions in the state (or one in a territory) deviates from the average enrolment in the state or territory by more than plus or minus 10 per cent. Electorate populations change due to births, deaths, inward migration and outward migration.

Figure 9.21 — The entrance to a polling station run by the Australian Electoral Commission for the 2016 Australian federal election.
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>

The average House of Representatives' electorate size is calculated in the following way:

- Total number of enrolled electors in a state or territory divided by the number of electorates in the state or territory equals the average electorate size for the particular state or territory.

There are a number of triggers that will cause the AEC to redistribute electorates. If:

- the last redistribution was more than seven years past;
- a state or territory becomes entitled to more or less representatives; or
- a state or territory's electorates' eligible population sizes changes beyond a certain threshold; then

the AEC will redistribute electoral divisions within a state or territory.

Sometimes, state populations change enough that a state may gain or lose electorates. Western Australia gained a 16th electorate, named Burt, from the 2016 election onwards. NSW lost an electorate from 2016 and now has 47. One new electorate was added because of national population growth so that the House of Representatives will increase from 150 to 151 seats from the 2019 election.

17 Note that a state's 'population' refers to everyone in the state, 'eligible elector population' refers to everyone entitled to vote whether enrolled or not, and 'electors' refers to everyone on the electoral roll.

As previously described, Tasmanian electors in the state's five lower house electorates are overrepresented because Section 24 of the Constitution guarantees 'Original states' a minimum of five seats. Each Tasmanian electorate has significantly less than the 107,000 average enrolled electors of other electorates. It is difficult to manage territory electorates because of their small populations. Currently, the Australian Capital Territory has three seats and the Northern Territory, two.

The **Senate** is a very different matter. Perceptive students may recognise that the constitutional requirement for equal state representation conflicts with equality of political rights and the principle of one vote, one value. States vary significantly in population, yet they all have 12 senators, regardless. Malapportionment is a severe criticism of Senate representation, so much so that Prime Minister Paul Keating, frustrated by the Senate's refusal to pass government bills, famously derided the upper house as 'unrepresentative swill'.

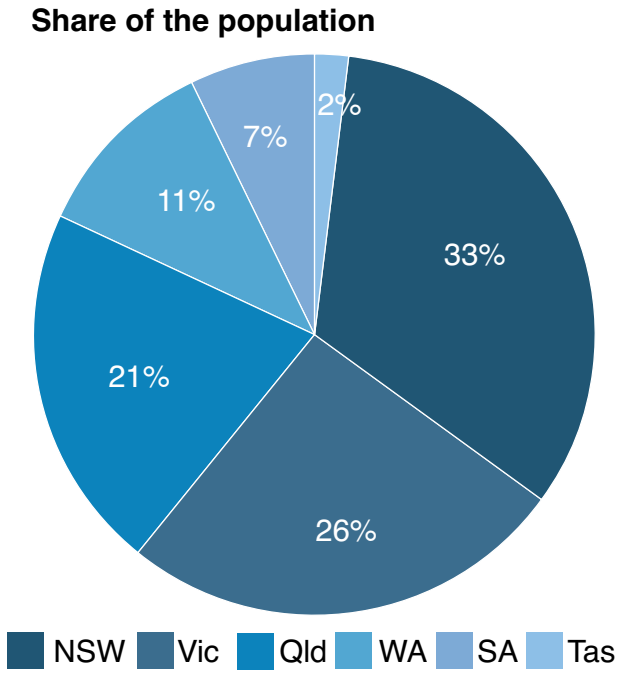


Figure 9.22 — Malapportionment is constitutionally embedded in the election of the Senate where each state has 12 Senators despite varying population sizes.
Source: Nicol Davis, 2018

Some states' upper houses, including the **Western Australian Legislative Council**, have malapportionment similar to that in the Senate. The Legislative Council's three regional electorates are represented by six members of the Legislative Council (MLCs), and the three city based electorates also have six MLCs. Despite Perth's metropolitan area containing approximately 65 per cent of the state's population it has the same number of MLCs as the regions, which have only 35 per cent of the population.

Before the 2005 electoral reforms, WA's **Legislative Assembly** electorates had a rural bias. Allocating too many electorates to rural regions relative to Perth maintained the bias. In effect, rural electorates had about half the number of enrolled electors compared to city electorates, giving country electors twice the voting power and representation than city dwellers. A 2005 reform removed the rural bias in Western Australian lower house elections.

On balance, Australia does well to maximise the principle of 'one vote, one value' within the constraints imposed by constitutional law and the realities of population distribution.

Gerrymanders

A **gerrymander** is a deliberate drawing of electoral boundaries to disadvantage a political party. By concentrating the vote of an opposition party into fewer seats, a governing party can reduce its rival's chances of winning a majority in the representative legislative chamber.

Imagine a country called 'Fitnessia' in which 60 per cent of electors are runners and 40 per cent are cyclists. Fitnessia has a five seat parliament. How should they elect representatives so that majority rule applies?

In Figure 9.24 Fitnessia's democratically minded leaders have created electoral divisions in a fair way. An election using FPP or PV would result in three electorates representing runners and two representing cyclists. There would be a Runners' Party government because they would have a three to two majority in the parliament.

However, sometime governments use their power to exert influence on the electoral process by manipulating electoral boundaries. In our scenario, in the great cyclist revolution of 2035, cyclists seize power. They use their power to redraw electorate boundaries as shown in Figure 9.25. The distribution makes sure there will be a three to two Cyclist Party majority in parliament and a Cyclist Party government. Cyclists now have a firm grip on power and will use the parliament to make electoral laws to disadvantage the Runners' Party in future elections.

Gerrymandering deliberately denies equality of political rights and undermines majority rule with the aim of maintaining the over-representation and power of a minority. Gerrymandering is

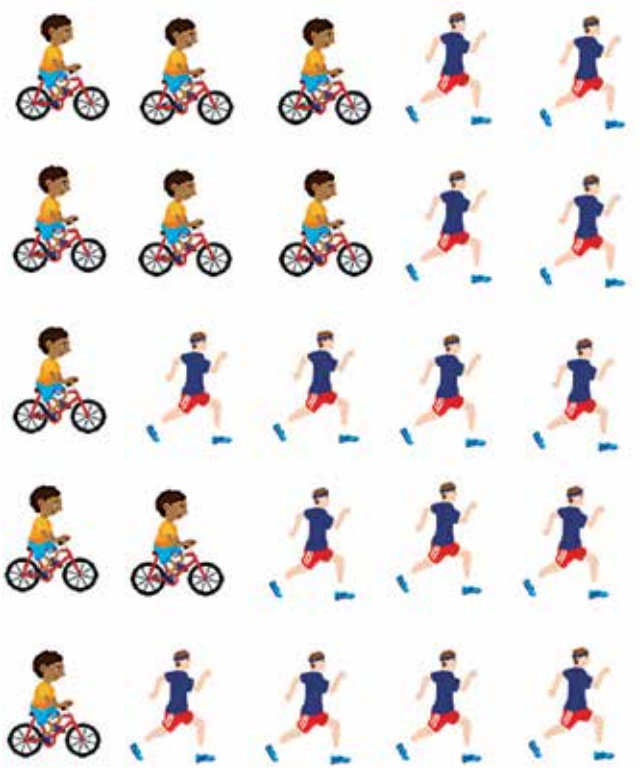


Figure 9.23 — Fitnessia is a country with 60 per cent runners and 40 per cent cyclists
Source: Stephen King, 2018

named after the Massachusetts' State Governor, Elbridge Gerry, who in 1812, redrew his state's Senate electoral boundaries to disadvantage his party's rivals in US Senate elections. The *Boston Gazette* newspaper coined the term Gerrymander because Massachusetts' Senate electorate's boundaries resembled the shape of a salamander (an amphibious creature). Students should recognise the distorted electoral boundaries in Figure 9.25 compared to the even and compact[18] boundaries in Figure 9.24. Odd shaped and distorted electorate boundaries are an indication of gerrymandering.

Gerrymandering is much more likely to occur when those with an interest in winning elections have the power to draw electoral boundaries. Section 60 of the *Commonwealth Electoral Act 1918* gives the AEC the power to appoint a Redistribution Committee, with the Australian Electoral Commissioner being a member of that committee. The AEC is independent of political parties and has no interest in who wins elections.

Gerrymandering is common in US Congressional electorates and results in unfair electoral representation. Many electorates have extraordinary distortions with varying degrees of compactness. Some electorates in the state

18 'Compactness' is a good measure of gerrymandering. The ratio of the area of an electorate to the area of a circle with the same perimeter as the electorate indicates its compactness. 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.

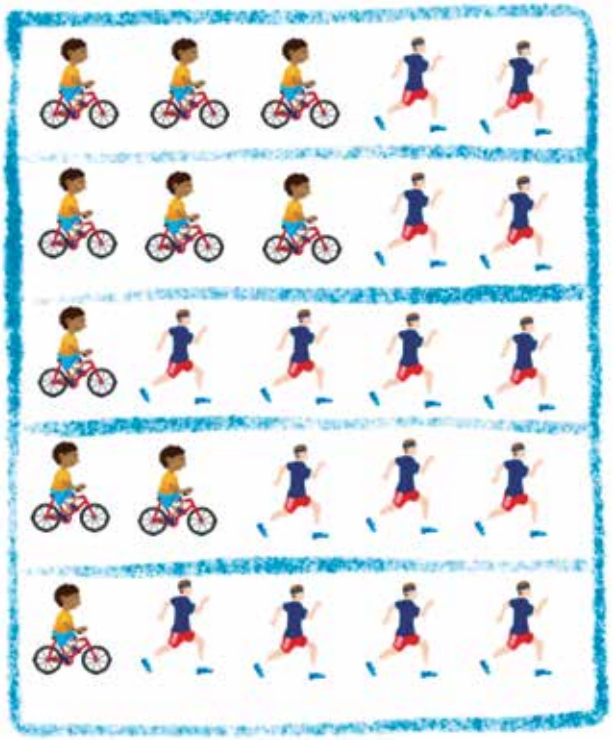


Figure 9.24 — Fitnessia's five electorates in a fair distribution.
Source: Stephen King, 2018

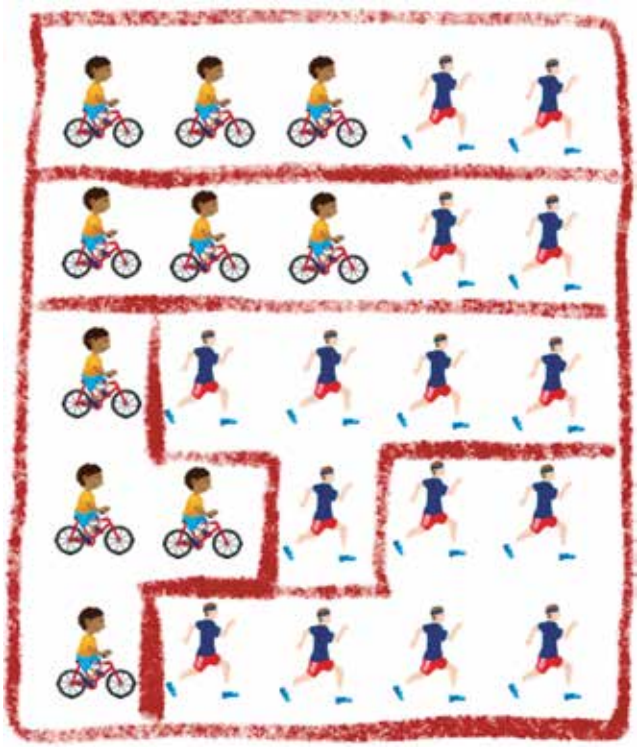


Figure 9.25 — Fitnessia with three gerrymandered electorate districts, guaranteeing the Cyclist Party wins elections and forms government.
Source: Stephen King, 2018

of North Carolina, for example, are the most gerrymandered in the US. Gerrymandering occurs because party controlled US state legislatures draw the boundaries of their state's federal electorates. They use their law making powers to disadvantage the other major party in federal elections.

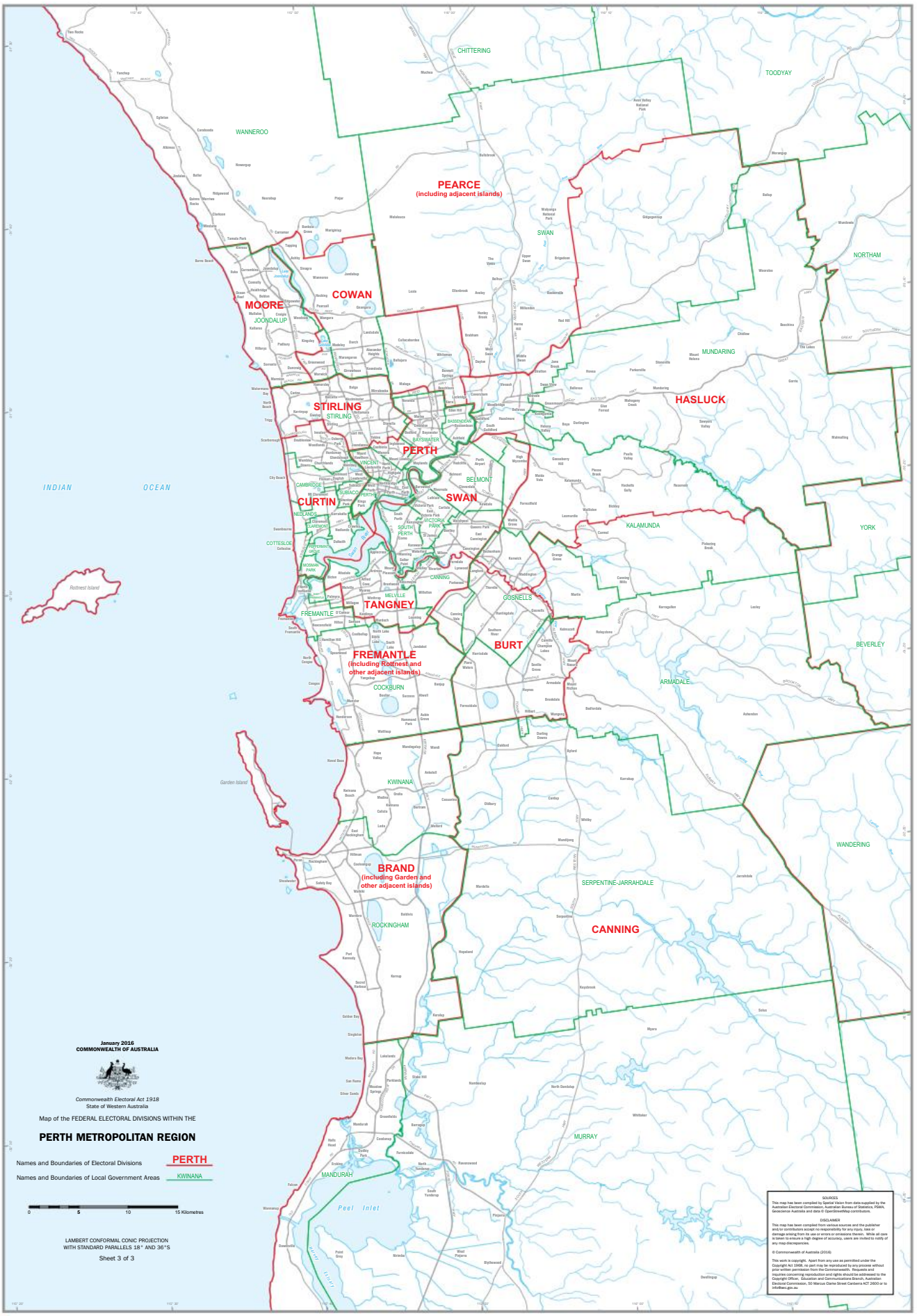


Figure 9.26 — House of Representatives electorates in the Perth area. Note how the electorates are quite compact in shape. The boundaries follow roads or natural features like the coast and the Swan River. They vary in size because population density varies across the area of the map.

Source: Australian Electoral Commission, Map of the federal divisions within the Perth metropolitan region, 2016, <https://www.aec.gov.au/Electorates/Redistributions/2014/wa/final-report/files/greater-perth.pdf>

Summary

- Sections 7 and 24 of the Constitution establish representative democracy in Australia by requiring both houses of the Commonwealth Parliament to be 'directly chosen by the people'.
- A representative democracy needs electoral systems to translate votes into seats in parliament. Members of parliament are the representatives of the citizens who elect them. Members of parliament are often partisans, as opposed to delegates or trustees. The composition of the parliament may mirror society.
- Elections are the major means of political participation for the majority of Australian citizens. The Constitution limits a Commonwealth Parliament to a maximum term of three years, with no minimum. Western Australia has a fixed four-year term. Elections are regular and frequent, which ensures popular participation and the accountability of elected officials.
- Electoral systems ideally:
  - fairly enable the political right to vote;
  - protect electors from intimidation;
  - value each vote equally;
  - are open and transparent; and
  - treat electors, candidates and political parties fairly.
- Electoral systems should also produce patterns of representation that reflect the operating principles of a liberal democracy by:
  - creating majority rule in parliament and government;
  - respecting political and legal minority rights;
  - providing for equality of political participation, rights and freedoms; and
  - providing limited and accountable government.
- Electoral systems fall into two broad categories, neither of which can provide all the characteristics of an 'ideal' electoral system:
  - majoritarian systems are based on single-member electorates. First past the post and preferential voting systems are examples of those that have been used in Australia.
  - proportional systems are based on multi-member electorates. Single transferable vote proportional representation (STV/PR), with modifications to simplify voting and reduce party control, has been used in Australia since 1949.
- First past the post (FPP) is simple, quick and easy, but flawed. It is able to create 'popular majorities' at the expense of fairness to political parties and independents. It creates a two party system, and suffers from vote splitting and high vote wastage. It was used for federal elections from 1902 to 1918 for both houses.
- Preferential voting (PV) is marginally more complicated than FPP, but also less flawed. It is able to create 'preferred majorities' at the expense of fairness to all political parties and independents. It creates opportunities for minor parties to trade preferences and influence major party policies. It creates a two party system, eliminates vote splitting and reduces vote wastage. It was used for federal elections from 1918 to 1949 for both houses, and continues in use for the House of Representatives. It is used to elect all state lower houses except Tasmania's, which is elected using a proportional voting system.

continued overleaf

- STV/PR is complicated, but fair to parties. As it represents parties in proportion to their vote, it is fair to political parties, but often at the expense of forming a majority. It promotes negotiation and consensus building between parties. It eliminates vote wastage and vote splitting. It has been used for Senate elections since 1949. It is also used, in various versions, to elect state upper houses.
- The 'Australian electoral compromise' is the term used to describe the use of two different, but complementary, electoral systems in order to achieve an 'ideal' electoral system. Essentially, it the use of majoritarian and proportional systems to elect the two houses of the bicameral parliament.
- PV is used to elect the House of Representatives because it is the people's house and the house of government:
  - as a single-member system it creates a direct link between the single representative and their electorate's constituents, thus promoting popular representation; and
  - it creates 'exaggerated preferred majorities' that have resulted in stable majority governments for much of Australia's history.
- Single Transferable Vote Proportional voting is used to elect the Senate because it is a house of review.
  - As a multi-member system, it tends to create a hung chamber with diverse representation. It dramatically reduces the chances of a rubber stamp or obstructionist Senate being elected by preventing major party majorities. A 'balance of power Senate' promotes dialogue and consensus between parties, reduces the power of the executive and creates a deliberative approach to law making where many viewpoints must be considered.
  - These qualities, plus the Senate's co-equal power, enhance the Senate as a check and balance against the House of Representatives and the executive government formed within it.
- Compulsory voting is a characteristic feature of Australian elections.
  - Its advantages include:
  - making voting a duty;
  - ensuring high turnouts by increasing political participation;
  - minimising the influence of extreme views;
  - ensuring parliaments and governments have mandates; and
  - allowing political communication to focus on issues rather than motivating electors to vote.
- Its disadvantages include:
  - forcing disengaged citizens to vote and influence elections through donkey votes or increased informal votes;
  - infringing a 'right not to vote'; and
  - creating predictable electorate contests, which reduces political choice and representation in safe seats.
- The AEC is an independent statutory authority with no vested interest in who wins an election. It runs all aspects of federal elections and draws electoral district boundaries to eliminate gerrymandering and malapportionment, guaranteeing equality of the political right to vote. It counts votes and declares election results. Equivalent state based electoral commissions run all aspects of their respective state elections.
- The Constitution creates malapportionment in the Senate because it requires states to be equally represented, despite large differences in their populations. The Constitution also produces malapportionment in the House of Representatives in Tasmania's favour. The AEC cannot overcome this limitation.

Activities

Short answer

1a) Define the term 'election' as it applies to the Commonwealth Parliament.

1b) Differentiate between the electoral requirements outlined in Section 24 of the Constitution with those outlined in Section 7.

1c) Using examples, discuss **one** advantage and **one** disadvantage of preferential voting.

2a) Explain what is meant by the term 'mirror representation'.

2b) Distinguish between 'delegate' and 'partisan' representation.

2c) Discuss the extent to which the proportional representation voting method used in the Senate promotes a fair electoral outcome.

3a) Explain the term 'gerrymandering' as it applies to electoral systems.

3b) Briefly explain 'plurality voting' and outline its **two** key features.

3c) Discuss **one** strength and **one** weakness of the 'first past the post' voting system.

Source analysis

Read the section titled 'Malapportionment' (under 'The integrity of Australian elections') and respond to the questions below.

4a) Define the term 'malapportionment'.

4b) Using the source, explain **one** example of how malapportionment occurs in elections to the House of Representatives and **one** advantage or disadvantage of this situation.

4c) Discuss **two** advantages and **one** disadvantage of the Australian Electoral Commission maintaining the integrity of Australia's electoral system.

4d) Identify and explain **one** weakness of Australia's electoral system and evaluate **one** proposal to reform this weakness.

Essay response

5) Evaluate the effects of preferential voting on the Commonwealth Parliament by referencing at least one recent federal election.

6) 'Australia's electoral compromise provides the perfect balance, ensuring both individuals and regions are represented equally'. To what extent does Australia's electoral compromise ensure adequate representation?

continued overleaf

Investigation and discussion

7) Prepare a debate on the topic: 'Australia should remove compulsory voting from federal elections'.

8) Investigate the Senate voting reforms passed through the Commonwealth Parliament in 2016.

   8a) Explain the changes in electoral process and procedure made by the *Commonwealth Electoral Amendment Act 2016*;

   8b) Record the advantages and disadvantages of these reforms; and

   8c) Consider expert opinions, such as psephologist Antony Green, on how this has affected representation in the Senate after the 2016 double dissolution election.

9) Examine the current composition of the Australian Senate and research the number of first preference and, if relevant, transfer votes each Senator received. What observations can you make about the impact of proportional representation voting on Senate elections?

UNIT 2

Electoral representation in another country

Syllabus points:

- **The electoral and voting systems of another country**
- **Essential to the understanding of representation are the principles of fair elections and participation.**

New Zealand and the United States of America

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[1] it was involved in the colonial conventions which led to the Australian federation. New Zealand suggested it may even join the federation, but never did.[2]

Australia and New Zealand are sibling nations; they have fought together as the ANZACs, indicating just how closely related they are.

The United States of America

The United States of America (US) is a liberal democracy like Australia and New Zealand. It was also a British colony, but unlike Australia and New Zealand it had to fight a war—the American Revolutionary War of 1775–1783—to become an independent country.

Australia and New Zealand have had close political, economic and social ties with the US since World War Two when all three countries fought together in the Asia-Pacific region.

■ Figure 10.1 — New Zealand rejected joining the federation of Australian states (1900).
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>

Comparing political and legal systems — Australia and New Zealand

Similarities

New Zealand has cultural, political and legal affinities with Australia. Like Australia, it adopted the **Westminster system** of responsible government with an elected, representative parliament. It has a parliamentary executive formed within and responsible to the parliament. It has an independent judiciary based on English common law and the adversarial system of trial.

Both are **constitutional monarchies**, with the British Crown forming part of each nations' parliaments and executives. Each has a Governor-General representing the Crown and exercising the formal legislative and executive powers of the monarchy on the advice of elected ministers. The two countries share Westminster conventions that establish Cabinet governments accountable to parliament.

Calling an election is the same in each county. In both countries, the Prime Minister advises the Governor-General to dissolve the parliament and issue writs for an election. Both countries' parliaments have **three-year terms** and, in each case, the Prime Minister may call an earlier election.

1 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.

2 New Zealand could have become the seventh state of Australia.

Figure 10.2 — Ministers of New Zealand's sixth Labour Government, with Governor-General Dame Patsy Reddy, 26 October 2017.
Source: New Zealand Parliament — New Government, 2017, CC BY-SA 4.0, <https://commons.wikimedia.org/w/index.php?curid=63772417> and <https://en.wikipedia.org/wiki/Government_of_New_Zealand#/media/File:New-govt-2017.jpg>

New Zealand has the **Electoral Commission**, which performs a similar role to the Australian Electoral Commission. It is an independent authority responsible for running all facets of the election. This includes electoral enrolment, political party registration and the administration of all parliamentary elections and referenda. In New Zealand, a separate Representation Commission is responsible for drawing electoral boundaries in accordance with the *Electoral Act 1993* (NZ) and census data to provide reasonably equal populations within each electorate.

> *There is a critical difference between the two countries in relation to indigenous peoples' political and legal status. This has implications for each country's electoral system.*

Differences

Where Australia is a federation, New Zealand is a **unitary** state with no sovereign state governments. Consequently, its national sovereignty is vested in a single parliament.

Another fundamental difference between New Zealand and Australia is the nature of their parliaments. Australia has a bicameral legislature, New Zealand has a **unicameral** legislature. New Zealand's single house of parliament is called the House of Representatives. The fact that New Zealand has a unicameral legislature becomes very significant when considering the electoral systems of each country.

Figure 10.3 — Parliament House, Wellington, New Zealand.
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 10.4 — Treaty of Waitangi (Te Tiriti o Waitangi) (1840).
Source: The Waitangi Sheet of the Treaty of Waitangi, published 1877, Public Domain, <https://en.wikipedia.org/wiki/Treaty_of_Waitangi#/media/File:Treatyofwaitangi.jpg>

New Zealand has no written constitution and, like Britain, relies on unwritten Westminster conventions and a series of statutes.[3] Therefore, New Zealand has an **unwritten constitution**. Australia needs a written constitution to create its national government, preserve its states and divide legislative, financial and other powers into exclusive, concurrent and residual spheres. New Zealand's constitutional laws do not need to do any of these things.

While Australia and New Zealand also have indigenous First Nations peoples — Aboriginal and Torres Strait Islanders in Australia and Māori in New Zealand — there is a critical difference between the two countries in relation to indigenous peoples' political and legal status. This has implications for each country's electoral system.

Britain and the Māori people signed the *Treaty of Waitangi* which recognised the Māori's place in New Zealand law. The *Treaty of Waitangi* grants the Māori people special legal status as a First Peoples minority in their own country. No such treaty was ever signed by an Australian colony with its indigenous peoples, leaving Australia's First Nations with no political, legal or other rights for decades. As a result, the New Zealand electoral system provides for **Māori electorates** and, therefore, guaranteed representation in the parliament.

Choosing New Zealand's electoral system

Like all independent and self-governing liberal democracies, New Zealand has a choice of electoral systems. Students will be aware that there are many criteria for a good electoral system. Critically, no single system can achieve all the criteria of an 'ideal' system. Thus, there will always be an 'electoral problem' that cannot be solved by adopting any one type of electoral system.

Democracies must solve this electoral problem to achieve an 'ideal' electoral system. Good solutions always involve **electoral compromises**. Compromises seek to balance the strengths and weaknesses of two complementary systems.

The Australian solution to this electoral problem was to adopt two complementary electoral systems, one each to elect the two houses of its bicameral parliament. A two system solution like Australia's was not available to New Zealand because of its unicameral parliament.

Like Australia, New Zealand has a history of electoral reform, which makes it quite different from most Anglo-democracies such as the United Kingdom, the United States of America and Canada. Most English-speaking democracies have tended to be electorally conservative and retained their simple first past the post systems.

> *New Zealand held a referendum in which the people chose to replace their first past the post system with the mixed member proportional system (MMP).*

New Zealand's enthusiasm for electoral reform has led to a system that aims to achieve a variety of outcomes. It seeks to:

1. produce effective and stable government reflecting the will of the majority;
2. provide accountability of representatives with direct links to electors;
3. be fair to electors, candidates and political parties;
4. represent society's diversity; and,
5. because of the *Treaty of Waitangi*, they represent a special minority — New Zealand's First People — the Māori.

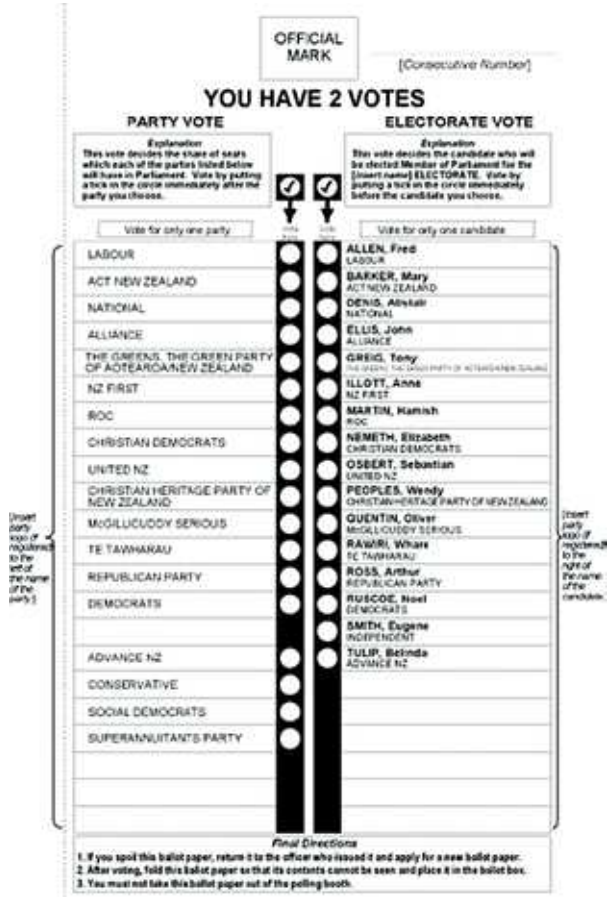
The list above makes it clear that New Zealand sought an 'ideal' electoral system and, therefore, required an electoral compromise.

The challenge of unicameralism

Unicameral parliaments present challenges when trying to solve the 'electoral problem'. Unicameralism makes it impossible to use two complementary systems because there is only one chamber to elect. Instead, what is needed is one system that blends complementary features from several voting systems.

In 1993, New Zealand held a referendum in which the people chose to replace their first past the post system with the **mixed member**

3 Office of the Governor-General of New Zealand, New Zealand's Constitution, 2017, <https://gg.govt.nz/office-governor-general/roles-and-functions-governor-general/constitutional-role/constitution/constitution>.



■ Figure 10.5 — A sample MMP ballot paper.
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 10.6 — Kelvin Davis, the first Deputy Leader of the New Zealand Labour Party of Māori descent.
Source: New Zealand Government / Te Puni Kōkiri, Kelvin Davis ministerial portrait, Ministers, CC BY-SA 3.0, <https://commons.wikimedia.org/w/index.php?curid=64969930> and <https://en.wikipedia.org/wiki/Kelvin_Davis_(politician)#/media/File:Kelvin_Davis.jpg>

> *MMP is a blended system combining majoritarian and proportional features into a system able to elect a unicameral parliament and deliver multiple forms of representation.*

proportional system (MMP). MMP was formally adopted in 1996. MMP is an electoral system specifically designed to solve New Zealand's 'electoral problem'. MMP is a blended system combining majoritarian and proportional features into a system able to elect a unicameral parliament and deliver multiple forms of representation.

The majoritarian part of MMP is **first past the post** (FPP). The proportional part is a **party list system**.

New Zealand also incorporates a system called communal representation in its electoral system. **Communal representation** guarantees representation for a particular community. In New Zealand's case, the *Treaty of Waitangi* recognises the special status of the Māori. The electoral system has been designed to ensure Māori representation in parliament.

Thus, New Zealand's system can be represented as follows:

a) FPP plus party list = MMP; then

b) MMP plus communal representation = New Zealand's electoral system.

New Zealand's electoral compromise achieves fairness for political parties and diversity especially well. But compromise always has a price. The price of New Zealand's electoral compromise is a reduced emphasis on 'majority rule'. As a result of this electoral system, there is an elevated chance of minority governments. There is also a reduction in accountability for some parliamentarians. Those who are chosen by parties, rather than directly by electors, are less accountable. These strengths and weaknesses will be evaluated later.

Some argue communal representation breaches the democratic principle of equality of political rights. However, Māori electors can only vote in one electorate — either General electorates or Māori electorates — not both. Moreover, the principle of 'one vote one value' is a feature of all electorates.

How the electoral system works

The House of Representatives

Elections are used to fill the New Zealand House of Representatives with representatives from electorates and political parties.

There are 120 seats in the House of Representatives, but this not a fixed number and can change from election to election depending on the results.

Elector franchise and casting of votes

In New Zealand all citizens and permanent residents 18 years of age and over are entitled to the political right to vote. There is universal suffrage and a wide **franchise,** with few limitations on the right to vote.

It is compulsory to enrol to vote. However, in New Zealand, the act of voting is voluntary. This allows the Electoral Commission to conduct elections with accurate records and integrity.

> *It is compulsory to enrol to vote. However, the act of voting is voluntary.*

New Zealanders, like Australians, get two votes per election. New Zealand electors get one ballot paper on which two methods of voting are printed:

- the first vote is a 'party vote'*;* and
- the second vote is an 'electorate vote'.

Party votes are only for political parties. Electorate votes are for individual candidates.

As a result of electors having two votes to cast there are two types, or classes, of members of parliament (MPs):

- list MPs, who are nominated by their political party; and
- electorate MPs, who win seats in either:
  - general electorates; or
  - Māori electorates.

Electorate MPs are elected first. List MPs are then added to the House of Representatives to 'top-up' political parties' representation. Topping-up seats using List MPs ensures political parties receive seats in parliament in proportion to their vote.

The party vote — Determining the proportion of seats per party

Party list is a proportional multi-member electorate system. The electorate is the entire country. There are no individual candidates on the party ballot paper, only the names of political parties. Electors cannot directly choose individual List MPs. They can only vote for a political party. Because New Zealand uses first past the post, there are no preferences.

A political party must receive a threshold of five per cent or more of the vote to be entitled to seats in parliament. Parties are entitled to seats in proportion to the vote received. Thus, if a party receives 30 per cent of the vote, it will receive 30 per cent of 120 seats, or 36 seats in total.

The Electoral Commission tallies the party votes around the country. Counting party votes tells the Electoral Commission what proportion of seats each party will receive.

Parties list their candidates on a 'party list' which is registered with the Electoral Commission before the election. The Electoral Commission draws List MPs from their party list in the order the party decided — the first List MP to be elected is the top-ranked candidate on their party's list.

> *Electoral MPs are elected first. List MPs are then added to the House of Representatives to 'top up' political parties' representation.*

Perceptive students will note how political parties are entirely in control of their List MPs. This presents a weakness regarding accountability — electors have no control over whom a party puts at the top of its party list and they cannot directly choose a List MP. Parties may list anyone, including 'party hacks'[4] who they want to reward for prior service to the party, but who may not be the best choice or most effective MP to represent the people in an electorate.

Electors use their first vote (their party vote) to vote for their choice of political party. Note, the

4 A 'party hack' is a derogative term for someone who has played the party political power game or someone with ambitions for power. They are 'party machine men and women', and parties may reward such people for services to the political party.

party vote only determines the proportion of votes each party receives. It does not elect MPs directly.

Again, the Electoral Commission counts the party votes to determine the proportion of seats each party is entitled to in the House of Representatives. The Commission will use the party lists to top-up seats only after the electorate vote is counted and Electorate MPs have been elected.

The electorate vote — Electing Electorate MPs

There are two types of electorates in New Zealand.

1. General electorates; and
2. Māori electorates, which guarantee communal representation.

FPP is a majoritarian single-member electorate system, with a simple majority required to win. FPP is used to elect both types of electorates.

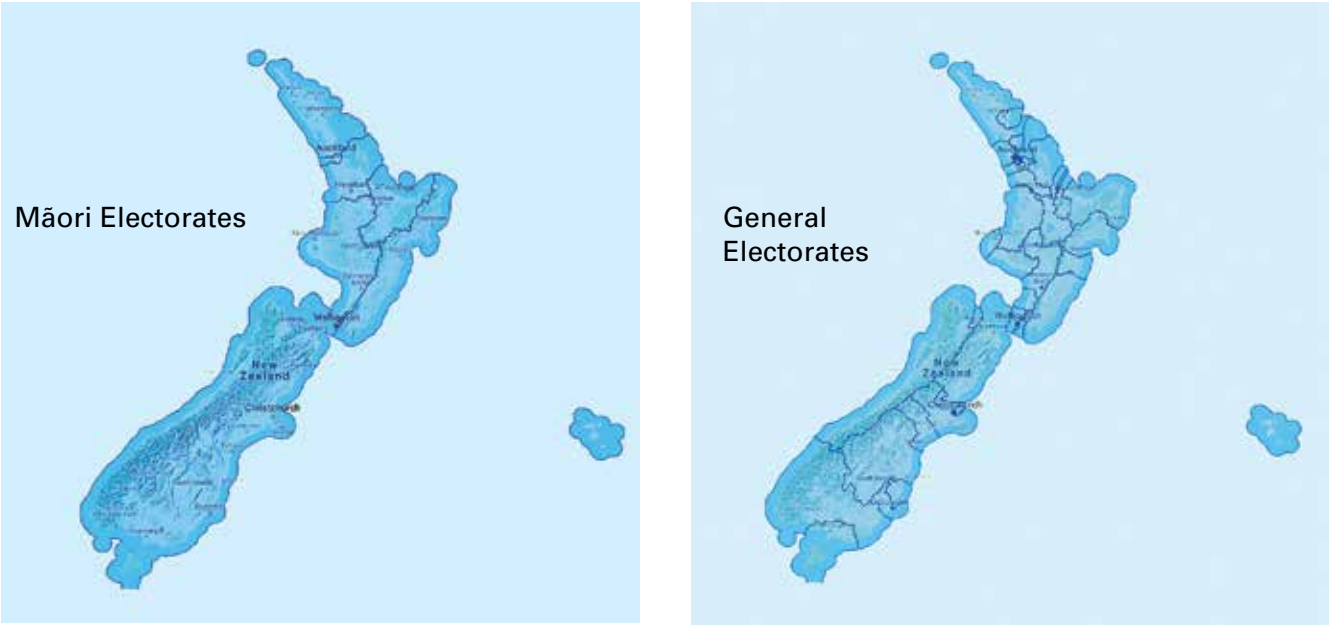
All electorates must have about the same number of electors to ensure one vote one value. One vote one value upholds the equality of the political right to vote. The government statistician calculates electorate sizes based on census data.

New Zealand has two main islands, the more populated North Island and the much less populated South Island. The *Electoral Act 1993* (NZ) specifies the South Island must have 16 General electorates. To calculate the total number of electorates the following formula is used:

- the South Island electoral population (that is, the total number of electors in the South Island) is divided by 16 to find out the average General electorate population. This number is called the 'South Island quota';
- the total Māori electoral population is divided by the South Island quota to find the number of Māori electorates; and
- the North Island electoral population is divided by the South Island quota to find out how many electorates are needed for the North Island. There will always be more than 16 because the North Island has a much larger population.

This system of calculating electorates ensures one vote one value. South Island and North Island General electorates will have close to the average number of electors per electorate. So, too, will the Māori electorates.

A map of New Zealand electorates will show a larger number of General electorates across the whole country and a smaller number of Māori electorates. Figure 10.7 does not show the city electorates, which are too small to show at this scale — this is why South Island appears to have less than 16 electorates.



■ Figure 10.7 — New Zealand Māori and General electorates. Note: City electorates, like those in the city of Auckland, are much smaller geographically because of higher urban population densities and are not observable on this Figure.

Electors may be enrolled on either the General electoral roll or the Māori electoral roll. They cannot be enrolled on both. However, there are restrictions on who can enrol on which electoral roll:

- Māori New Zealanders may choose to enrol for either the General electorate or Māori electorate which represents their location; whereas
- Pakeha (European New Zealanders) and other New Zealanders may only be enrolled in their General electorate.

Electors use their second vote — the electorate vote — to vote for their General or Māori electorate candidate. The Electoral Commission counts the votes for each General and Māori electorate and declares each electorates' winner based on a simple majority (a plurality).

This FPP system elects all Electorate and Māori MPs.

Filling the House of Representatives

The Electoral Commission fills the House of Representatives in the following order, using party and electorate votes.

1. Party votes are counted first to calculate the number of seats to which each party is entitled based on the proportion of votes it received.
2. Electorate votes are counted.
3. Electorate MPs are elected to the House of Representatives.
4. The number of electorates won by each party is noted and compared to each political parties' proportional entitlement of seats.
5. If a party does not win enough electorates to reach its proportional entitlement of seats, List MPs are drawn from the party's list to 'top-up' their number of seats.
6. If a party exceeds its proportional entitlement of seats by winning too many electorates, the Electoral Commission will add additional MPs from other parties' lists to expand the size of the House of Representatives until each political party has attained its proportional entitlement.

Once again, each elector has two votes. The first vote is a party vote used to determine the proportion of seats to which each party is entitled in the House of Representatives (if it passes a threshold of five per cent of the vote).

The second vote is an electorate vote for either a General electorate or a Māori electorate. It elects MPs with a direct link to a constituency of electors, making them delegate, trustee or partisan representatives and more directly accountable.

Party votes are counted first to calculate the percentage of seats to which each party is entitled. Then electorate votes are counted to fill all the General and Māori electorates. The Electoral Commission uses party lists to draw on extra List MPs to 'top-up' each parties' seats until each has its entitled proportion of seats. This will only occur if the party does not win enough Electorate MPs. If a party exceeds its proportion of seats with Electorate MPs the total number of seats in the parliament is increased (with **overhang seats**) until that party's entitled proportion is achieved. This means the size of the House of Representatives is not fixed and may, at times, be more than 120 seats. List MPs are partisan representatives and only have weak accountability.

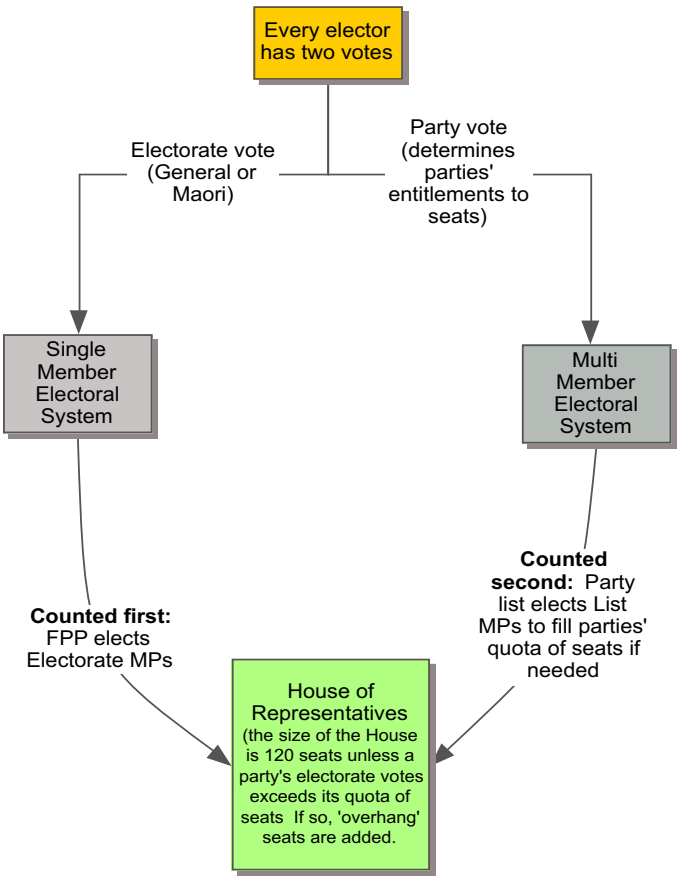


Figure 10.8 — New Zealand's MMP electoral system blends the majoritarian FPP and proportional PL systems to elect one house of parliament.
Source: Stephen King, 2018

Resolving electoral problems through MMP

1. **Situation**: A party does not win enough electorates to meet its proportional entitlement.

- **Problem**: After the electorate vote is counted the party does not have enough Electoral MPs to reach its entitled proportion in parliament.
- **Solution**: The Electoral Commission draws from the party's list and uses its List MPs to 'top-up' its number of seats until its quota of seats is reached.
- **Example**:

– a party wins 40 per cent of the party vote (it is entitled to 48 seats);

– 30 Electorate MPs are elected in the electorate vote;

– the Electoral Commission tops-up its representation by adding 18 List MPs from its party list; and

– it now has 30 Electorate MPs and 18 List MPs resulting in 48 MPs in total.

2. **Situation**: A party wins too many electorates and exceeds its proportional entitlement.

- **Problem**: After the electorate vote is counted the party has too many Electoral MPs and overshoots its entitled proportion in parliament.
- **Solution**: The Electoral Commission draws from other parties' lists to expand the size of the House of Representatives beyond 120 seats until the party has the correct proportion of seats.
- **Example**:

– a party wins 30 per cent of the party vote (and, therefore, is entitled to 36 seats);

– 40 Electorate MPs are elected, exceeding its proportion of seats;

– the Electoral Commission adds List MPs from other parties to increase the House of Representatives from 120 to 133 seats. The 13 extra seats are called 'overhang seats'; and

– now the party's 40 MPs represent 39.9 per cent of the larger House of Representatives. The party will have no List MPs.

Evaluating New Zealand's electoral system

New Zealand has a unicameral parliament, which means it cannot follow Australia's example and adopt a two system solution to the 'electoral problem'. Instead, New Zealand has found a solution by adopting MMP to solve its electoral problem.

The key to understanding MMP as a solution to the electoral problem is to recognise there are two classes of MPs elected to one house of parliament. The term 'mixed member' refers to two classes of members of parliament — Electorate MPs and List MPs. The system is proportional because the composition of the House of Representatives is proportional to parties' electoral votes.

The following criteria form the goals of an 'ideal' electoral system in that they:

1. produce effective and stable government reflecting the will of the majority;
2. provide accountability of representatives with direct links to electors;
3. are fair to political parties;
4. represent society's diversity; and,
5. because of the *Treaty of Waitangi*, they may represent a special minority — New Zealand's First People — the Māori.

The extent to which MMP achieves each of these criteria can now be evaluated.

Effective stable government

Does MMP achieve effective and stable government? All proportional systems increase the risk of unstable minority government. Despite this risk, New Zealand has enjoyed relatively stable government since MMP was introduced in 1996.

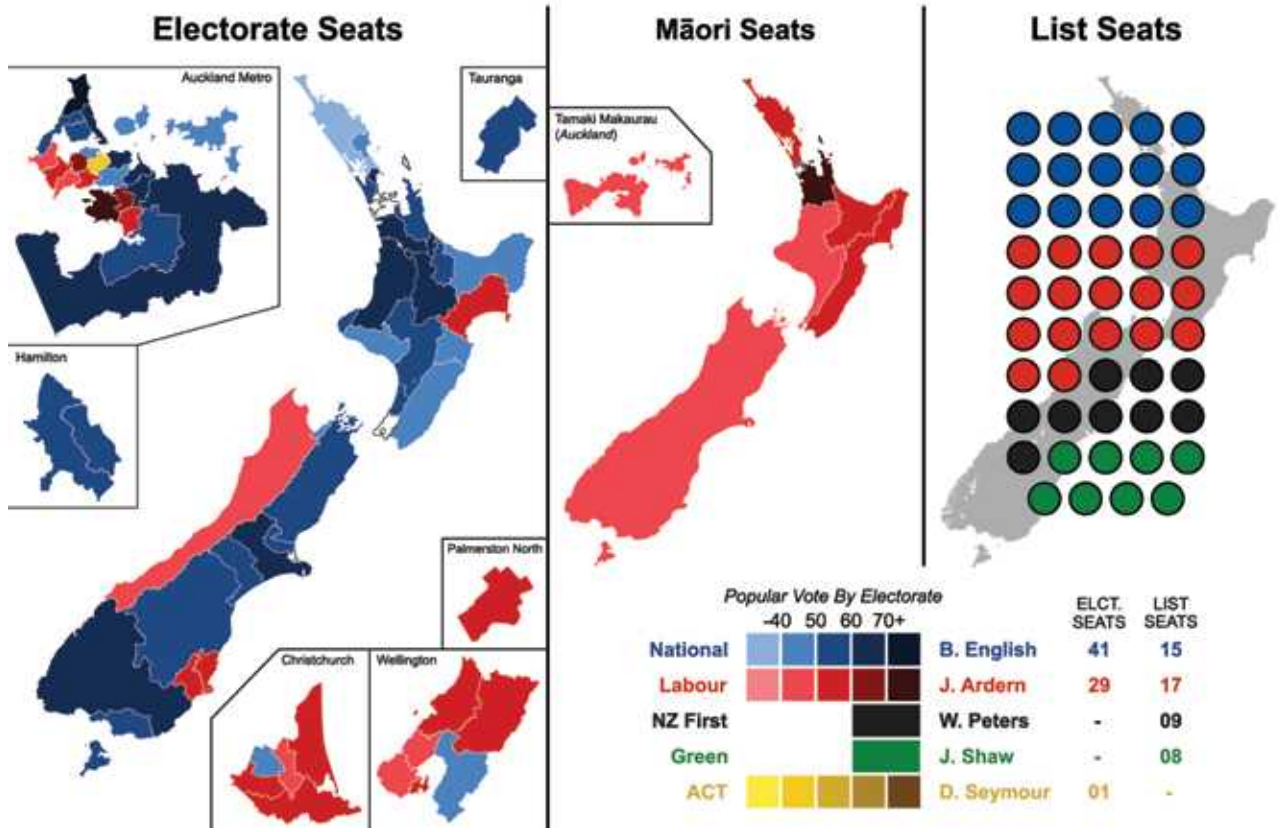
Table 10.1 (see previous page) demonstrates the dominance of coalitions in minority governments since MMP was introduced. Most governments have proven to be stable and capable of serving a full term in office. There is an argument that New Zealand First — and other minor parties — have had much power under MMP. New Zealand First, led by Winston Peters, has been able to influence policy and the allocation of ministerial portfolios strongly over several governments including the current Ardern Labour Government.

Additionally, the government formed in 2017 did not include the National Party, despite it winning many more seats than the Labour Party. Labour only governs because New Zealand First and the Greens support it in a minority government. Perceptive students may see how this could undermine majority rule in government.

New Zealand seems to enjoy similar 'stability' in government to Australia, especially since 2007. Since 2007, only the Rudd and Abbott governments were elected with stable majorities. Australia's preferential system has not been able to create exaggerated majority government (through over-representation) to the same degree it has in the past.

Governments formed under MMP	Composition and stability
1996	• The first election conducted under MMP. • The National Party and NZ First formed a coalition government. • It took six weeks to form a government. • Cabinet contained ministers from both parties. • Collapsed in 1997 when Jenny Shipley replaced Jim Bolger as National Party leader and became Prime Minister. • NZ First was the critical party with the power to decide who formed the government. It was able to force compromise policies on the National Party in return for support. **Evaluation**: An unstable government with too much power lying with the minor party, NZ First.
1999	• Labour formed a government in coalition with the Alliance party — a grouping of smaller parties. Despite this, Labour could not form a government. • The Greens agreed to support Labour and Alliance to form a multi-party coalition government. Labour leader, Helen Clark ONZ SSI PC, became Prime Minister. • The Greens were not in the cabinet. • The Clark Government survived its full term and won the next election. **Evaluation**: Stable and successful government. Clark was able to hold a multi-party coalition government together with a consensus style of leadership.
2002	• Clark Government returned to office leading another multi-party coalition of Labour, Progressives and United Future. • The Clark Government survived its full term and won the next election. **Evaluation**: A stable government held together by negotiation and compromise.
2005	• Clark formed her third government in coalition with NZ First, United Future and the Greens. • NZ First became influential again with its leader, Winston Peters PC becoming Foreign Minister outside Cabinet. • The Greens were not in the Cabinet. **Evaluation**: A stable government, but with much influence from NZ First which held ministerial portfolios outside Cabinet (meaning Winston Peters PC was not bound by the convention of cabinet solidarity).
2008	• National Party form a government with support from ACT, United Future and the Māori Party. • National Party Leader, John Key GNZM AC, became Prime Minister. • Ministerial positions were held by some minor party ministers. **Evaluation**: A stable government that won the next election.
2011	• National Party again formed a government with the minor parties. • The government served a full term with Prime Minister Key. **Evaluation**: A stable government led by a popular Prime Minister.
2014	• National Party becomes the first party since MMP was introduced to form a majority government. • Majority was lost during the parliamentary term and a minority government was formed relying on ACT, United Future and the M ori Party again. • National Party changed leaders to Bill English, who became Prime Minister. **Evaluation**: Despite being rare, a majority government was achieved. However, it lost a seat in a by-election and became dependent on minor parties. Replacement of the Prime Minister indicates a lack of stability.
2017	• Labour and the Nationals both try to form a government. Nationals had 56 seats to Labour's 46. • NZ First again became the decider, supporting the Labour Party in a minority coalition government. • In this case, the most popular party (Nationals) are not part of the governing coalition. • The Labour Party leads the current government in 2018 with Jacinda Ardern as Prime Minister. **Evaluation**: Students are encouraged to investigate this government to decide for themselves if it is stable or unstable, and what level of influence there is from NZ First.

■ Table 10.1 — History of New Zealand Governments since MMP was introduced in 1996.
Source: Stephen King, 2018



■ Figure 10.9 — Results of the 2017 New Zealand general election. The left hand side shows the winning party's strength by General electorate, the centre shows the winning party's strength by Māori electorate, and the right hand side shows the total number of additional member seats won by each party.
Source: DrRandomFactor, New Zealand 2017 election results map — Results by electorate, Māori electorate, and additional member seats, 2017, Own work, CC BY-SA 4.0, <https://commons.wikimedia.org/w/index.php?curid=62758082>

Accountability of representatives

Single-member electorates provide strong direct links between electors and their MP because there is only one MP to hold to account and electors vote for or against them individually. MMP has one class of representatives who are Electorate MPs representing General or Māori electorates. In the 52nd New Zealand Parliament there were 64 General and seven Māori MPs out of a total of 120 MPs. This group of directly elected MPs means MMP does provide proper accountability.

It is also almost impossible for electors to hold the List MPs to account. List MPs are chosen by parties, not directly elected by the electors. In the 52nd Parliament there were 49 List MPs. No one can say specifically which region of New Zealand or which group of New Zealanders any particular List MP represents. They collectively represent the whole country and those who voted for their party, no matter where they live. The dilution of List MPs' links to constituents reduces the accountability of MMP.

Fairness to political parties

There is no doubt MMP is fair to parties. If a party achieves five per cent of the national vote it will get seats in parliament. If a party wins at least one Electorate MP seat, then it will get MPs elected, even if its national vote is less than five per cent. This threshold is lower than that needed to win seats in Australia's Senate, which is usually about 14 per cent of the vote in a general election.

> *MMP provides direct accountability for electorate MPs to their constituents, however, there is little accountability of List MPs to the electors.*

The two party system created by the previous FPP system saw the National Party and the Labour Party overwhelmingly dominate parliament and the executive. MPP has broken the two party system and weakened the power of the major parties. Minor parties now regularly win seats and get ministerial positions in governments formed by one of the two major parties. See Table 10.1 for details of minor party roles in forming a government and in government portfolios. New Zealand First has been the most significant minor party since MMP was introduced.

The ability to choose List MPs gives power to political parties. Some argue the power to choose List MPs results in parties choosing poor quality, but loyal, party candidates or party hacks. Others argue it allows parties to choose candidates who might not get elected as Electorate MPs because of their background — so called 'diversity candidates'. Either way, it gives power to political parties.

Representing diversity

There is no doubt about the increased diversity of the New Zealand House of Representatives since MMP was introduced.

Firstly, there are many more parties represented in parliament. The proportionality of MMP ensures even small parties win seats if they get at least five per cent of the vote. Table 10.1 provides evidence of multi-party representation in parliament and government.

Secondly, many more women are being elected. Forty per cent of all female representatives have been elected as List MPs chosen by their parties.[5] MMP allows parties to nominate individuals such as women, ethnic groups and other minorities who may struggle to get elected as Electorate MPs in single-member electorates due to social and cultural prejudices.

Figure 10.10 — Prime Minister Jacinda Ardern (2018). *Source: Governor-General of New Zealand, Jacinda Ardern in 2018, extracted image from: 'Patsy Reddy and Jacinda Ardern.jpg', CC BY-SA 4.0, <https://commons.wikimedia.org/w/index.php?curid=69052867> and <https://en.wikipedia.org/wiki/Jacinda_Ardern#/media/File:Jacinda_Ardern,_2018.jpg>*

The importance of party lists and List MPs to diversity has been recognised. There is a proposal to reform MMP to fix the ratio of Electorate to List MPs at 60:40 to maintain diversity.

Representing a special minority

The communal representation component of the electoral system guarantees Māori representation in parliament — at least seven seats. Communal representation is achieved through communal voting. As Māori people have the option to enrol in Māori electorates, these First Peoples can choose to vote collectively to represent and forward their special interests in the parliament. Only Māori people can be candidates for the seven Māori electorates. Furthermore, the Māori Party is entitled to a proportion of seats if it wins over five per cent of the vote. The Māori Party has a party list from which List MPs are elected to fill normal (non-Māori) seats.

Additionally, Māori people can stand for election as candidates for any party in a General electorate. They can also be elected as List MPs for other parties. In fact, 20 per cent of all Māori persons elected to parliament are List MPs.

The United States of America

How the electoral system works

The US has elections for many of its public offices. At the national level, there are separate elections for the executive branch (president/vice president) and the legislative branch (both houses of Congress). At the state level, there are 50 state executives (governors) and state congresses, all elected separately. Then there are local county and city elections for municipal governments. Several of the states also have elections for judges, attorneys-general and secretaries of state. There are also elections for many posts in government bureaucracies, such as school boards and sheriffs. This discussion of the electoral system addresses only the federal level of the complex US electoral system.

Two elections

One distinction between parliamentary systems such as Australia's and presidential systems like that of the US is the election of the executive branch. Other sections of the textbook deal with the indirect election and formation of the

> *The US has two elections—one for its executive and one for its legislative branch*

5 Arseneau, Therese, 'The Impact of MMP on Representation in New Zealand's Parliament — A view from outside Parliament', ASPG Conference Paper, 2018, p 5 and p 12.

Australian executive. It is worth noting that the US has two elections—one for its executive and one for its legislative branch, whereas Australia has only one for both the executive and the legislature.

Voluntary voting and management of elections

The US has voluntary electoral enrolment and voting. This means 'getting the vote out' is an important part of the electoral process. Because, by law, voting in the US is not compulsory, great effort is made by political parties and candidates to encourage their supporters to enrol and vote. Voluntary voting reduces political participation.

All 50 states run their own electoral systems for both Presidential and Congressional elections, within the limits of the *Constitution of the United States of America* (the US Constitution). This means that there is no nationally consistent electoral system. Different states use different methods to enrol electors, cast ballots, count votes and declare results. There is a wide variance between state electoral processes, especially laws governing political rights, such as the right to vote. The result is inequality of political rights, a problem which affects the participation of African Americans in the electoral system to a greater extent than other Americans.

> *Election Day is set by law. It is always a Tuesday in early November.*

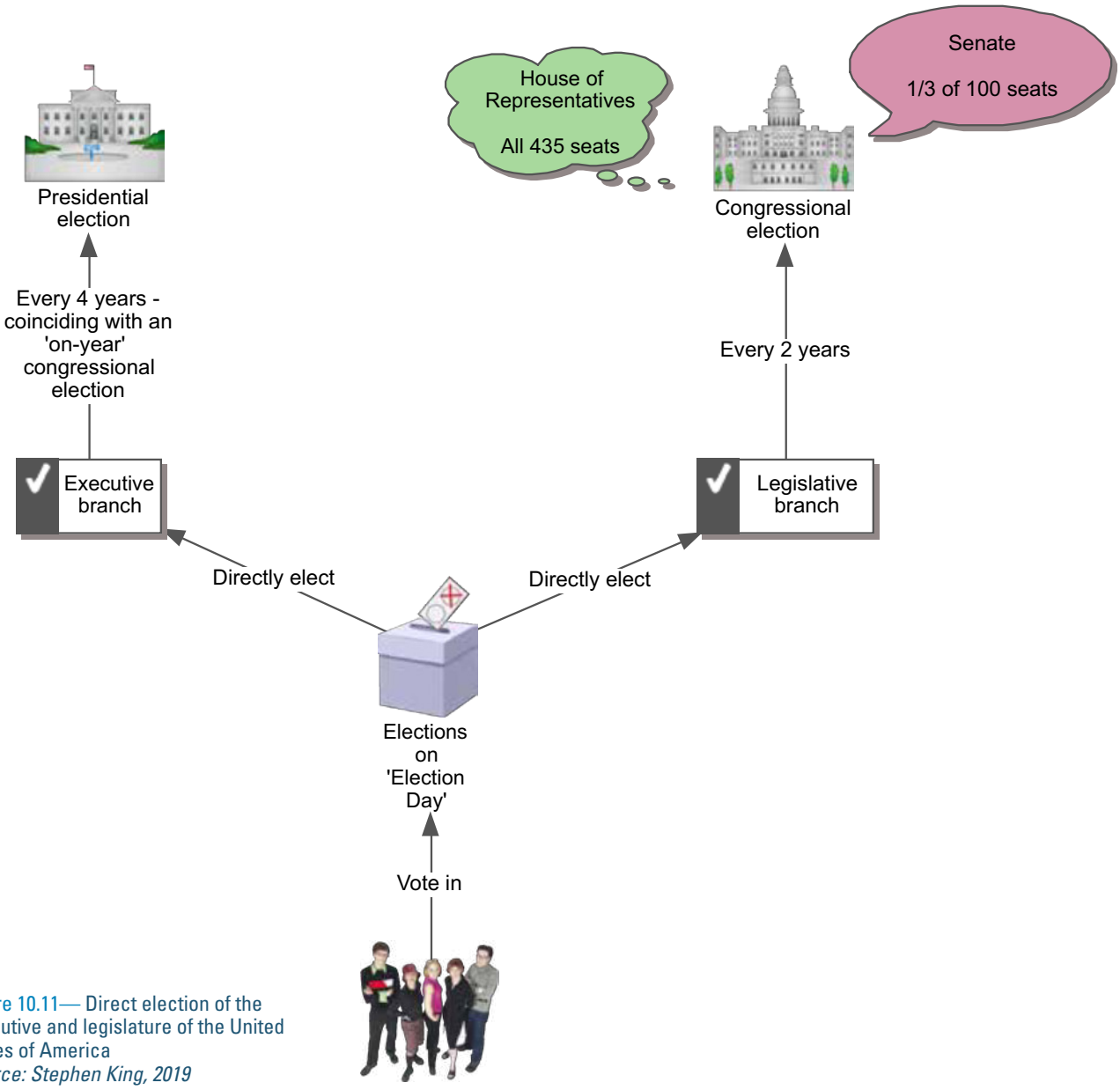


Figure 10.11— Direct election of the executive and legislature of the United States of America
Source: Stephen King, 2019

The Federal Election Commission (FEC) is an independent agency appointed by the President and confirmed by the Senate. The FEC has responsibility for overseeing campaign finance and donations to political parties and candidates. The FEC does not organise and run elections. Its role is less important than the Australian Electoral Commission (AEC), which is responsible for running federal, state, territory and local elections.

Election Day is set by law. It is always a Tuesday in early November. The choice of the month of November and a week day is a legacy of an agrarian past. Today, weekday voting results in a reduction in political participation because many people cannot leave work to vote. This was never the intention of the law, but like many historical features of systems of government, it remains as it was originally.

Electing the federal executive

The executive of the US is composed of an elected President and Vice President, and a cabinet of secretaries appointed by the President. Section 1 of Article 2 of the US Constitution sets out the process for electing the federal executive. A President is elected for a four-year term and is limited to two terms.

Primaries—The parties elect their presidential candidates

Primaries and caucuses are electoral competitions held by each of the major parties to elect their presidential candidates. The Republican Party and the Democratic Party are the two major parties. Many candidates nominate, and the parties' primaries and caucuses elect the final candidate. Primaries are votes by secret ballot, whereas caucuses are open meetings where members discuss and informally vote for candidates. Primaries have become the dominant method used by parties to elect their candidates and they are run on a state by state basis. Some states still use the caucus method. The process for the primaries and caucuses varies between parties and states. Ordinary party members and, in some cases, non-party members, can vote for their preferred presidential nominee.

State primaries and caucuses send delegates to their party's national convention. The winner of the voting at the national conventions becomes the party's nominated presidential candidate. The successful candidate chooses a vice presidential running mate. These national conventions are clearly very significant events in the electoral process.

> *Primaries and caucuses are electoral competitions held by each of the major parties to elect their presidential candidates*

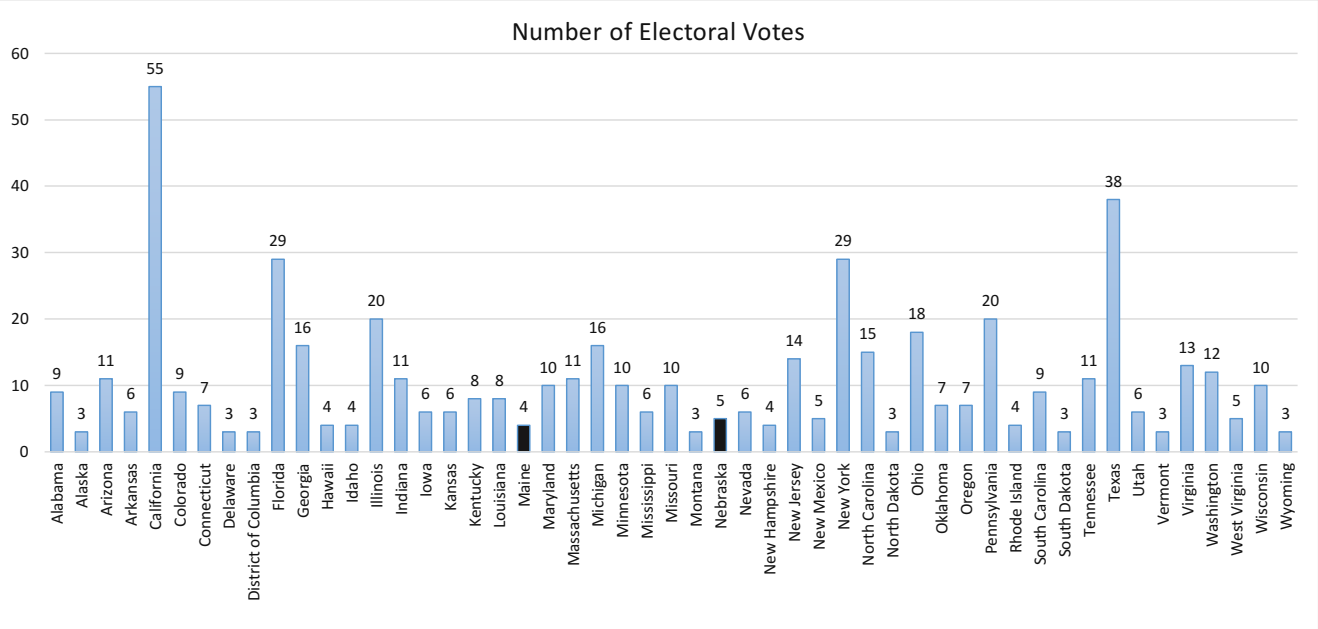
Electoral College—The people elect their President

The Constitution specifies that an Electoral College elects the President and Vice President. The Electoral College is a body of popularly elected delegates from each of the 50 states and the District of Columbia. Its original 18th Century purpose was to limit 'mob rule' by preventing an uneducated population from directly electing the President. The Electoral College would instead be composed of wise statesmen who would then elect a President.[6] This system continues today, despite the fact that most Americans are well educated and do not need others to vote for them. When Americans vote for their President, they are formally electing state delegates to send to the Electoral College which will then elect the President using the first past the post system. The election of the President via the Electoral College is, therefore, an indirect process.

> *The Constitution specifies that an Electoral College elects the President and Vice President*

Each state has Electoral College delegates equal to the state's combined representation in the House of Representatives and the Senate. California—the largest state—has 53 seats in the House of Representatives and two Senate seats, giving it a total of 55 Electoral College votes. More populous states will thus have more Electoral College delegates. This helps achieve majority rule. Since 1824, when a presidential candidate wins a simple majority of a state's votes, they win all of that state's Electoral College votes—a winner takes all situation. For example, winning a simple majority of votes in California gives a candidate all 55 of the state's Electoral College votes. Only two states, Maine and Nebraska, do it differently. These states allocate Electoral College votes proportionally to the presidential candidates based on the percentage of the state vote they receive on Election Day.

6 In 1787 it would have been men only, no women, in the Electoral College.



Each state has Electoral College delegates equal to its number of representatives in the House of Representatives plus its two senators. If a presidential candidate wins a state on Election Day they get all the Electoral College votes for that state (winner takes all). The exceptions are Maine and Nebraska (black bars above), where the two presidential candidates win Electoral College votes in proportion to their electoral support.

Only 'swing states' or 'battleground states' really matter in a presidential election. California has by far the most Electoral College votes, followed by Texas. California is a strongly Democratic state, and Texas is a Republican state—they are safe states for each party. Florida changes from Democratic to Republican – it is a 'battleground' state for both parties. Therefore, both parties invest resources in winning Florida. but not in California or Texas. In the 2016 Presidential Election, 12 swing states decided the result.

■ Figure 10.12 — Electoral college votes, 2016 US Presidential election
Source: Stephen King, 2019

To be elected President, a candidate requires 270 or more votes of the total 538 Electoral College votes. A candidate may win fewer states by larger margins, while their opponent may win a larger number of states by smaller margins. If this happens, the Electoral College system can result in a candidate winning the majority of Electoral College votes with less than a majority of the national vote. This happened in the 2016 election when Hilary Clinton received more of the national people's vote, but less Electoral College votes than Donald Trump. Trump was elected President, thus undermining majority rule.

Electing the legislature

The US Congress is a bicameral representative legislature. The US House of Representatives is a people's chamber, representing each state in proportion to its population. There are 435 Representatives in the House. California has 53 House seats, more than any other state. This is because it is the most populous state. The seven smallest states, including Alaska and Montana, have only one representative each. The Senate is a federal chamber where states are represented equally. All states have two senators in the 100 strong chamber.

> *The US Congress is a bicameral representative legislature*

State congresses make electoral laws for electing their state's federal congressmen and women. Electoral laws across the country therefore vary. State congresses also control the boundaries of electoral divisions. This means that the power to design electoral boundaries is in the hands of political parties who have vested interests in election outcomes. The result is the gerrymandering of federal congressional districts in many states, and to varying degrees. Gerrymandering deliberately reduces equality of political rights and undermines other democratic principles such as majority rule and participation.

Features such as these are in stark contrast to Australia where one national electoral law governs elections, and elections are administered entirely by the independent AEC. Australia upholds equality of the right to vote to a greater extent than the US.

■ Figure 10.13 — Map of the 50 states of the United States of America
Source: <https://upload.wikimedia.org/wikipedia/commons/8/83/Map_of_USA_with_state_names_et.svg>

Congressional elections occur every two years, in an even year—one of the shortest electoral cycles in the democratic world. The entire House of Representatives is elected every two years (that is, representatives have two-year terms). One-third of the Senate is elected at the same time as the House (that is, senators have six-year terms). This is called 'Senate rotation' and ensures a residual of experienced senators remain after every election, providing stability to government. Every second election, a 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' because they occur halfway through a president's four-year term. Mid-terms are sometimes considered referendums on the performance of the President. For example, the 2018 mid-terms saw the Democratic Party win control of the House. Some interpreted this result as the people's judgment on the performance of Republican President Trump.

> *Congressional elections occur every two years, in an even year—one of the shortest electoral cycles in the democratic world*

Voting for the 435 House of Representatives electoral districts is by the first past the post system. There are multiple single-member electorates in each state. Senate seats are also elected using first past the post, but in this case the whole state is the electorate.

Conclusion

The US is a democracy. It has two separate electoral systems to elect its national executive and legislature. State laws govern much of the country's national election processes, resulting in state by state variations in procedures. State legislatures may make electoral laws that can reduce equality of political rights and participation for political reasons. The Electoral College system is a remnant from an age when education was not universal and the country's Founding Fathers sought to protect American democracy from mob rule. The Electoral College can sometimes undermine majority rule. Neither presidential nor congressional elections are perfect and, in many ways, the Australian electoral system is superior in upholding democratic principles such as majority rule, equality of political rights and political participation.

The 2016 US Presidential Election

In November 2016, businessman and reality TV star, Donald Trump, and Indiana State Governor, Mike Pence, won 304 of the 538 Electoral College votes to become President and Vice President of the United States, respectively. Trump's victory was unexpected since he was considered an unlikely Republican Party candidate and ran against a strong Democratic Party candidate in Hillary Clinton.

Parties nominate their candidates

Well before Election Day, the Republican and Democratic Parties must first select their presidential candidates. A process of elections at state-based primaries and caucuses democratically chooses candidates. Between February and November 2016, primaries and caucuses occurred across the US. The first two

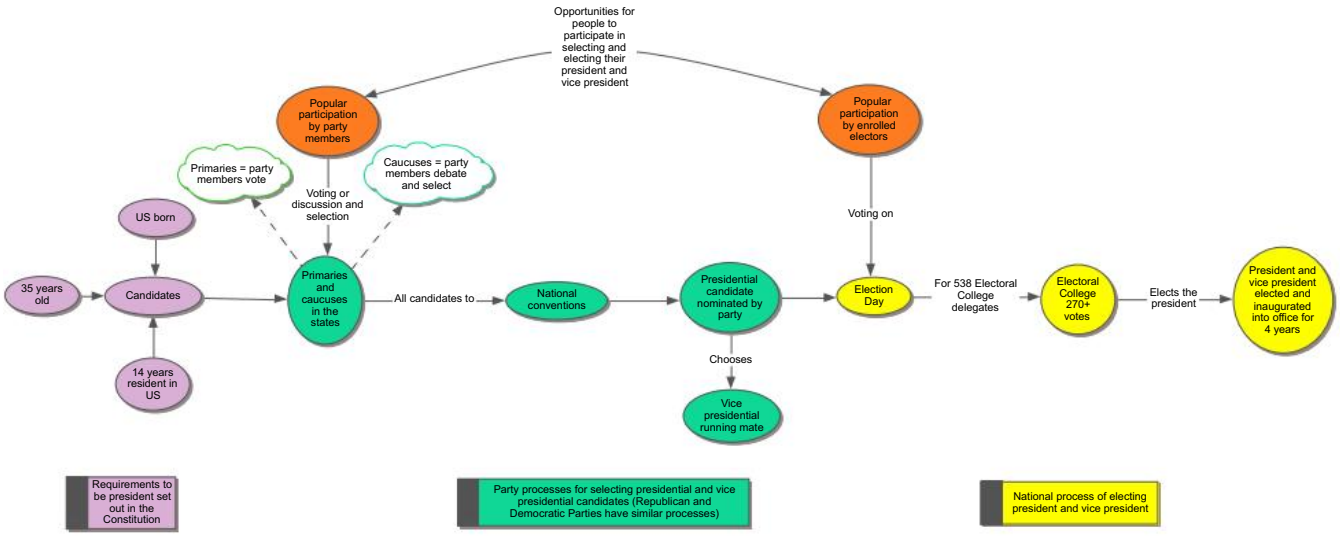


Figure 10.14 — The process of selecting the US President
Source: Stephen King, 2019

were the New Hampshire Primaries and the Iowa Caucuses. Despite these states being small and not representative of the US as a whole, their primaries and caucuses both receive enormous media attention and can give momentum to the candidates who win them. Many states hold their primaries on the same Tuesdays in March. These are called 'Super Tuesdays'.

Donald Trump ran for President as the Republican Party candidate. This party is referred to as the 'Grand Old Party' or GOP. He defeated 16 Republican hopefuls to win the GOP nomination. One prominent candidate was Jeb Bush, brother of George W Bush and son of George H W Bush, both former Republican Presidents. Many did not expect Trump to win the GOP nomination. He was not a typical Republican presidential candidate—he was very much 'anti-establishment'. His win demonstrated the power of ordinary party members to override the desires of the GOP elite, and illustrates the power the primaries/caucuses have as a process of democratic candidate selection.

Figure 10.15 — Donald Trump accepts the Republican nomination for President
Source: https://upload.wikimedia.org/wikipedia/commons/d/db/Trump_accepts_nomination.jpg

Donald Trump's presidential rival was Democratic Party nominee Hillary Clinton. As the wife of former Democratic President, Bill Clinton, and Secretary of State to the former Obama Administration, Senator Clinton was an 'establishment' candidate and the first woman to be nominated by a major party. She had won the Democratic Party nomination against 'anti-establishment' candidate Bernie Sanders in a close fought contest in the Democratic Party primaries and caucuses.

> *Trump's victory was unexpected since he was considered an unlikely Republican Party candidate and ran against a strong Democratic Party candidate in Hillary Clinton*

The campaigns

Donald Trump ran a populist and nationalist presidential campaign, tapping into the grievances of Americans left behind by the economic forces of globalisation and those who feared the impact of immigration. His slogan was "Make America Great Again". He used populist policies, such as promising to build a wall along the US/Mexico border to stop illegal immigration and saying that he would challenge China over trade. Many Americans felt disenfranchised and forgotten by traditional party politics. They had lost trust in the usual institutions of American government. They formed Trump's 'base'. While Trump's public comments and

personal and business history alienated some electors, his conduct seemed only to energise his base. Trump's campaign relied heavily on his personality, rather than a record of political achievement or GOP philosophy.

Hillary Clinton ran a traditional campaign based on her reputation as a senator, former First Lady and Secretary of State. She presented herself as a proven and safe candidate who could be trusted with American power, and promised a continuation of Obama-era policies. Clinton, however, represented the very institutions of American government that so angered Trump's base. Moreover, she made tactical errors, such as describing Donald Trump's supporters as "a basket of deplorables", alienating them further. Trump made allegations that Clinton had made illegal use of private email accounts when she was Secretary of State. He called for her to be jailed for these 'offences'. Despite these mistakes and allegations, Clinton was ahead in most polls throughout the campaign and was expected to win. Clinton's campaign relied heavily on her record and Obama's presidential legacy.

> *Donald Trump ran a populist and nationalist presidential campaign, tapping into the grievances of Americans left behind by the economic forces of globalisation and those who feared the impact of immigration.*

Figure 10.13 — Hillary Clinton – Official portrait of the former US Secretary of State
Source: United States Department of State, 2009, Public Domain, <https://upload.wikimedia.org/wikipedia/commons/thumb/2/27/Hillary_Clinton_official_Secretary_of_State_portrait_crop.jpg/614px-Hillary_Clinton_official_Secretary_of_State_portrait_crop.jpg>

Features of the campaign

The 'weaponisation' of social media (Facebook, in particular) was a feature of the 2016 election. Data gathered by Facebook was used to target tens of millions of Americans with personalised political advertising. There were allegations of Russian collusion with the Trump Campaign and interference in the election. These allegations were the basis of the Mueller Investigation into Russian 'hacking' of the election which was ongoing in the first three years of the Trump Presidency. FBI Director, James Comey, also made comments concerning the email scandal just before the election—an intervention that many argued was improper.

The election was also exceptional in other respects. The pre-election polling was inaccurate. The missteps and character of Donald Trump, which would ordinarily have ensured his electoral defeat, seemed to have the opposite effect.

> *The 'weaponisation' of social media (Facebook, in particular) was a feature of the 2016 election*

The results

Hillary Clinton won the popular vote. She received 65,853,514 votes to Donald Trump's 62,984,828 votes—a margin of 2.1 per cent more than Trump. Trump, however, won the traditionally Democrat voting, industrial Upper Midwest states of Michigan, Pennsylvania and Wisconsin—all badly affected by the economic forces of globalisation. It was his win in these 'swing states' that gave him the majority of the 304 Electoral College votes needed to win the Presidency.

Hillary Clinton made history as the first woman to run for President of the US.

Donald Trump's victory is only the fifth Presidential election since 1824 where the winner lost the popular vote.

Hillary Clinton won medium sized states that usually vote for the Democratic Party by large margins. She also won the big states of California and New York. The concentration, however, of Democratic Party votes in these states caused a high level of vote wastage—that is, Clinton would have had a stronger chance of victory if her support was more evenly spread, especially if some of her excess votes were in

the Upper Midwest. [7] These factors gave Hillary Clinton another historic first—with the highest margin of the popular vote (2.1 per cent) since 1876, she was the first presidential candidate to actually lose an election.

> *Hillary Clinton won the popular vote but Donald Trump won the "swing states" that gave him a majority of the 304 Electoral College votes to win the presidency.*

The 2018 Congressional Election

In November 2018, the Democratic Party took control of the House of Representatives from the Republican Party, but failed to secure a majority in the Senate. It was a critical election because it placed one of the two houses of the Congress in the hands of the Democrats and gave them control of the House of Representatives' investigative and budgetary powers. The previous Republican House of Representatives majority had resisted the use of these powers against their own party's President. In Democrat hands, these powers place stronger checks and balances upon President Trump.

On Election Day every two years the US elects its legislative branch in a congressional election. The bicameral legislature comprises an elected House of Representatives and Senate. The House of Representatives represents the people, and the Senate represents the states. All 435 seats in the House of Representatives are elected alongside 35 of the 100 Senate seats. The 2018 congressional election was an off-year election since it occurred two years into President Trump's first four-year term of office.

The importance of mid-term elections

All congressional elections hold the legislature to account and allow for a renewal of the Congress's legislative and accountability mandates.

Off-year elections are commonly referred to as mid-term elections, and are heavily influenced by the performance of the executive branch—that is, the President. This is because these elections are the first opportunity for electors to pass judgement on their President. As such, the party of the President may be rewarded or punished depending on their first two years in office. Mid-terms are also an opportunity for electors to renew the checks and balances inherent in the design of the US system of strictly separated powers.

A Congress dominated by the party that does not control the presidency is more likely to check and balance presidential power. If the people are unimpressed by the President, this may be precisely what they intend. As such, mid-term elections are critical to the US democratic system because they allow for accountability of both the Congress and the President.

It seems that this was the intention of American electors in 2018. By giving the Democratic Party control of the House of Representatives electors were giving it a mandate to hold President Trump to account and to check his legislative agenda.

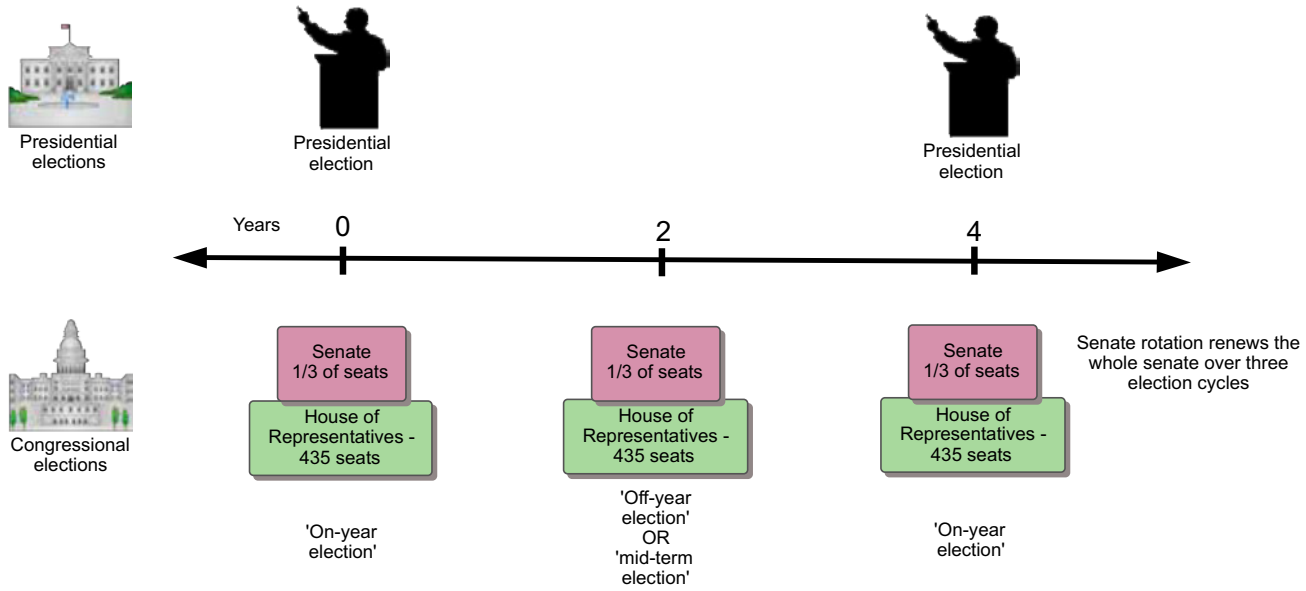


Figure 10.17 — Election cycles of the United States of America
Source: Stephen King, 2019

7 Upper Midwest refers to states around the Great Lakes, historically in a western position in relation to the original 13 colonies.

Before the 2018 mid-terms, the Republican Party had 240 seats in the House and 51 seats in the Senate, giving it a majority in both houses of Congress.

The House of Representatives

The House of Representatives is elected in relative proportion to the population. States with the largest populations have more seats, just as it is in Australia. Moreover, Republican electoral support was not especially strong, even when Trump won the presidency in 2016. He was only the fifth President in history to win without winning the popular vote, and his support—and that of the Republican Party—had dropped in the two years following the election. As the 'popular' chamber, the Republican majority in the House of Representatives was thus very vulnerable.

With the whole chamber up for re-election and the Democratic Party only needing to win 23 seats to take control from the Republicans, the Republican House of Representatives majority was in even more jeopardy.

History, however, was against the Democratic Party. Only twice in history had they achieved a gain of 23 seats or more—once in 1974 and again in 2006.

Historically, American voters tend not to vote out a sitting representative. Of critical importance in 2018 was that 39 Republican Representatives were retiring and not up for re-election. Many of them were also in 'swing states'—such as Florida and Pennsylvania—that could be turned against the Republicans.

A factor that would work for the Republicans was that in many Republican controlled states the electorates were gerrymandered. State congresses control the electoral laws and boundaries for the US Congress. Gerrymandering

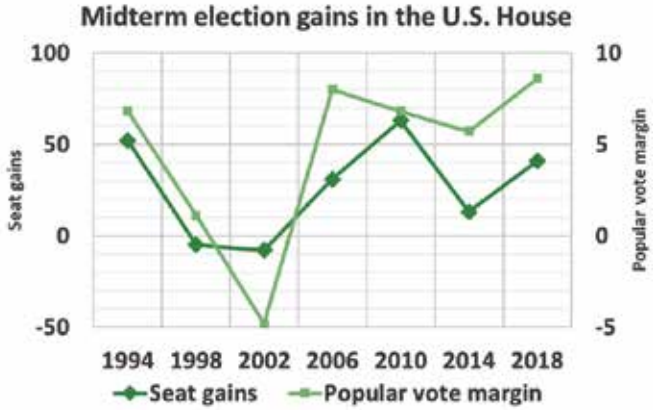


Figure 10. 18 — Historical mid-term seat gains in the House of Representatives for the party not holding the presidency.
Source: By Orser67 - Own work, CC BY-SA 4.0, <https://commons.wikimedia.org/w/index.php?curid=74351491>

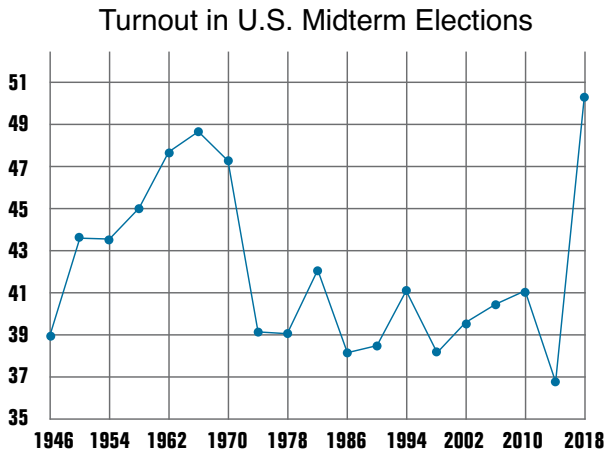


Figure 10.19 — Turnout of the voting eligible population in mid-term elections held since 1945
Source:https://upload.wikimedia.org/wikipedia/commons/thumb/a/a6/Turnout_in_US_midterm_elections.png/370px-Turnout_in_US_midterm_elections.png By Orser67 - Own work, CC BY-SA 4.0, https://commons.wikimedia.org/w/index.php?curid=74351645

has long been an anti-democratic feature of the US legislative elections. It undermines majority rule and distorts popular participation and representation.

Several other factors helped the Republicans. Weekday voting—always a Tuesday—and voluntary electoral enrolment are factors. Democratic Party supporters tend to be lower paid workers who cannot afford to take time off work to vote. The party is also more popular with migrants who may not speak English and African-Americans who tend to be discriminated against by strict voter registration laws.

The Senate

In 2018, 35 Senate seats were up for re-election. Only nine of these seats were held by Republicans. This meant that in the Senate rotation of 2018 it would be difficult for the Democratic Party to win the Senate even if there was a strong anti-Republican swing. The Senate rotation acts as a brake on wholesale change in the upper house—a factor that would insulate the Republicans from any electoral backlash aimed at the 'party of the president'.

The results

The Democratic Party won 232 seats in the House of Representatives giving it firm control of the lower house. A record 90 women were elected. Democrats Ilhan Omar and Rashida Tlaib became the first Muslim women elected to Congress. Deb Haaland and Sharice Davids were the first Native American women to be elected to Congress. Alexandria Ocasio-Cortez, at 29, became the youngest woman ever elected to Congress.

The Republican Party performed strongly in the Senate and increased its majority by one seat to 52.

Power has shifted within the US system of government. Congress has become more powerful relative to the executive. The election result has brought the ultimate power into play – impeachment. The new House of Representatives is more hostile to Mr Trump and prepared to use the impeachment power. Impeachment is the power to check the executive and hold it accountable. Congress may remove a president on the grounds of treason, bribery or high crimes and misdemeanours. The impeachment power is distributed between the two houses of Congress, so this important power is separated, checked and balanced.

The House of Representatives initiates the process by conducting an impeachment inquiry to gather evidence and then passes Articles of Impeachment by a simple majority. Once the House of Representatives passes Articles of Impeachment a President has been impeached. Being impeached by the House is equivalent to being charged with a crime, but not yet found guilty. The President remains in office but may be politically damaged. The process then passes to the Senate.

> *Power has shifted within the US system of government. Congress has become more powerful relative to the executive.*

The Senate may put a President on trial. The 100 senators act as jury with the Chief Justice of the Supreme Court as judge. If the Senate passes a two-thirds majority guilty verdict, the President is removed from office. There is no other sanction. However, a president who has been removed from office loses immunity from prosecution and may be charged with criminal offences or civil wrongs and later brought to trial in an ordinary court.

During a July 2019 telephone call to Ukrainian President Volodymyr Zelensk, it is alleged Mr Trump threatened to withhold US aid unless its government investigated former Obama Vice President Joe Biden and his son's business activities in the Ukraine. Mr Biden is a candidate for the Democratic Party's 2020 Presidential election and any accusations about him from Ukraine could be used by Mr Trump during the 2020 Presidential election. The telephone conversation was overheard and a whistle-blower within the White House went public with the information.

Figure 10.20 — Alexandria Ocasio-Cortez, the youngest woman ever elected to Congress, 2018 Mid-term elections
Source: https://upload.wikimedia.org/wikipedia/commons/thumb/d/de/Alexandria_Ocasio-Cortez_%40_SXSW_2019_%2832411240957%29.jpg/800px-Alexandria_Ocasio-Cortez_%40_SXSW_2019_%2832411240957%29.jpg

Using presidential power to collude with a foreign power for domestic political purposes is arguably an abuse of power. Withholding US aid to pressure a foreign government to investigate a domestic political rival may fall within that definition. It may even be a 'high crime or misdemeanour', which is an impeachable offence.

The Democratic Party controlled House of Representatives opened an impeachment inquiry into the Ukraine incident. It subpoenaed witnesses, including some from within Mr Trump's inner circle. Impeachment hearings were conducted publicly and reported in the media. At the time of writing the inquiry was still underway and had not proceeded to a vote on Articles of Impeachment.

No President in history has been removed from office, although the House of Representatives has impeached several, including Bill Clinton in 1998 and Richard Nixon in 1974. Despite the Ukraine incident and the 2019-2020 House impeachment process it is unlikely President Trump will be removed from office. Since the 2018 mid-terms, the Democratic Party has had the power to pass Articles of Impeachment in the House of Representatives. To do so when there is no chance the Republican controlled Senate will convict the President may be seen as politically motivated and energise Mr Trump's supporters, further polarising politics in the US. Alternatively, it may weaken Mr Trump and enhance the chances of the Democratic Party presidential nominee winning in 2020.

Summary

- 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.
- MMP 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, perhaps, 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 entirely 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 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.
- In the US 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, thus reducing political participation.
- A US presidential election occurs every four years. State primaries and caucuses send delegates to their party's national convention where a presidential candidate is nominated. On election day electors in each state choose their delegates to the Electoral College, and the Electoral College then chooses the President. The election of the President is therefore indirect.
- Elections for members of the House of Representatives occur every two years. One third of the Senate is elected at the same time so that senators serve a term of six years, providing stability to government.

Activities

Short answer

1a) Explain what is meant by the term 'unicameral'.

1b) Distinguish between a federal and a unitary system of government.

1c) Discuss how the 'mixed member proportional' (MMP) system adopted by New Zealand in 1996 has solved their 'electoral problem'.

2a) Define 'electoral compromise'.

2b) Distinguish between 'electorate MPs' and 'List MPs' in the New Zealand electoral system.

2c) Discuss the impact of MMP on the formation of government in New Zealand.

3a) Define the term 'communal representation' as it relates to the New Zealand electoral system.

3b) Outline **three** goals of an ideal electoral system.

3c) Discuss the impact of MPP on the 'two party' system in New Zealand.

Source analysis

Read the excerpt from *The Conversation* below and respond to the questions that follow:

> 'Why guaranteed Indigenous seats in parliament could ease inequality', by Dominic O'Sullivan, Associate Professor, Charles Sturt University.[8]
>
> *Australia's democracy is not well equipped to consider the implications of prior occupancy, culture or colonial legacy. Democratic structure determines whether public decisions are the outcome of an inclusive political process. It determines whether people have had equal opportunities to contribute to decision-making, and it is reasonable to expect Indigenous people to require some benefit in return for recognising the legitimacy of the state.*
>
> *Guaranteed parliamentary representation is not the only mechanism for ensuring Indigenous political voice. It may not, ultimately, be one that Indigenous Australians choose to pursue. However, it is one that has served New Zealand Māori well for 150 years, and is worth considering in response to John Rawls' argument that:*
>
> The unity of society and the allegiance of its citizens to their common institutions rest not on their espousing one rational conception of the good, but on an agreement as to what is just for free and equal moral persons with different and opposing conceptions of the good.

4a) Explain what is meant by 'political voice'.

4b) Using the source, explain **two** matters that determine public decisions.

4c) Discuss the practice of guaranteed indigenous seats in parliament through 'communal voting' in New Zealand.

4d) With reference to a recent election, assess the extent to which majority rule is achieved in New Zealand compared to Australia.

continued overleaf

8 O'Sullivan, Dominic, 'Why guaranteed Indigenous seats in parliament could ease inequality', The Conversation, 2017, <https://theconversation.com/why-guaranteed-indigenous-seats-in-parliament-could-ease-inequality-74359>.

Essay response

5) 'The New Zealand electoral system supports greater diversity in parliament than the Australian electoral system'. Evaluate the validity of this claim.

6) 'Although there are many similarities between Australia and New Zealand, their systems of electoral representation are fundamentally different'. Analyse this statement.

Investigation and discussion

7) Investigate how the 2017 New Zealand election affected government. Is this government stable and what impact has New Zealand First had on the formation of government?

8) Consider how countries seek to provide representation for their First Peoples.

   8a) How does Canada and Sweden ensure inclusivity of their First peoples?

   8b) Explain the viewpoints of various stakeholders in the Australian political and legal system on the question of an indigenous voice to parliament.

9) Investigate the electoral and voting systems used for presidential elections, such as the United States. Explain how this system differs from Australia's, the advantages and disadvantages, as well as the extent to which representation is achieved.

UNIT 2

Representation – Individuals, pressure groups and political parties

Syllabus points:

- **political representation with reference to the role of political parties and pressure groups**

Aristotle[1] thought humans were political animals. What did he mean?

One way of reading this is to say that because human beings are social beings with the power of speech and the capacity to determine right from wrong, they have a particular human inclination or tendency to be drawn to political associations to satisfy their social needs. So how does this work?

People, as social beings, develop worldviews. Many have particular interests. Some believe in causes. Worldviews, interests and causes unite and divide people. Worldviews, interests and causes give rise to political groups. To be in a political group is to share a worldview, an interest or a cause with others who have 'like interests'. Political groups may be allies or opponents depending on how similar or different their worldviews, interests or causes may be. Political groups contest with each other for power and influence. Contests between worldviews, interests and causes can be referred to as 'politics'.

While humans are social creatures, they are also individuals. **Individuals** are persons acting of their own accord, in their own interests or in the public interest. As sole persons they undertake the action themselves, not as a representative or spokesperson for a political party or pressure group. All citizens (and non-citizens) can act politically as individuals to participate in the electoral processes to the extent they have political freedoms to do so. For example, Zali Steggall (Independent member for Warringah, NSW), Andrew Wilkie (Independent member for Clark, Tasmania), Alan Jones, Vicki Lee Roach or Shannon Rowe (plaintiffs for court cases), as well as every Australian resident may each participate in applying political pressure and enjoy freedom of political communication. However, only citizens aged 18 years and older may actually enrol and vote. This means that residents of Australia and high school students can engage in political action, but not (yet) vote. All individuals can act as 'political animals' to the extent they are empowered to do so.

In addition to individual action, each type of political group offers individuals possibilities, or mediums, for participation in the political system and electoral processes. According to Aristotle, to live in political groups is the natural state for human beings. Political groups can range from small community groups pressing their local council government for a new neighbourhood park all the way up to nation states pursuing their national interests on the world stage.

Figure 11.1 — Aristotle, ancient Greek philosopher and scientist (384–322 BCE).
Source: Francesco Hayez, Aristotle, 1811, Public Domain, <https://en.wikipedia.org/wiki/Aristotle#/media/File:Francesco_Hayez_001.jpg>

> *Political groups contest with each other for power and influence. Contests between worldviews, interests and causes can be referred to as 'politics'.*

This chapter is concerned with:

- representation through two types of political groups: political parties and pressure groups.

Students are reminded to re-visit Chapter 8 which covered the key concept of representation which is further developed in this chapter.

1 One of the greatest Ancient Greek philosophers who, along with Plato, is considered the 'Father of Western Philosophy'.

Democracy and political groups

Democracy tolerates pluralism. It accommodates different political points of view and the individuals and groups who hold them. Democratic principles make possible a peaceful contest between political groups. Freedom of speech allows for debate between people and groups with different political views. A political argument is not a war between people or groups. Instead, it is a process for understanding others' worldviews, interests or causes. Compromise between competing groups is the art and science of democracy.

Democratic processes, such as elections, allow political groups — for example, political parties — to enter, or put pressure on, legislatures. Elections permit non-violent contests and transitions of power between political groups. That is, elections create a relatively short-term victory based on the majority will of the people, and a political party has a short-term victory over all other political groups.

Political groups in a pluralist society[2] compete with each other in the battle of ideas and influence. Not all groups are represented in parliament. Groups outside parliament try to influence elections and exert pressure on those inside — that is, those with legislative and executive power. Democratic freedoms, like freedoms of speech and media, allow people and groups to criticise or support those in power. They may raise interests and causes, bringing them to public attention.

Political pressure may be persuasive or coercive. Either way, it can influence power.

Figure 11.2 — Former leader of the Greens, Christine Milne, speaks at the People's Climate March in Melbourne. Political parties such as the Greens enable people to express a worldview.
Source: Peter Campbell, Christine Milne speaking at the Peoples Climate March in Melbourne in September 2014, 2014, Creative Commons BY-SA 4.0, <https://en.wikipedia.org/wiki/Australian_Greens#/media/File:2014-09-21_Christine_Milne_Peoples_Climate_March_Melbourne_600_0479.JPG> and <https://commons.wikimedia.org/w/index.php?curid=35583416>

Political parties — Representing worldviews

Worldviews are broad understandings of how the world is or ought to be, according to those who hold the worldview. They are based on values like equality, freedom, faith or nationalism.

Political parties are organised groups of people who form to represent and promote broad worldviews. They seek to win seats in parliament and, if possible, form government. Parliaments make laws and governments carry them out. There is no better or more effective way to implement a worldview than from within these institutions of political power.

Pressure groups — Representing interests and causes

Interests and causes are much narrower than worldviews. They are very much focused goals. Some are based on narrow 'self interest', like increasing a social or economic benefit for a particular group, such as a salary increase for teachers or lower taxes for companies. Others are based on 'selfless causes'. Causes are goals seen as benefiting the community or the planet. For example, stopping logging in national parks, ending whaling or lowering carbon dioxide emissions are causes.

The purpose of a **pressure group** is to advance an interest or a cause. Their focus is narrow. They do not seek election to parliament because they have less attachment to broad worldviews. They are more concerned with influencing parliament or government to take specific action to advance their particular interest or cause. Pressure groups may seek to affect the composition of parliament and who forms government by using strategies to influence electors' choice when they cast their votes. Pressure groups may also offer support to political parties whose worldviews seem to advance their interest or cause.

Figure 11.3 — The Sea Shepherd Conservation Society is a pressure group that uses direct tactics to protect marine wildlife and inform the public on their plight.
Source: David w ng, A variation of the flag used by the group, 2006, Public Domain, <https://en.wikipedia.org/wiki/Sea_Shepherd_Conservation_Society#/media/File:Seashepherd_small_pt.jpg> and <https://commons.wikimedia.org/w/index.php?curid=530423>

2 A society tolerant of many political views and groups.

Political parties and ideologies

A worldview is a way of understanding the world. Religions provided worldviews that were significant in the past and continue to do so today. Since the Enlightenment period, worldviews have incorporated non-religious understandings of the world, including the scientific worldview based on rational hypotheses.

An **ideology** is a way of interpreting the world through **political philosophy**. Political philosophy is like a hypothesis based on rational political thinking. Ideologies are 'scientific' political worldviews. Ideologies are sets of mutually supportive, coherent and all-encompassing ideas explaining how society is or ought to be. An ideology can provide answers to political questions such as: 'how should society be governed?', 'what is the role of government?' and 'how should wealth be distributed?'

The value of an ideology is its ability to answer almost any political question. In other words, political ideologies have a broad application. Moreover, the answers will all be mutually supportive and coherent. For example, the answers to the questions, 'how much tax should people pay?' and 'should government provide financial support for the poor?', will make sense within one ideological perspective. From within an 'ideology of equality' these questions can be answered logically. The answers in this case are obvious — more tax is needed to increase money for government spending to support the poor.

> *Ideologies are sets of mutually supportive, coherent and all-encompassing ideas explaining how society is or ought to be.*

Figure 11.4 illustrates how a political party can develop logical policies that fit together because they are all guided by the same set of beliefs or political philosophy.

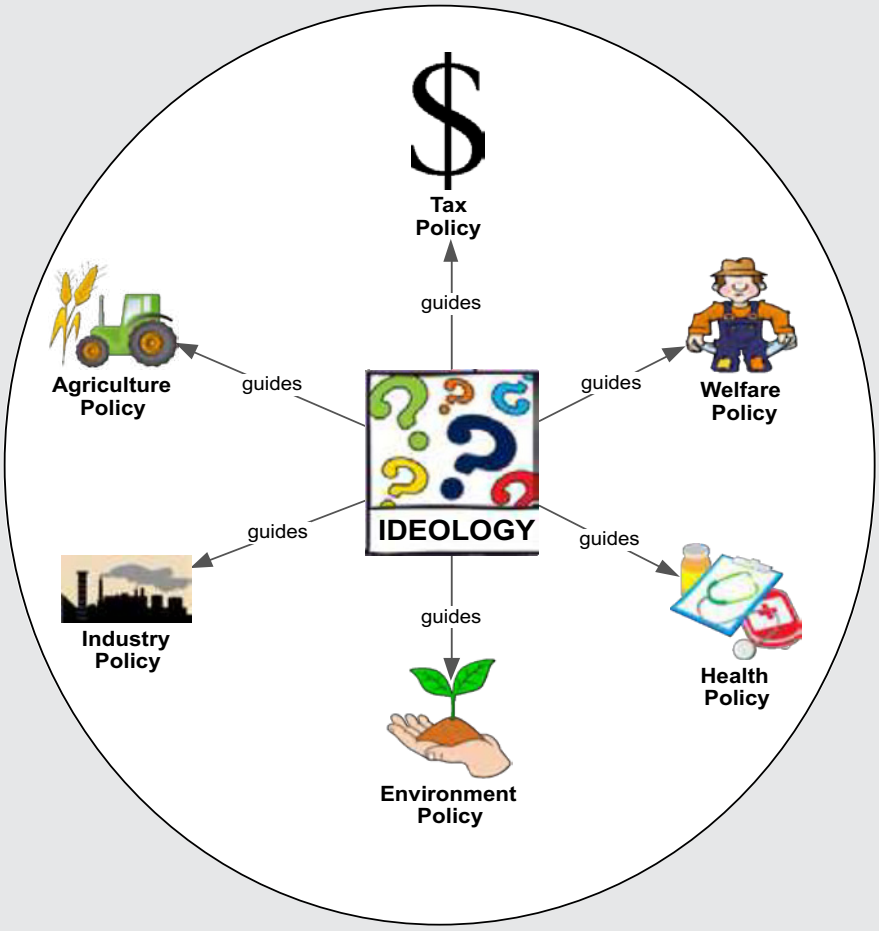


Figure 11.4 — An ideology provides philosophical guidance for a political party's policies. All the policies will share a logical set of principles. They will be mutually supportive and coherent.
Source: Stephen King, 2018

The political spectrum

A standard way to think about political worldviews (ideologies) is to arrange them on a **political spectrum** from left to right based on how they view the 'good society'.

- The further *left* an ideology, the greater emphasis it places on social and economic equality. The 'good society' is an equal society. Left-wing ideologies support a big role for government. A powerful government is necessary and desirable to redistribute wealth because society is inherently unequal. The 'good society' emerges from government intervention to spread and distribute wealth.
- Ideologies to the *right* emphasise liberty. The 'good society' is a free society. Right-wing ideologies argue for a smaller role for government. A small government is necessary to police safety and enforce contracts, but is an otherwise undesirable burden on individuals' ability to decide and act for themselves. The 'good society' emerges from the freedom of individuals to act in their own interests.

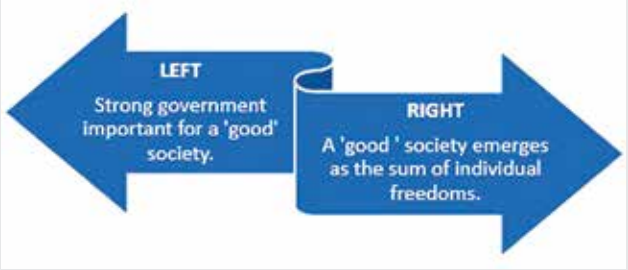


Figure 11.5 — The political spectrum.
Source: Nicol Davis, 2018

Political ideologies are often economic. For example, should government or private individuals own economic assets like factories, farms and banks? Should people keep what they earn? Or, should people get what they need?

Political ideologies can be social. For example, should same-sex couples be allowed to marry? The answer depends on a worldview based on values. Religious belief provides values that influence worldviews. Tradition is also an important consideration.

Political ideologies can also be communal or based on race or ethnicity. For example, nationalism is a political ideology based on the belief in the superiority of one's nation. Nazism is an ideology based on the belief in the superiority of a race. Some political ideologies are extreme and intolerant. They

Figure 11.6 — Adolf Hitler first outlined the anti-Semitic philosophies that were to become the hallmark of his government in Mein Kampf which was first published in 1925.
Source: Anton Huttenlocher, Mein Kampf in its first edition cover, 2006, Public Domain, <https://commons.wikimedia.org/wiki/File:Erstausgabe_von_Mein_Kampf.jpg> and <https://commons.wikimedia.org/wiki/File:Erstausgabe_von_Mein_Kampf.jpg#/media/File:Erstausgabe_von_Mein_Kampf.jpg>

> *The range of ideologies the two major parties offer encompasses the worldviews held by most Australians and, therefore, make partisan voting a natural political choice for most electors.*

are not pluralistic. The most extreme, such as Nazism and Communism, are incompatible with democracy because they are intolerant of competing ideologies.

Major political parties in Australia

Around 70 per cent of Australians vote for either the Australian Labor Party (ALP) or the Liberal Party of Australia (LPA). The range of ideologies the two major parties offer encompasses the worldviews held by most Australians and, therefore, make partisan voting a natural political choice for most electors.

The Australian Labor Party

The ALP was originally a democratic socialist party. It was formed by trade unions in the 1890s and is Australia's oldest political party. It invented the concept of 'party discipline' in which party members pledge to support party policy and vote as a party bloc in parliament. It also invented the idea of two related parts making up one disciplined political party — a parliamentary party and an extra-parliamentary

■ Figure 11.7 — Chris Watson, first leader of the then Federal Labour Party 1901–1907, and Prime Minister in 1904.
Source: National Library of Australia, Portrait of J. C. Watson, first Labor Prime Minister of Australia, c 1904, <http://nla.gov.au/nla.obj-136264386/view>; <https://en.wikipedia.org/wiki/History_of_the_Australian_Labor_Party#/media/File:ChrisWatsonBW_crop.jpg> and <https://commons.wikimedia.org/w/index.php?curid=61813852>

party.[3] This structure gave the ALP enormous resources and organisational strength that its opponents could not match. It also gave ALP supporters plenty of opportunities to participate and represent their own worldviews by joining the ALP and volunteering to help it win elections. With its superb organisation and parliamentary discipline, the ALP became a potent political force.

Democratic socialism is an ideology that requires a significant role for government. The distribution of wealth and opportunity in an unregulated society is viewed as unfair. The government's role is to redistribute wealth by nationalising[4] large sectors of the economy and imposing high taxes on the wealthy elite class in society. A comprehensive government run welfare system transfers wealth so there is greater equity between citizens. The attempts made by the Chifley ALP Government (1945–1949) to nationalise the banks is a good example of a socialist policy. Government regulation of prices and wages is another. The ALP has always aimed to achieve socialism through democratic processes and not by violent revolution, as happened in Soviet Russia.

The Whitlam ALP Government (1972–1975) was a short-lived, but transformative, government that created free healthcare (Medibank) and abolished tertiary education fees so that people from across society could go to university, not just the children of the wealthy. It withdrew Australian troops from the Vietnam War and was the first western government to recognise Communist China. This government passed the *Racial Discrimination Act 1975* and took the action to improve Aboriginal wellbeing by introducing the *Aboriginal Land Rights (Northern Territory) Bill 1976*. This bill was before parliament when the Whitlam Government was dismissed in November 1975.[5] Typically for a left-wing government eager to reform society, Whitlam used Canberra's law making and financial dominance over the states to increase his government's authority by centralising power in the national government. He was then able to make sweeping reforms in education and health, which are state residual powers. The Whitlam Government is a textbook case study of a left-wing socialist/social democratic, progressive government.

Today the ALP has virtually abandoned socialism and is now a social democratic party. **Social democracy** is further to the right on the political spectrum, but still views government as an essential agent to combat inequality. A social safety net in the form of a good welfare system provides a basic standard of living for those unable to support themselves. At the same time individuals are free to create businesses and wealth. Social democracy requires government intervention to achieve fairness. For example, the introduction of the National Disability Insurance Scheme (NDIS) by the Gillard ALP Government (2010–2013) is a contemporary example of social democratic policy.

The modern ALP contains a broad spectrum of left to centre-right internal **factions** representing traditional socialism (the Left Faction) all the way to contemporary social democracy (the Right Faction).

■ Figure 11.8 — Gough Whitlam, Prime Minister 1972–1975.
Source: National Archives of Australia, Personalities — Gough Whitlam, Leader of the Opposition, <https://commons.wikimedia.org/wiki/File:Gough_Whitlam_1962.jpg> and <https://recordsearch.naa.gov.au/SearchNRetrieve/Interface/DetailsReports/PhotoDetail.aspx?Barcode=11196671>

3 The parliamentary party, referred to as the Caucus, includes the members of the House of Representatives and Senators elected to parliament. The extra-parliamentary party is the component that supports electoral efforts with fund raising and organising. In the early ALP, these two parts were tightly bound, with the leaders of the extra-parliamentary party being the more powerful.

4 Government takeovers of large private industries, companies and banks; government ownership of the 'commanding heights of the economy'.

5 A modified bill, the A*boriginal Land Rights (Northern Territory) Bill 1976*, was introduced by the Fraser Liberal Government and was passed as the *Aboriginal Land Rights (Northern Territory) Act 1976* (the Land Rights Act).

Figure 11.9 — Today, the ALP has a spectrum of internal factions. *Source: Matt Golding, in Michael Smith News, 2015, <https://www.michaelsmithnews.com/2015/06/great-research-from-fairfax-media-on-labor-branch-stacking-and-bill-shorten-branch-stacker-says-i-ma.html> and <http://www.threefingers.com.au/gag.htm>*

When the ALP was a democratic socialist party up to the 1970s, its typical supporters were:

- workers in unionised industries like steel and manufacturing;
- the 'labouring class', also known as the 'working class';
- Irish Australian residents; and
- Catholic Australian residents.

After the Whitlam (1972–1975) and Hawke/Keating (1983–1996) governments — an era when the party was social democratic — supporters tended to be:

- working people of lower socio-economic status;
- progressives (people who valued the arts and culture, and academics);
- inner city (urban elites and professionals);
- migrant Australians; and
- younger Australians motivated by idealism.

The Liberal Party of Australia

Sir Robert Menzies was Australia's longest serving Prime Minister and a colossal figure in Australian political history. He founded the Liberal Party. He aimed to unite a group of small and unorganised pre-World War Two non-Labor parties into one single party. His new Liberal Party would try to match the organisational strength of the ALP.

To unify non-Labor parties Menzies had to appeal to a broad spectrum of social liberals and conservatives who had been loosely organised in parliament, but lacked a strong

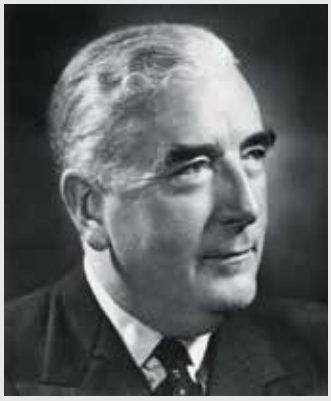


Figure 11.10 — Robert Menzies, Liberal Prime Minister from 1949 to 1966. *Source: Arthur Dickinson, Portrait of R. G. Menzies, Prime Minister of Australia, National Library of Australia, 1950s, Public Domain, <https://en.wikipedia.org/wiki/Robert_Menzies#/media/File:Portrait_Menzies_1950s.jpg> and <http://nla.gov.au/nla.obj-136264652/view>*

extra-parliamentary organisation. They shared one ideological commitment — a vehement opposition to early Labor's socialism. Menzies' first Liberal Party government was so anti-socialist it passed a law banning the Communist Party of Australia, a party more socialist than the ALP. In a landmark case, *Australian Communist Party v Commonwealth (1951)* 83 CLR 1, the High Court ruled the law unconstitutional.

The Liberal Party describes itself as a 'broad church' because of the range of 'anti-Labor' ideologies Menzies brought together as its foundation. Its wide range of worldviews makes it attractive to a large range of Australians. At the same time, it generates internal tensions which are hard for the party to manage. It has never quite matched the ALP's discipline because of the diversity of worldviews it contains within its 'broad church'. It is also more reliant on its parliamentary wing for policy development than the ALP. The Liberal's extra-parliamentary structure is less important in its success than the ALP's. Consequently, the Liberal Party relies heavily on competent leadership in parliament to instil discipline between its conservative and social liberal blocs. The Liberal Party is formidable when it has an effective leader able to bridge the ideological divide. When the leadership has been undermined, the party has been less effective, with internal divisions and conflicts reducing its electoral appeal and success.

The early Liberal Party was a social liberal party. **Social liberalism** emphasises the primary role of the individual in society. Individual enterprise is the best way to achieve social and economic outcomes, and the government could best support this by not over-regulating society and the economy. At the same time, social liberals recognise that not all individuals are equally capable or born with equal opportunities. Through no fault of their own, some people cannot provide for themselves. Menzies believed that no Australian should

feel ashamed of having to rely on government support if they genuinely needed help from the community.

Post-War Liberal governments, dominated by Menzies himself, used parliament to provide incentives for home ownership and to support the growth of a large middle class. The conservative desire for strong families overcame a liberal resistance to government interference in social and economic spheres of life. The following is an example of the tensions that can exist within the Liberal Party.

The contemporary Liberal Party is an economic liberal and conservative party. **Economic liberalism** is the belief that the government should deregulate the economy and let free market forces determine everything from prices to wages, to wealth distribution. People should help themselves and not rely on the government, which means reduced taxes and reduced government spending on welfare and services. This ideology inspired the Howard Government's 'WorkChoices' industrial relations legislation in 2005 — the *Workplace Relations Amendment (Work Choices) Act 2005*. The Turnbull Government's cut to income tax and company tax rates in 2018 are both policies influenced by the ideology of economic liberalism.

Conservatism is a social, rather than economic, ideology although it does have some economic aspects. Conservatives believe in preserving traditional social norms and institutions, such as marriage and religion. The Howard Government's 2004 decision to amend the Commonwealth *Marriage Act 1961* to prevent the recognition of same-sex marriage is an example of law inspired by conservative values. Prime Minister Abbott's decision to reintroduce 'Knights' and 'Dames' into the Australian honours system is another example of conservatism's appeal to traditional values.

Figure 11.11 — In 2018, the Liberal Party attempted to reduce company tax to 25 per cent for all companies.
Source: Matt Golding, 2017, <https://www.pollbludger.net/2017/11/21/essential-research-54-46-labor-17/comment-page-1/> and <http://www.threefingers.com.au/>

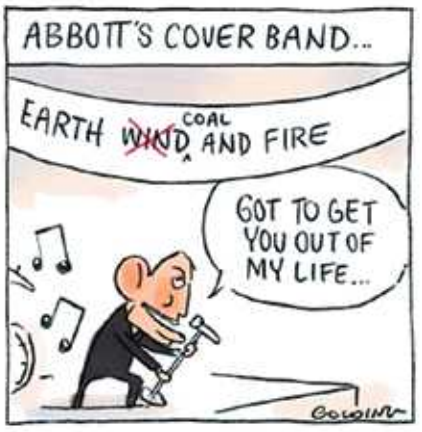


Figure 11.12 — Former Prime Minister Tony Abbott would like to see the government buy and operate coal-fired power stations.
Source: Matt Golding, 'Abbott's cover band…', 8 best responses to Abbott's war on renewables, 2015, <https://yes2renewables.org/2015/07/15/10-best-responses-to-abbotts-war-on-renewables/> and <http://www.threefingers.com.au/>

Despite being a 'broad church' or perhaps because of it, the modern Liberal Party has developed internal divisions in which social liberalism sits uneasily with economic liberalism and conservatism. So much so that in February 2017, conservative Senator Cory Bernardi resigned from the Liberal Party and formed the Australian Conservatives. His new party provided an alternative electoral choice for Australians who felt the Liberal Party was not conservative enough to represent them. In April 2017 the Australian Conservatives merged with the conservative, religious Family First Party (Family First). With the merger, Family First was absorbed into the Conservatives. However, this minor party was dissolved in 2019 and Cory Bernardi now represents South Australia as an independent Senator.

Recent policy ideas by conservative backbenchers, led by former Prime Minister Tony Abbott, illustrate these tensions. He and 20 other Liberal Party conservatives formed a parliamentary group called the Monash Forum (which also contains members of parliament (MPs) from the Nationals). This group wants the government to buy and operate coal fired power stations. As a policy, it seems more 'socialist' than 'liberal', but it draws on a conservative worldview of traditional regional communities based on coal mining.

The internal tensions within the Liberal Party boiled over when Malcom Turnbull was deposed as Prime Minister in late August 2018. Peter Dutton, a senior conservative figure in the party, led a party room revolt against Mr

Turnbull, a progressive social liberal. The leadership contest, which was primarily motivated by ideological differences among parliamentary Liberals themselves, resulted in Scott Morrison becoming Prime Minister. Not since John Howard's time in office has a Liberal leader been able to successfully unite the 'broad church' within the party for more than two or three years at a time.

From Menzies (1949–1966), through the years of various Liberal governments (Holt, Gorton and McMahon) to 1972, and the Fraser Government (1975–1983), the Liberals were a social liberal/ conservative party. Its supporters were:

- a conservative and growing middle class aspiring to home ownership and higher standards of living;
- small and medium size business owners;
- the wealthier upper class with substantial property ownership; and
- protestant Australians.

	Australian Labor Party	Liberal Party of Australia
Parliamentary Party Every member of the party in the House of Representatives and the Senate — they meet in 'party room' meetings.	Caucus led by either the: • Labor Prime Minister, when in government; or • Labor Opposition Leader, when in opposition. *Strict rules on changing the leader were agreed upon in 2013.	The Party Room led by either the: • Liberal Prime Minister, when in government; or • Liberal Opposition Leader, when in opposition. *Strict rules on changing the leader were agreed upon in 2018.
Discipline	Caucus members pledge to support the party. Intolerant of dissent (very strict discipline).	Members are expected to be loyal to the party. More tolerant of dissent (tight discipline).
Extra-parliamentary organisation Provides opportunities for participation and representation by ordinary citizens as party members.	Hierarchical: • ALP President; • National Conference (every three years) — decisions are binding on caucus; • state conferences; and • local branches based in suburbs and towns. The National Executive runs the party between meetings of the National Conference.	Hierarchical: • Liberal Party President; • Federal Council — decisions are non-binding on the parliamentary party; • state councils; and • local branches based in suburbs and towns. The Federal Executive runs the party between meetings of the Federal Council.
Centre of power	Historically, the: • National Conference and National Executive controlled policy, chose ministers and allocated portfolios. Contemporary: • More power held by the parliamentary leader and Caucus. • ALP Prime Ministers choose ministers and allocate portfolios.	Historically, the: • parliamentary party has always been the centre of power. Contemporary: • No decisions made by the extra-parliamentary party are binding on its parliamentary members.
Ideology	Historically: • Democratic socialism Contemporary: • Social democracy	Historically: • Social liberalism Contemporary: • Economic liberalism/ conservatism
Representation Provides opportunities for citizens to vote for a party with a worldview similar to their own and so have their worldview represented in parliament.	Historically: • working class; and • Catholics. Contemporary: • working families; • lower socio-economic people; • migrants; • inner-city professional elites; and • progressives.	Historically: • wealthy and middle classes; • small business owners; and • Protestants. Contemporary: • small business owners; • self-employed trades; • middle and upper socio-economic people; • mortgage belt suburbs; and • conservatives.
Pressure group support*	Pressure group supporters: • unions (ACTU); • welfare groups, e.g. Australian Council of Social Services (ACOSS); and • progressive cause groups, e.g. GetUp	Pressure group supporters: • Business Council of Australia (BCA); • Minerals Council of Australia (MCA); and • Australian Chamber of Commerce and Industry (ACCI).

Table 11.1 — Comparing features of the Australian Labor Party and the Liberal Party of Australia.
Source: Stephen King, 2018

From the time of the Howard Government (1996–2007) and throughout the Abbott/Turnbull/Morrison Government (from 2013), the Liberals were considered to be an economic liberal/conservative party. Supporters of these governments tended to be:

- small business owners;
- self-employed tradespeople (a growing class of former Labor supporters emerging from the diminished 'working class' — the product of economic change);
- the 'aspirational class' (not necessarily wealthy, but working hard to get ahead; the so-called 'Howard's Battlers');
- middle ring and outer suburbs (the 'mortgage belt' — including young families worried about jobs and interest rates, power prices and the cost of living); and
- older Australians motivated by conservative values.

Table 11.1 (previous page) provides a comparative summary of Australia's two major political parties.

Minor political parties in Australia

Of course, other parties exist beside the ALP and the Liberal Party.

As Australian society grew and diversified new constituencies emerged, often centred on issues such as the environment or immigration. New worldviews were emerging. These new constituencies desired representation in parliament. New political parties arose to meet the democratic needs of Australians for more electoral choice.

The Nationals

The National Party is an exceptional example of a minor political party with a very long history. As the Country Party in the 1920s, it represented people living in rural and regional Australia, which was a significant proportion of the population at the time of federation. While it originally had an agrarian worldview, today the National Party has a unique brand of **'agrarian social democracy'** mixed with **'economic liberalism'**.

Its electoral support is geographically concentrated in farming regions. With such concentrated regional support, it can and does achieve the absolute majorities necessary to win country seats in the House of Representatives. Because its electoral support is so concentrated, it is the only minor party

Figure 11.13 — Barnaby Joyce resigned as leader of the National Party on 22 February, 2018.
Source: Matt Golding, 2017, <http://loonpond.blogspot.com/2017/10/in-which-pond-heads-off-to-petulant.html#.Wzt83dIzZdg> and <http://www.threefingers.com.au/>

to consistently win more than one seat in the lower house. The Nationals won 10 seats in the House of Representatives in the 2019 federal election and four Senate seats, similar to their performance in the 2016 election.

Following the 2019 election, with only 67 seats of their own, the Liberal Party could not form government[6] without the Nationals' support. Together, they form a governing team known as 'the Coalition', putting the Nationals in a uniquely powerful position for a minor party. The National Party always has places in a Coalition Cabinet, with several key portfolios such as Resources and Agriculture, held by Nationals' ministers. When the Coalition is in government the Nationals' leader is the Deputy Prime Minister. Currently, this position is held by Michael McCormack.

Electors who vote for the Nationals are well represented in parliament and government. Their strength tends to reside in being able to win lower house seats, a rare achievement for a minor party.

Australian Greens

Environmental politics created an opportunity for a new political party when it became a political issue in the 1960s. Since then a new constituency emerged — young, educated

6 Seventy-six seats are required to form a government in the 150-seat House of Representatives. From 2019, the House will expand to 151 seats.

and mostly urban middle class professionals who care about the environment. The Australian Greens (the Greens) have become an influential third force in Australian politics by offering the ideology of **environmentalism** in addition to **social democracy** that represents this worldview.

The party was formed by environmental activists Bob Brown and Christine Milne. They united several state-based environmental parties and movements. The following parties/movements amalgamated to form the Greens, contributing a diverse range of ideologies to the new party:

- United Tasmania Group — an environmental group from the island state;
- the Nuclear Disarmament Party — a Western Australian party that won a Senate seat in the 1984 election; and
- an industrial left-wing movement in New South Wales (NSW) — a group which included far-left socialists.

With such diverse origins, the Greens have four strands to their ideology — and, thus, appeal to a range of Australian electors looking for representation for their left-wing worldviews:

- ecological sustainability;
- social justice;
- grassroots democracy; and
- peace and non-violence.

The Greens often achieve representation in the Commonwealth Parliament. Notably, they have been quite successful in the Senate, where quotas are lower and allow them to harness their broad support across each state and secure seats. The Greens have also managed to win one lower house seat consistently in the last four elections. Adam Bandt, the member for Melbourne, first won his seat in the House of Representatives in 2010, and was re-elected in 2013, 2016 and 2019. With electors also supporting them in other inner city urban seats in some progressive areas, the Greens have performed well contesting the two party preferred count against the ALP. However, they are yet to win more than the one lower house seat in an election. Ultimately, electors who vote for the Greens are well represented in parliament, particularly in the Senate.

Pauline Hanson's One Nation

Pauline Hanson's One Nation (PHON) party arose in the 1990s and then again in recent years to become a significant influence in the 45th Parliament. By offering **nationalist populism**, the party provides an alternative political choice to Australians who have become disillusioned with the major parties. Rapid social and economic change is disrupting their vision of traditional Australia, and they look to PHON to hold back the tide of change.

Figure 11.14 — The Australian Greens have often been able to influence government policy through holding the balance of power in the Senate.
Source: Alan Moir, 2011, <http://www.sauer-thompson.com/archives/opinion/2011/07/political-balan.php> and <https://twitter.com/moir_alan/>

Populism is not an ideology. Populists lack the coherent discipline of ideas that marks an ideology. They appeal to particular grievances and offer simple solutions that may be attractive to disillusioned electors. In times of rapid social, technological and economic change, many people may feel 'left behind' or disenchanted.

Populism's fundamental weakness is the lack of clarity guiding principled policy and decisions. Populist members of parliament swing with the public mood. While this ability to follow public sentiment offers representation to those citizens who prefer particular populist policies, it also makes the members difficult to predict in parliament.

Figure 11.15 — The election of PHON Senators is largely due to the populist statements made by its leader, Pauline Hanson.
Source: Alan Moir, Pauline Hanson's One Notion Party, 2017, <https://twitter.com/moir_alan/status/849812854479781888> and <https://twitter.com/moir_alan/>

PHON achieved four seats in the Senate of the 45th Commonwealth Parliament following the 2016 double dissolution election. However, this representation has dwindled as Senators have been disqualified by Section 44 of *the Commonwealth of Australia Constitution Act 1900* (the Constitution) or resigned from the party to sit as independents. Following the 2019 federal election, PHON has two Senate seats.

Australian Conservatives

Liberal Party Senator Cory Bernardi became disenchanted with his party under the leadership of Malcolm Turnbull who had moved the party away from the deep conservatism of former leader Tony Abbott. Bernardi broke away from the Liberals, but stayed in parliament to form the Australian Conservatives.

His party aims to provide electoral choice for **conservative** Australians who were alienated by the nationalist populism of PHON, yet not satisfied with the Liberal Party's social liberalism. Again, this party offers minority views a voice in the parliament, thus enhancing their representation.

Family First, a South Australian based social conservative party with a religious ideology was represented by one South Australian Senator in several consecutive parliaments. Family First merged with the Australian Conservatives in 2018. The Australian Conservatives was dissolved in 2019 and Cory Bernardi now sits in the Senate as an independent.

Liberal Democrats

The Liberal Democrats are a **libertarian** party. They believe in a minimal role for government and the maximisation of individual liberty. They are further right than the Liberal Party. David Leyonhjelm was the party's single Senator in the 45th parliament and there are no Liberal Democrats in the 46th parliament.

Other minor parties

Other minor parties of recent note include the **Nick Xenophon Team** (NXT). NXT was a South Australian minor party based on the personal popularity of its leader, Nick Xenophon, who became well known in South Australia as an anti-gambling campaigner and used his popularity to achieve a Senate seat. He formed NXT and succeeded in getting two additional Senators and one Member of the House of Representatives elected in 2016. He resigned from the Senate to run in the 2017 South Australian state election, but failed to win any seats in the state parliament. Following Nick Xenophon's departure from the Senate, NXT changed its name to the **Centre Alliance**. NXT was quite an influential party as it held the balance of power between the parties in the upper house. The Centre Alliance retained two seats in the Senate after the 2019 election. The votes of its Senators could be important to the passage of government legislation, but they do not hold the balance of power.

■ Figure 11.16 — The Palmer United Party was one of dozens of minor political parties in Australia.
Source: Alan Moir, 2014, <http://townsvillelabor.weebly.com/blog/category/pup> and <https://twitter.com/moir_alan/>

Other populist parties have come and gone. As noted above, populist parties lack a clear ideology and often rely on the personality of their founders. Their philosophical deficiency, absence of direction and policy inconsistency can cause electors to abandon them as quickly as they supported them. A significant recent example is the **Palmer United Party** (PUP). It achieved a lower house seat (Clive Palmer in the seat of Fairfax) and several Senate positions in the 2013 election, but disintegrated, losing all its representation when its MPs either lost their seats, joined other parties or became independents.

Clive Palmer revived his party in 2018, renaming it the **United Australia Party** (UAP)—a name with a long history in Australia. Its slogan, 'Making Australia Great' was borrowed from Donald Trump's 'Make America Great Again' election slogan of 2016. While Palmer's UAP appeared to share a brand of nationalist populism with PHON, it failed to win any seats in the 2019 election.

There are dozens of minor political parties in Australia. Most never win any seats in parliament. To be successful a minor party needs to have between five and 15 per cent electoral support, which is enough to win Senate representation in the upper house where the proportional electoral system is employed.

Political parties and representation

By offering ideological choice, the two major parties offer clear and easy options at election time. Australians can engage in elections by voting for one or the other political party. About 70 per cent of electors make this choice.

Electors do not have to get to know individual electoral candidates as individuals to find out if they share their same worldview. Instead, they can choose a candidate from the political party they prefer, trusting that the political parties have selected candidates that will uphold their worldviews. Voting for a party's candidate rather than an individual candidate is like choosing a 'ready-made' product. Partisan representation simplifies electoral choice.

> *The electoral system favours a 'centrist two party system' in the House of Representatives but in the Senate representation for minority worldviews and ideologies.*

Political choice and representation

Like any functional democracy, Australia has a multi-party system with a wide range of political choice offered by Australian political parties. The political spectrum in Australia has a 'pragmatic centre' where most electors tend to vote and where the two major parties need to locate themselves ideologically to win enough support to form a government.

Representation is enhanced in Australia by a wide range of electoral choices:

- Voters can better participate in elections as a result of the wide variety of choice on offer. They are not locked into a simple two party system; and
- there is a high probability that at least one major or minor party or an independent will offer the representation any particular Australian elector seeks.

Moreover, citizens can use their political freedoms of association and speech to join and support any political party they choose. Party membership enhances participation and representation for citizens who want more engagement than merely voting every three years. See Chapter 12 for more details about participation in the electoral system.

As a whole, Australian electors tend to be **pragmatic centralists**. The great bulk of them do not support extremist political ideologies and tend to use the ballot box to punish any party that strays too far to the left or right. They may vote for minor populist parties occasionally and have done so more frequently in recent elections. However, the electoral system favours a 'centrist two party system' in the House of Representatives, while proportional voting in the Senate provides representation for minority worldviews and ideologies in a powerful upper house.

Lastly, compulsory voting tends to reduce extremist views and tends to keep Australian politics in the centre of the political spectrum. Recent political events may be evidence of a resurgence of ideology as a guiding principle for both major parties. The deposing of Liberal Prime Minster Malcolm Turnbull by conservative forces within his own party, and the Shorten ALP Opposition's proposed policies tightening the tax laws for wealthy individuals and companies are key examples.

Partisan representation

Disciplined political parties brought with them a new form of representation — partisan representation. Partisan representation comes at the reduction of delegate and trustee forms of representation, but is not incompatible with these traditional models of representation.

In Westminster theory, MPs are the delegates or trustees of their constituents. In practice, they are partisans.

MPs do bring their constituents' issues to parliament, but today it is indirectly — through their parties to the parliament. Electorate issues are debated in the Labor Caucus and the Liberal Party Room, and get factored into these parties' final decisions. Party members will always (in the case of Labor) or almost always (in the case of Liberal) vote with their party on the floor of parliament. Perceptive students will appreciate that political parties and their representatives will have already taken into consideration the perceived interests of their constituents in developing their 'party line'. Therefore, elected representatives will be efficient in communicating to their electorates how the party policy will affect the people in each of their electorates locally.

Representation in government

In Westminster systems with an indirectly elected 'parliamentary executive', forming a government requires a majority of seats in the House of Representatives.[7] Voting as a party bloc ensures party policy is carried into law if the party is in government. The incentive to be united and disciplined is high.

Party discipline delivers two things that are useful if the aim is to represent supporters' worldviews and make law implementing an ideology:

1. the party stays in government because its majority is guaranteed; and
2. it wins every vote in the lower house.

Party discipline requires that party members support their party in the parliament. The result is executive dominance of the House of Representatives. Its legislative process, its procedures and its business are all at the will of the governing party. Perceptive students will recognise the value of party discipline in creating government dominance in a Westminster system.

Representation in opposition

The Opposition has two roles in the Westminster system — to:

1. hold the government to account using parliamentary procedures; and
2. present themselves as a viable alternative government.

When in opposition, a major party can rely on its extra-parliamentary organisation to provide financial, research and other sources of support. These resources help a party in opposition perform its Westminster role of holding the government to account.

The ALP has a well-developed extra-parliamentary organisation supported by a disciplined and well-resourced union movement, which is itself a significant pressure group. The union movement is also a good illustration of how individuals and groups can participate in the electoral process, though indirectly.

The Liberal Party has less developed extra-parliamentary support, but it is still the beneficiary of pro-business and other like-minded groups willing to support it in opposition.

7 This is in contrast to a directly elected 'presidential executive' as in the United States of America (US). As a consequence, the US system does not rely so heavily on party unity and discipline.

The parliamentary party, called Caucus for the ALP and the Party Room for the Liberals, can count on its extra-parliamentary executives, conferences, branch members and other supporters to help it represent opposing political views in parliament. An effective opposition party can therefore present itself as 'ready to govern' because, with the aid of its extra-parliamentary organisation, its policies can be developed in advance of an election.

Both parties hold national and state conferences/councils, where members of their extra-parliamentary parties (citizens) can meet to discuss issues and policy areas that may become a part of the party's platform in the lead up to the next federal election.

Representation — Women

One of the challenges for a democratic nation is achieving a representative reflection of the people themselves, and their demographics, in the representative and governing institutions, or the parliament and government. This is an element of mirror representation.

Women make up 51 per cent of the Australian population and so are, demographically, the majority. However, currently and historically they are underrepresented in both parliament and government. Over the last decade political parties have considered their approach to gender representation and have taken different approaches which have produced different effects.

A quota is a fixed or minimum number. A 'gender quota' is a way of ensuring a gender balance in a party's parliamentary membership. In 2015, the ALP increased its quota for female representatives. Its goal was 50 per cent female ALP representatives in parliament by 2015. The ALP has 46.8 per cent female representation in the 46th Parliament because of its gender quota. At the recent Victorian state elections (November 2018), the ALP had a landslide victory and the incumbent Premier, Daniel Andrews, announced that his new cabinet would be gender balanced, with 50 per cent women – the first in Australia.

The Liberal Party does not have a formal gender quota. Instead, it has the goal of 50 per cent female party representatives. In the 46th Parliament 26.4 per cent of Liberal MPs are women. In late 2018, the Liberal Party was struggling to retain its female MPs in the aftermath of the Turnbull to Morrison leadership change, with outspoken Liberal Member of the House of Representatives, Julia Banks, announcing that she would not re-

contest the 2019 federal election. However, upon an Independent, Prof. Kerryn Phelps AM, winning the blue-ribbon seat of Wentworth, Banks decided to withdraw from the Liberal Party and to join the crossbench herself, as an Independent. There has been much internal debate about how to achieve a gender balance in the Liberal Party, with some Liberal MPs suggesting a quota system should be adopted.

Within minor political parties there is a great variance in the number of women in the parliamentary party. The Greens, as the most progressive of all political parties, usually has a fair balance of men and women amongst their candidates and elected representatives. For other minor parties, gender representation is either not considered an issue or, if it is, their efforts to improve the representation of women is less successful.

Figure 11.17 — Former Minister for Foreign Affairs Julie Bishop is one of only 21 per cent of women in the Liberal party. *Source: Department of Foreign Affairs and Trade, Official portrait of Julie Bishop, Australian Minister for Foreign Affairs, CC BY 3.0 AU, <http://foreignminister.gov.au> and <https://commons.wikimedia.org/w/index.php?curid=51252200>*

Pressure groups — Interests and causes

People have particular interests and causes, as well as worldviews. Interests and causes are not like ideologies; they are not sets of mutually supportive, coherent and all-encompassing ideas. Rather, interests and causes have narrow aims.

Because they are not sets of coherent ideas, interests and causes do not provide answers to the big political questions in the way that ideologies do. Instead, they will have distinct objectives or goals to be achieved. Interests and causes have limited aims which advance benefits for either:

- a particular group; or
- the greater good of all.

Pressure groups are associations formed by individuals to pressure government and parliament to make decisions or laws advancing their interest or cause. They will involve themselves in the electoral process so they can influence who becomes the law makers.

By forming associations, people can cooperate to enhance their chances of success in representing their shared interests and causes. The aim of pressuring political decision makers (minsters, legislators and public servants) is to change actions in ways benefiting the **stakeholders**[8] who share the interest or cause. A stakeholder, in this case, is anyone who has an interest in a political decision. This could range from:

- farmers wishing to influence the legislation relating to the 'live sheep trade'; to

> *Pressure groups are associations formed by individuals to pressure government and parliament to make decisions or laws advancing their interest or cause. Because of this, they will involve themselves in the electoral process through which they can influence who becomes the law makers.*

- students marching on parliament to oppose the government's stance on climate change; to
- the Australian Medical Association (AMA) pushing to get all people held in detention on Nauru and Manus Island evacuated.

Figure 11.18 — The Australian Business Council is a powerful pressure group representing the interests of 'big business' in Australia. *Source: Matt Golding, 2017, <https://www.pollbludger.net/2017/11/21/essential-research-54-46-labor-17/comment-page-16/> and <http://www.threefingers.com.au/>*

8 Stakeholders are anyone, including individuals, companies, groups and others, who have an interest in a decision. They may be self-interested or interested for the sake of the community.

Interests and sectional pressure groups

Interests can be defined as narrow, self-focused concerns. They can include hobbies and sports, but these seldom motivate political action. It is when interests become economic or social that they can motivate political action.

Any economic, social or other activity where laws and regulations create winners and losers will tend to generate political participation. When pressure groups participate in the political sphere they aim to represent stakeholders with something to gain. Economic, industry or professional interests tend to motivate political participation. Some examples include:

- pharmacists, a professional group with interests in the regulation of medications;
- welfare recipients on government benefits and pensions, a socio-economic group with interests in welfare policies;
- business owners, an economic group with interests in corporate tax rates and business regulations; and
- mining companies, an industry with interests in mining taxes, royalty payments and environmental regulation.

Interests relate to sectors of society or the economy. In the examples above, welfare recipients are not stakeholders in corporate tax rates, and pharmacists would have little professional interest in the rate of mining taxes. They would only be concerned in the sectors in which they have a stake.

The representation of shared interests is what unites people to engage in political participation.

Pressure groups representing interests are called **sectional pressure groups**. Examples include:

- the Pharmacy Guild and the Pharmaceutical Society of Australia, which represent the narrow interests of the pharmacy sector;
- the Australian Council of Social Services (ACOSS), representing the interests of welfare recipients;
- the Business Council of Australia (BCA) and the Australian Chamber of Commerce and Industry (ACCI), which represent the interests of the business sector; and
- the Minerals Council of Australia (MCA), representing the interests of the mining sector.

Laws can create winners and losers. Winners and losers will organise themselves to protect the status quo or change the rules. All sectional pressure groups seek benefits for the group they represent. One way they can attempt to address this is through the electoral process, influencing who forms government and the composition of the parliament.

Their resources, organisational strength, expertise and access to power make sectional pressure groups very effective at representing sectional interests. Their ability to forcefully represent members' interests makes them very successful when attempting to influence political decisions of parliamentarians, government and electors.

Causes and cause based pressure groups

Causes have altruistic aims. **Altruism** means to sacrifice for a selfless benefit. Causes have principled aims which motivate people because they are good in themselves.[9] Altruistic people are motivated by a conviction that the cause they support is for the greater good of society, humanity or other species, and the Earth — not just themselves or any self-interested group.

Any moral, ethical or values issue where right and wrong is in dispute will tend to generate political participation. The aim of political participation where right and wrong is at stake is to represent a moral, ethical or values point of view in the hope of 'righting a wrong'. Issues such as human rights, protection of the environment, conservation of endangered species, and whether Australia should become a republic can motivate people despite them having little or no self-interest in the outcome. They believe the cause is 'good in itself'.

Altruistic people will act because they believe it is right to do so. Some examples of **cause based groups** include people concerned about:

- the environment;
- the rights of a particular group;
- endangered species;
- animal rights;
- religious values;
- political values;
- fairness and equality;
- community values; and
- many other general and specific causes.

9 Something that is 'good in itself' is intrinsically worthwhile; it is an 'end in itself'. Something that is 'good for a purpose' is extrinsically worthwhile; that is, it is only of value because it serves another purpose; it is a 'means to an end'. In moral philosophy, things which are 'good in themselves' have more worth than things that are 'good for a purpose'.

Causes may be narrow in focus, but they can have broad-based appeal. They may draw support from people from all walks of life. Supporters of causes can come from across the political spectrum, from lower and higher socio-economic groups, and members of different professions and industries. The broad-based appeal of causes can make groups representing those causes very influential during elections.

> *The representation of a common cause is what often unites diverse groups of people to engage in political participation.*

The representation of a common cause is what often unites diverse groups of people to engage in political participation.

Pressure groups representing causes are called **cause-based pressure groups**. Examples include:

- the Australian Conservation Foundation (ACF), representing the environmental conservation values;
- Australians for Marriage Equality (AME) and the Australian Christian Lobby (ACL), which represented the 'yes' and the 'no' causes respectively in the 2017 marriage equality postal survey;
- People for the Ethical Treatment of Animals (PETA), representing the cause of animal welfare;
- the Save Beeliar Wetlands group, which represented opposition to the Roe8 road project as an environmental and community cause; and
- the Australian Refugee Advocacy Network, which represents the cause of respecting the rights of asylum seekers and refugees.

Laws made in democracies reflect the dominant moral, ethical or value beliefs, but they can vary between different people, especially in diverse, multicultural and plural societies. The rule of law requires that everyone obeys the law even if they disagree with it, but some people will suffer a dilemma because of their perception of what they believe is right and wrong. People with strong beliefs in causes will therefore organise themselves so they can attempt to change the laws they believe are wrong. They may take political action through election campaigns by supporting political parties or Independent candidates who agree with their cause.

Figure 11.19 — The Giant Panda is one of many endangered animals that groups like the World Wildlife Fund was established to protect.
Source: Parkjisun, 'Panda', Noun Project, <https://thenounproject.com/search/?q=panda&i=912743>

Because they often lack resources and access to power, cause-based pressure groups are less effective than sectional groups at achieving change.

However, cause-based groups can be very effective if several factors operate in their favour. For instance, the public can become seized by an issue through powerful media imagery or perceptions of gross injustice. Occasionally, an issue triggers a response from parliamentarians who use their 'inside' access to other MPs and ministers to increase pressure. In 2018 images of Australian sheep suffering on ships bound for the Middle East were sufficient to mobilise mass support for groups like the RSPCA and their campaign to end the export of live sheep. Motivated by public concern and her own ethical objections, Sussan Ley, a Liberal backbencher in the House of Representatives, introduced a private member's bill to ban the trade. Ley's bill contradicted her party's position on the issue. Subsequently, Prime Minister Malcolm Turnbull reprimanded her, but she refused to back down. Her action in parliament raised the issue at the highest level of government. It might have been expected that this issue could have electoral repercussions for the Morrison Government at the 2019 federal election, but this was not the case. In May 2019, Sussan Ley replaced Melissa Price as the Minister for the Environment. Despite Ley's commitment to banning the live sheep export trade, as a minister in the newly elected Morrison Government, it is now unlikely that she will cross the floor to progress her private member's bill.

Current Australian migration policy dictates that if asylum seekers and refugees detained on Nauru — an independent Pacific island nation — arrived by unauthorised boat they will never be allowed to settle in Australia. They must be resettled in another country. In 2018

Figure 11.20 — The policy of the Commonwealth Government towards asylum seekers has motivated many people to pressure the government for change.
Source: Matt Golding, 2017, <https://www.refugeebuddies.org/cartoons?lightbox=dataItem-j9rv00wo> and <http://www.threefingers.com.au/>

a terminally ill Afghan Hazara refugee detained on Nauru was denied access to Australia for palliative care. The government insisted he be sent to Taiwan to receive adequate care until he died. In response to his plight, over 400 Australian doctors signed a letter to Peter Dutton, Minister for Home Affairs, demanding the government bring him to Australia to receive care while being supported by the Australian Hazara community. His case is an example of a perceived injustice that motivated many doctors to act as a cause-based pressure group, triggering public interest and pressure on the government. The government relented, and the man was brought to Australia and passed away, surrounded by his community.

In thinking about the development of this migration issue, it is worth noting that on the final day of parliament's 2018 sitting, Prof. Kerryn Phelps' private member's bill to bring all remaining detainees on Manus Island and Nauru to Australia for urgent medical treatment was delayed. Debate on this issue was postponed until February 2019, but it passed into law just before the federal election. The Morrison Government is determined to repeal the legislation claiming that it allows people who are criminals or are a security risk to enter Australia. However, since the election, the Minister for Home Affairs has already used his power under this legislation to prevent a detainee from coming to Australia, thus refuting the government's own argument about how the law works. At the date of printing the 'Medevac' law had not been repealed, its future passage relying on the vote of one Senator, Jacqui Lambie. Despite changing community perceptions on the plight of detainees leading into the 2019 election, it was not a significant factor in the outcome. For more details on this election see Chapter 12.

Occasionally, parliamentarians will represent a cause in parliament if their conscience motivates them. Alternatively, they may act as delegates for their electorate if an issue has become important to the people they represent. For example, cross-party **ginger groups** formed during the long fight to change marriage laws to allow same-sex marriage. A ginger group is a group of MPs, often from across party lines, who share a common cause that is unrepresented through partisan representation. Cause-based pressure groups can gain access to parliamentarians and ministers through ginger groups.

Hybrid groups

Some pressure groups represent both interests and causes. These groups are called hybrid groups.

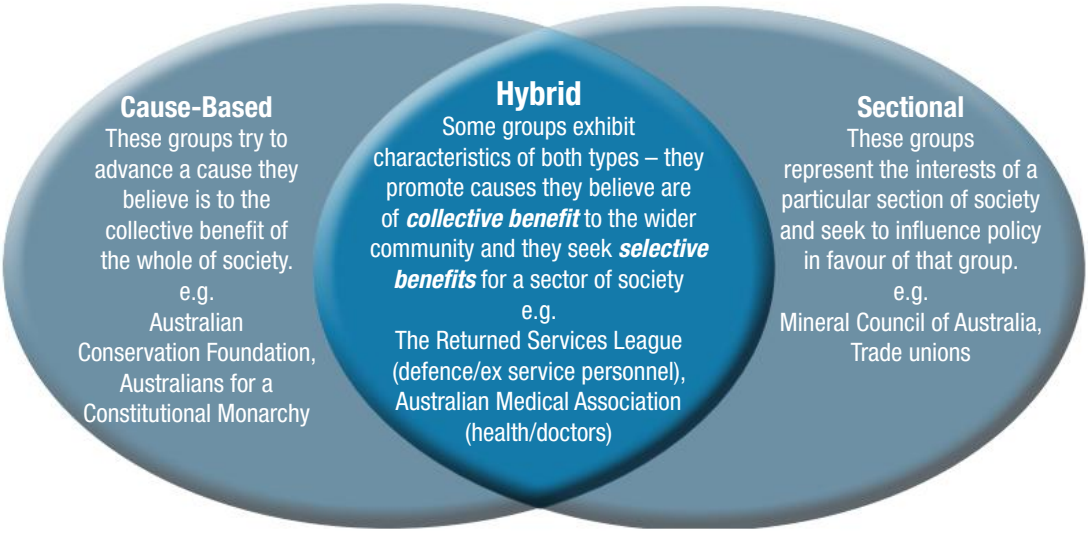


Figure 11.21 — Hybrid groups combine the characteristics of both caused-based and sectional groups
Source: Stephen King, 2018

It is common for a group representing a sectional interest also to regard its interest to be a public good. For example, the AMA is an influential sectional pressure group representing doctors. The AMA's interest is 'better conditions' and to 'promote the wellbeing of doctors'. The AMA's cause is improved public health. For example, it publicly argued for and supported the legislation proposed by Prof. Kerryn Phelps to remove all existing detainees from both Manus Island and Nauru offshore detention centres, citing critical physical and mental health issues. The AMA is a vocal pressure group that seeks to advertise its position on important health matters. They make a deliberate decision about what to emphasise and campaign about in the lead up to election campaigns.

Pressure groups and representation

Political parties represent worldviews by seeking election to parliament in the attempt to form a government. Pressure groups do not seek election to parliament; instead, they use a range of strategies to apply pressure on those with decision making power.

There are many ways to represent interests and causes. For example:

- raising awareness;
- using influencers;
- persuasion; and
- coercion.

Raising awareness

Groups can raise awareness through public action. Action during an election campaign can be effective at influencing electoral outcomes.

Rallies and marches draw media attention to issues of public concern. Advertising can foster public knowledge or understanding of an issue. Posting and sharing powerful imagery through social media platforms is a compelling contemporary method of raising awareness. Some pressure groups also produce 'how to vote' advice for their members and other citizens during election campaigns. All these strategies are used by pressure groups seeking to influence elections.

Sectional groups can use their significant resources to purchase **advertising**. Many advertising campaigns have successfully represented sectional interests in recent years. During the 2010 election campaign, the MCA funded a $26 million television campaign aimed at the Rudd Government's mining tax. After the 2010 election, the new minority Gillard Government abandoned the tax and replaced it with a less effective mining tax.

Cause-based groups use the appeal of their cause to motivate volunteers to take **direct action** through peaceful public protests. There are many local groups in regional Australia opposed to coal seam gas mining (fracking). Fracking is the process of injecting high-pressure water and chemicals underground to fracture rocks. This causes gas to be released, which allows it to be extracted. The downside is that it can also damage underground water supplies and farmland. Protests are commonly organised by groups whose causes are environmental protection, conservation of farmland and the value of community before industry. People have marched in the streets of their country towns carrying placards. Lock the Gate is an example of a pressure group protesting against fracking. A further illustration of direct action occurred on Friday 30 November 2018 and again in September 2019, when students from across the nation took the day off school to march up to their state parliaments in protest at the lack of government action on climate change. Climate change, animal rights and refugee pressure groups have been especially active in representing their causes and seeking to influence electoral processes in recent elections, and will likely continue to be as active in the future.

Influencers and media

Influencers are high profile people with the power to influence many others and, through them, governments and law makers. They are helpful to cause-based groups because they can generate huge public support in place of expensive advertising.

Celebrities or personalities known through traditional media such as film and television can lend their name and fame to a cause. Although not an election, the 2017 marriage equality plebiscite was nevertheless a 'popular vote'. In the lead up to the plebiscite and the passage of the marriage equality legislation many high profile individuals like Magda Szubanski, Ian Thorpe and Liam Hemsworth gave their support to the cause. Prominent musicians are also sometimes associated with a cause. In the 1980s, Australian band, Midnight Oil, composed many political protest songs which

■ Figure 11.22 — Andrew Denton acts as a spokesperson for the causal pressure group, Go Gentle Australia.
Source: Bjorn Bednarek, Andrew Denton, 2004, CC BY-SA 2.0, <https://commons.wikimedia.org/wiki/File:Andrew_Denton_(cropped).jpg> and <https://commons.wikimedia.org/w/index.php?curid=3949401>

became a part of the political landscape of the time. Today, there are many other channels through which charismatic or talented individuals can reach people, build celebrity status and influence voter choice at elections.

It is not uncommon for celebrities to endorse groups, parties or candidates in the period before an election. In November 2018, for example, Jimmy Barnes advocated for an end to the offshore detention of refugees and asylum seekers, saying it was 'not the Australian way'. Barnes timed his comments to coincide with pre-election pressure on the Morrison Government and the Shorten Opposition, hoping to influence them during a key phase in the electoral cycle.

Groups can publicise an interest or cause by having a well-known public figure as a spokesperson. Celebrities often lend their name and fame to a cause. Pressure groups can leverage a celebrity's public profile to promote their interest or cause.

Andrew Denton is a well-known Australian television presenter from Perth. Many years ago he watched his father die a slow and painful death. In 2016 he founded the cause-based pressure group, Go Gentle Australia to advocate for assisted dying laws. Go Gentle Australia was very actively engaged in advocating for the *Voluntary Assisted Dying Act 2017* (Vic). In August 2019, the West Australian Parliament introduced 'end of life' legislation. While the bill progressed quickly through the lower house, 350 amendments—including government sponsored amendments—were proposed in the upper house. As at the end of November 2019 debate in the upper house was ongoing. The bill will be subject to a 'conscience vote'. Go Gentle Australia is a good example of the power of a celebrity to advance an interest or cause of a pressure group.

Today, it is possible for people with no public profile to reach tens or hundreds of thousands, perhaps millions, of people very quickly through new media — social media.

Almost no one had heard of Wangkatjungka, and fewer still knew about Layangali and Nelson Bieundurry. In 2016 the Western Australian Government wanted to close down many remote aboriginal communities due to the prohibitive cost of providing services to such small numbers of people scattered across vast desert regions. Layangali Bieundurry and her brother, Nelson, live in the remote community of Wangkatjungka, a community threatened with closure. Despite very slow internet in the desert, Layangali and Nelson posted a single message on a Facebook page. By the end of the week, thousands of people across Australia were taking direct action, protesting in cities around Australia. Their message spread internationally and support came from Indigenous and non-Indigenous groups all over the world. The cause of preserving aboriginal peoples' connection to their land had surged around the globe through a social media post from a remote Australian desert community with a population of 200 relatively powerless citizens. The #SOSBLAKAUSTRALIA campaign went 'viral'. Before the 2017 state election, the Barnett Government had threatened to close remote communities because of the cost of providing them with services. After the election, the incoming McGowan Government negotiated with the Commonwealth for funding to support remote communities. Pressure from groups and individuals like Layangali and Nelson Bieundurry may have been a factor in the election.

New media can supercharge a cause and create influence in an instant.

Persuasion

Pressure groups try to persuade decision makers. A standard method is writing **submissions** to parliament. All types of pressure groups write submissions to parliament.

Parliament makes laws. In-depth public consultation often takes place when bills pass through the committee stage of the legislative process. Legislative committees receive public submissions from individuals and pressure groups putting their points of view, interests and causes forward for consideration by legislators. Submissions may result in amendments to bills and, thus, are an avenue through which pressure groups can represent their interests and causes in the law making process.

The National Security Legislation Amendment (Espionage and Foreign Interference) Bill 2017 received many submissions from groups such as Australian Lawyers for Human Rights

(ALHR) and the Australian Lawyers Alliance (ALA) concerned about the trend towards laws restricting freedom of the press and of speech. The bill was amended to protect freedom of the press in response to these persuasive submissions to the parliamentary committee.

Persuasion can also take the form of **direct lobbying**. Lobbying is advocacy through direct interaction with decision makers. Powerful sectional pressure groups often have direct access to ministers, politicians and senior public servants. They meet with them in ministerial offices or even in restaurants and at functions. High-level access through one-to-one meetings with decision makers is perhaps the most influential form of persuasion. However, it is only available to sectional pressure groups representing critical economic interests.

Coercion

Pressure groups can sometimes exert such immense pressure that governments buckle to their will.

Multimillion-dollar **advertising campaigns** at election time can result in changes of government. The Australian Council of Trade Unions (ACTU) launched what is perhaps the most successful political advertising campaign in recent history. It developed the 'Your Rights at Work' campaign to forward the interests of its membership. They were protesting against the unpopular Howard Government industrial relations policy known as WorkChoices.

Figure 11.23 — The Gillard government was forced to consider options other than Malaysia due to court action by a pressure group supporting refugee rights.
Source: Alan Moir, Now… the really real Julia Gillard, c 2010, <https://www.safecom.org.au/gillard-in-pictures.htm> and <https://twitter.com/moir_alan/>

Pressure groups may take **court action** to achieve their aims. Courts can make legally binding decisions that governments must obey. The Gillard government's plan to send asylum seekers to Malaysia was challenged on behalf of Plaintiff M70 and Plaintiff M106 by the Refugee & Immigration Legal Centre, a pressure group representing the cause of asylum seeker and refugee rights. The High Court found the Malaysia Solution to be in breach of Section 198a of the *Migration Act 1958*. The government was forced to abandon the policy. Migration policy, particularly in relation to asylum seekers, continues to be an issue and was a contributing factor to the failure of the ALP to regain election at the 2013 federal election.

Pressure group theory and democracy

There are two views on pressure groups and their impact on democracy. Some argue pressure groups are essential for the representation of interests and causes in a plural society where tolerance of diverse political positions is encouraged. Others argue pressure groups overrepresent dominant interests at the expense of the public interest.

Pluralism

Pluralist theory is based on the belief that a healthy democracy requires many competing centres of power. There is an engagement with others on equal terms and a willingness to understand other viewpoints.

In this theory, pressure groups are centres of power and they compete with each other to influence government. All have equal opportunities to represent interests and causes. They all have equal opportunities to influence voter behaviour and election outcomes.

The activity of many thousands of pressure groups in the political system is evidence of pluralism in Australia. There is undoubtedly a contest between many pressure groups (centres of power) to sway political decision makers who are elected to represent the public interest (neutral arbiters concerned only with the 'public good').

Corporatism

From a **corporatist theory** perspective, there are many groups, but only a few are influential. In other words, there is an inequality of power within the political system. Inequalities of power distort democracy by undermining the principles of equality of political rights and

freedoms. The equality of political rights and freedoms are essential operating principles of any democracy.

Sectional interests can become so powerful they can distort electoral processes with money and behind the scenes influence. Government ceases to be a neutral arbiter concerned with the public good. Instead, it becomes the tool of sectional interests. In the worst case, rule by powerful groups replaces majority rule, and democracy is reduced to a sham. We see this today in modern 'illiberal democracies' like Russia and Turkey. These countries have elections, but they rarely reflect the majority will. Instead, they are used to legitimise rule by an elite or an individual.

There are indeed extraordinarily powerful interest groups in Australia. The 'coal lobby' — a term used to describe collectively, a range of resource companies, wealthy mining magnates and business groups — has enormous influence over parliament and government. The lobby donates money to political parties, runs multimillion-dollar advertising campaigns during election campaigns, and funds 'research institutes' producing research that supports coal and coal mining and undermines arguments relating to climate change. The coal lobby also operates internationally, influencing multiple governments.

In the Australian context, both pluralism and corporatism help explain pressure group activity. Perceptive students will recognise the critical role of a free press in holding powerful groups and governments to account. In 2018 *The Guardian Australia*, a major news organisation, published a series of articles under the title, *The transparency project.* These articles traced the influence of money and power in Australian politics. Students are encouraged to use their political and legal inquiry skills to research this series of articles. It is a source of examples for pressure group influence and of the role of a free press in a democracy.

Conclusion

In Australia's democracy the government is determined by regular elections which allow non-violent contests and transitions of power between competing political parties. Freedom of speech ensures people can criticise or support those in power. A wide range of political parties provides electors with choice in representation in parliament. Electors may also have their interests represented by one of the many pressure groups operating in the Australian political system.

Summary

- Representation is a key concept in explaining the existence and operation of political actors—individuals, political parties and pressure groups.
- Political parties represent ideologies and worldviews. Their ideologies provide coherent guides to action in all areas of government. A political party is an association of people with a similar ideological outlook aiming to win seats in parliament and, in fact, to form government or influence law making.
- Political ideologies and the parties that represent them fall along a spectrum—called the 'political spectrum'—from left to right:
  - left-wing political ideologies, which emphasise equality and prescribe a bigger role for government in overcoming inequality and creating an economically fair and socially just society—socialism and social democracy are examples; and
  - right-wing ideologies, which emphasise individual liberty and prescribe a smaller role for government to allow individuals the freedom to make choices for themselves and live with the consequences of those choices—social liberalism and economic liberalism are examples.

  The Australian Labor Party and the Liberal Party of Australia represent left-wing and right-wing ideologies, respectively.
- A large range of minor and micro parties represent a great diversity of political ideologies and worldviews in contemporary Australia. The Senate voting system gives them a powerful voice in the political system. The Australian Greens (environmentalism) and One Nation (nationalist populism) are examples.
- Pressure groups represent interests and causes. They have a narrower focus than political parties and are made up of individuals who share common interests or causes.
  - Interests are narrow, self-focused concerns. Sectional groups tend to advocate for benefits exclusively for their group based on things they see as 'good for themselves'.
  - Causes are narrow altruistic aims. Many people are motivated by moral, ethical or values-based beliefs that guide them in judging 'right' from 'wrong'. Cause-based groups tend to advocate for societal and collective benefits based on things they see as 'good in themselves'.
  - Hybrid groups share characteristics of sectional and cause-based groups.

Activities

Short answer

1a) Define the term 'major political party' in reference to Australia.

1b) Identify **three** characteristics of political 'representation' in Australia.

1c) Discuss the consequences of partisan representation in Australia.

2a) What is meant by the term 'social liberalism'?

2b) Briefly explain the ideology of **one** minor political party.

2c) Compare the contemporary political ideology of the Australian Labor Party with that of the Liberal Party of Australia.

3a) What is meant by the term 'cross party ginger group'?

3b) Explain the difference between a sectional pressure group and a cause based pressure group, giving an example of each.

3c) Outline some of the tactics pressure groups use to apply pressure on those with decision making power.

Source Analysis

Read the source information below and answer the questions that follow.

> An open question: how much of the criticism of Gillard's leadership capacity and competence has been the cause of relentless attacks in some media and how much of the criticism reflects a latent misogyny in the Australian psyche? That the media, and especially the Murdoch press and the radio shock-jocks, have been complicit in a relentless attack on Gillard is beyond doubt. Muller makes the point that narrow focus reporting heavily influenced perceptions of Gillard, which, in turn was reflected in opinion polls that finally contributed to her replacement. While the radio talkback operators, such as Alan Jones, Ray Hadley and Chris Smith, were relentless in depicting Gillard in 'sexist, extremist and malicious ways' (Muller 2013) on a daily basis, the Murdoch press often replaced reporting with opinion.

4a) Define the term 'latent misogyny' as it applies in Australia.

4b) With reference to the source, and your own knowledge, outline two possible impacts of the media on the willingness of women to stand for election to Parliament.

4c) Discuss **two** advantages and one disadvantage of minor parties in relation to representation in Parliament.

4d) Evaluate the extent to which the major parties are representative of the Australian population in Parliament.

Essay response

5) 'Major, minor and micro parties combine to provide effective representation of the diverse voting population in Australia'. Evaluate the validity of this statement.

6) 'Pressure groups have the most influence on electoral processes in Australia.' Assess this statement.

Investigation & discussion

7) Investigate the rise of the minor party vote in Australia and the issues that they advocate for, including:

   7a) the political and electoral history of Pauline Hanson since 1996 with reference to her Maiden Speech to the House of Representatives, her prominence in Australian media, and as Senator and Leader of Pauline Hanson's One Nation;

   7b) the political and electoral history of Clive Palmer's Palmer United Party and United Australia Party;

   7c) the formation of the Australian Conservatives; and

   7d) the historical and contemporary political and electoral history of the Australian Greens.

   With reference to the above and your own knowledge, prepare a response to the discussion topic: 'all segments of Australian society are represented in the Australian political system'.

Participation – Individuals, pressure groups and political parties

Syllabus points:

- **political participation with reference to the role of political parties and pressure groups**

Participation in electoral processes

Democracies represent differences by enabling political participation. Political participation has the capacity to impact directly or indirectly upon representation.

In a liberal democracy, the individual is at the heart of political life, and rights and obligations are at the heart of participation and representation. Hence, individuals can participate:

- individually by:
  - voting in elections;
  - running as a candidate, an Independent, in an election;
  - working for an electoral commission;
  - initiating a court case to protect their political rights and freedoms or to uphold the principles of liberal democracy and fair elections; and
  - taking other forms of individual political action; and
- collectively through joining or supporting:
  - political parties; and
  - pressure groups.

Individuals, political parties and pressure groups are all **political actors**. That is, they seek to exercise their political rights and freedoms in a democratic system to either influence those elected representatives making decisions and/or to seize control of the decision making institutions themselves in order to represent the worldviews, interests and causes that concern them. Political actors have some political power and/or authority to have a significant influence on decisions, outcomes and representation.[1] Those with power include citizens acting as individuals and also those political groups formed by a collection of individuals — political parties and pressure groups.

Individuals — Participation

Voting in elections

Individuals in a representative democracy exercise their democratic power most obviously through their vote. Indeed, Australia's representative democracy is guaranteed by Sections 7 and 24 of the Constitution which ensure members of the Senate and House of Representatives are "directly chosen by the people". These constitutional provisions, along with the interpretations by the High Court, protect the integrity of Australia's democratic system.

In the 2019 federal election there was a record enrolment rate of 96.8 per cent.[2] In a testament to the importance of their political right to vote, 15.08 million citizens cast a vote. This was an increase of 0.88 per cent on the previous election of 2016. Despite both compulsory enrolment and compulsory voting, 1.32million voters still failed to vote thus disenfranchising themselves. Voters who vote informally, intentionally or unintentionally, are also disenfranchised.

Individuals, through casting their vote, ultimately determine which candidates will be elected as their representatives in the lower house and upper house electorates. Citizen ballots will determine which initiatives will be advocated

> *"In the 2019 federal election there was record enrolment rate of 96.8 per cent. [2] In a testament to the importance of their political right to vote, 15.08 million citizens cast a vote, however, 1.32million voters still failed to vote"*

for and pursued, as well as which policies will have a chance of passing through parliament as a result of the election outcome. Whichever way the majority result falls, and the subsequent composition of the houses of parliament, the policies of the successful governing political party and those with the balance of power will be those which have the greatest chance of implementation during the next term of office.

Candidature — As an Independent

Individuals often elect to run as Independent candidates in elections, particularly by-elections, though they are often unsuccessful unless they have a significant profile.

In 2018, as a result of the removal from office of Prime Minister Malcolm Turnbull and his subsequent resignation from parliament, a by-election was held in his 'blue ribbon seat' of Wentworth — with an existing 19 per cent margin for the incumbent Liberal party from the previous election. Both major parties nominated formidable candidates. However, when high

1 Wolfsfeld, Gadi, 'Political actors', INFOCORE Definitions, Interdisciplinary Center, Herzliya, 2015, <http://www.infocore.eu/results/definitions/>.

2 Australian Electoral Commission, 'Turnout by state', Tally Room, House of Representatives,https://tallyroom.aec.gov.au/HouseTurnoutByState-24310.htm.

Figure 12.1 — At the polling booth on election day
Source: https://www.aec.gov.au/media/image-library/files/voting/2016-pp-1-sml.jpg

profile Independent, Prof. Kerryn Phelps entered the race this created a new dynamic for the by-election. As a GP in the electorate for the past 20 years and as a self-funded candidate, she based her campaign upon the loss of the Turnbull-Morrison Government's integrity and their inaction on climate change as well as on LGBTIQ and refugee issues. As a result of a divisive campaign Prof. Phelps was successful in being elected as an Independent Member of the House of Representatives. The outcome of this by-election was to destabilize the government giving it only a minority hold in the lower house. The seat of Wentworth returned to the Morrison Government in the 2019 election.

Figure 12.2 Prof. Kerryn Phelps—former Independent Member for Wentworth, NSW
Source: <https://www.aph.gov.au/api/parliamentarian/008Z0/image> Reproduced with permission of Prof Phelps

In recent times, there has usually been three independents in the House of Representatives. In the 45th Parliament, for example, Cathy McGowan, Andrew Wilkie and Prof. Kerryn Phelps each represented the interests of their electorates and had an important vote on all motions before the house in the minority Morrison Government.

Working for an electoral commission

Individuals can work for the Australian Electoral Commission (AEC) or state commissions such as the Western Australian Electoral Commission (WAEC) during the periods of elections, by-elections or referenda. Individuals who seek to work for the electoral commissions must be non-partisan and apolitical — meaning they cannot be a member of a political party, play an active role in a political party or actively engage in political discussion during the course of their employment.

> *"The High Court determined this legislation to be unconstitutional because it breached the principle of representative government as it restricted the ability for the MPs to be 'directly chosen by the people'."*

The participation of citizens in the administration and delivery of the electoral processes reinforces confidence in the integrity of the democratic

process. The participation of ordinary citizens in the process of allowing citizens a free and fair vote provides assurance that the votes are counted and recorded according to the rules of each of the electoral systems. This, in turn, provides for greater transparency and trust in the democratic representatives and institutions they are elect to.

Initiating court cases

Court cases can be a mechanism for participation of individuals in the political and legal system — to seek representation and also participation. An individual may only initiate a court case when they have standing — grounds to take legal action due to their being affected by the alleged wrong. Court cases that challenge electoral processes demonstrate the power of individuals to effect change in the electoral process, especially those heard in the High Court of Australia.

> *Individuals may make submissions to the Commonwealth Parliament or its committees that may be inquiring into or proposing changes to electoral law or procedures as well as to the AEC when they are reviewing electorate boundaries and allocations.*

The case of *Vicki Lee Roach v Electoral Commissioner (2007)* HCA 43 involved **Vicki Lee Roach** who was serving a six-year prison term for serious offences including conduct endangering persons and negligently causing serious injury. She sought to challenge the electoral change brought in under the Howard Government with the passage of the *Electoral and Referendum Amendment (Electoral Integrity and Other Measures) Act 2006*. This change made all persons serving a prison term ineligible to vote in a federal election, thus disenfranchising a significant proportion of the Australian electorate. The High Court determined this legislation to be unconstitutional because it breached the principle of representative government as it restricted the ability for the MPs to be 'directly chosen by the people'. It also placed a more prohibitive limit on voting than that imposed for those who stand for parliament — which you can do if you have been found guilty of an offence carrying a penalty of less than one year. With the amendment ruled invalid, the law reverted to the previous version — that prisoners serving a term of less than three years were eligible to vote in federal elections. So, whilst Vicki Lee Roach won — and many prisoners regained their right to vote — she did not get to vote herself. This affected the electoral process as it influenced who has the franchise and can, therefore, participate in choosing our members of parliament.

Other political action

In the lead up to elections, the current representative and nominated candidates can be particularly responsive to the interests, views and issues of each elector and electorates broadly. MPs and candidates, as well as their representatives, will door knock the electorate, seeking to hear from electors.

Each member of parliament has an electoral office within their electorate, and a reasonable amount of time is spent within these offices dealing with emails, phone calls and direct contact with members of their constituency. **Direct contact** with their local MP is one way for individuals to participate by indicating issues that are prominent within the community, and to help with their MPs electoral campaign in the lead up to the next election.

Individuals may choose to **petition** their parliament. Petitions provide an indication of issues that arise in the community in the lead up to an election campaign. Individuals who are extremely passionate about a particular issue can initiate a petition, collect signatures and pass this on to their MP to be tabled in parliament. Over recent years, there has been greater acknowledgement by the parliament of petitions, with an increase in the number of ministerial responses to them. While petitions are used by a wide variety of pressure groups and individuals to initiate change in the political system, there is little evidence that this form of political action results in real change, except in a few cases.

Individuals may also make **submissions** to the Commonwealth Parliament or its committees that may be inquiring into or proposing changes to electoral law or procedures. They may also make submissions — suggestions and objections — to the AEC when they are reviewing electorate boundaries and allocations. In reality, submissions of this type are generally made by experts in the field, such as psephologist, Antony Green, local councils and current members of parliament. Apart from

these experts, few individuals utilise this option to participate in the design or modification of electoral processes. This type of participation is illustrated by the submissions received when the Western Australian electoral redistribution was declared in 2016. The Western Australian Electoral Commission received 27 submissions and 28 objections. Thus, the process allowed these individuals to participate in the process of assigning electoral boundaries.[3]

Political parties — Participation

The primary goal of political parties is to be elected to a house of parliament — to form government or play a role in the legislative process. Major political parties are capable of achieving a majority in the lower house, whilst minor political parties are capable of winning seats in the lower and upper houses with the hope of exercising influence through important votes. It is with that in mind that political parties undertake all actions they can to encourage participation of citizens in the political party and to persuade citizens to vote for them at elections. The political party with the most power heading into an election is the party that forms government at the time — as it is the Prime Minister who holds the power to call the election and advise the Governor-General to issue the writs for an election.

Citizens can also participate in the electoral process through political parties by joining either of the major political parties or minor parties. Roles can include assisting the party by volunteering during election campaigns and on election days, where party members can hand out 'how to vote' cards or act as scrutineers at different polling booths. However, declining party membership is a phenomenon across the democratic world, including Australia. In the past, Australia's political party membership was much higher than it is today. All parties, especially the major parties, are trying to re-engage Australians by encouraging membership.

Candidature — As partisan

For highly engaged citizens, promotion through a party's rank and file can result in a party member being pre-selected as a candidate. From there, they can participate in elections as their party's candidate for an electorate in the Senate or House of Representatives. Then they have a chance of being elected to parliament themselves, as a partisan representative.

At the 2016 double dissolution federal election there were 57 political parties registered with the AEC who were eligible to **stand candidates**. These parties contributed the vast number of the 994 candidates for 150 House of Representatives electorates and the 631 candidates for the 76 Senate seats. The candidates that political parties nominate — and their qualifications, experience and local engagement, together with how well they are known to the electorate, all affect their likelihood of success. In some cases, the gender, race, ethnicity, religion, sexual orientation and age may also factor into some electors' decisions on who to vote for and, most decidedly, affects the demographic composition of the parliament. This, in turn, affects the extent to which Australia achieves mirror representation.

> *Political parties with representation in the Commonwealth Parliament can use their power and influence to try to amend electoral laws and procedures that govern elections.*

Parliamentary strategies

Political parties with representation in the Commonwealth Parliament can use their power and influence to try to **amend electoral laws and procedures** that govern elections. This has been occurring since the creation of the Commonwealth as elected representatives and political parties created, amended and administered Australia's electoral system. The adoption of first past the post, preferential voting and single transferable voting proportional representation systems, as well as the introduction and subsequent removal of group ticket voting, all influence how elections are conducted. Equally, the determination of who is able to vote is also critical, with the introduction of compulsory enrolment, compulsory voting, the extension and limitation of the franchise,

> *The passage of Commonwealth Electoral Amendment Act 2016 had considerable impacts on how electors cast their vote and on the outcome of subsequent federal elections.*

3 Australian Electoral Commission, 'Steps in the redistribution process', Western Australia (WA) federal redistribution, 2014 redistributions, <https://www.aec.gov.au/Electorates/Redistributions/2014/wa/index.htm>.

and enrolment time-frames or identification requirements for electoral integrity also affecting electoral procedures. Changes to the parameters of the electoral system and the franchise are fundamental to determining which political parties or individuals may be elected.

As a result of this, political parties have sought and will continue to seek to influence the electoral system to improve its integrity or to allow it to act in their favour. Many governments and minor political parties of all political persuasions have proposed to amend or have changed the electoral processes in some way since 1901. Perceptive students will recall Chapters 9 and 10 — and their discussion of how each electoral system affects the representation achieved in a representative democracy.

Most recently the *Commonwealth Electoral Amendment Act 2016* introduced by the Turnbull Government significantly affected the electoral processes in Australia. The Act sought to:

> *implement a partial optional preferential voting system above the line for Senate elections, including instructing voters to vote for at least six parties or groups in their order of preference; abolish group and individual voting tickets; remove the ability of an individual to be the registered officer or deputy registered officer of multiple registered political parties at the same time; enable political party logos to be printed on ballot papers for the House of Representatives and the Senate; and make technical amendments.*[4]

This Act was passed in the House of Representatives with members agreeing to the nine government and three Australian Greens amendments made in the Senate. The passage of this bill had considerable impact on how electors cast their vote, and the outcome of the subsequent 2016 federal election and those elections to follow. The Liberal, Nationals and Greens influenced and supported the bill's passage through both houses. It can be argued this legislation increased the likelihood of well-known political parties being elected whilst decreasing the opportunities for other political parties or micro parties to be successful. Alternatively, it can also be argued that the parliament was responding to valid concerns about the integrity of the 2013 federal election results in the Senate as a result of the election of numerous micro party candidates through the gaming of preferences. The reform placed the power of the vote back in the full control of the elector.

4 Parliament of Australia, 'Summary', Commonwealth Electoral Amendment Bill 2016, <https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=r5626>.

As previously noted, Australian **governments make changes to the franchise** — and have done so in the past — by restricting the vote to prisoners (as in Roach 2007) or by reducing the time period in which to enrol once an election is called (as in Rowe 2010 discussed below). Both of these proposals were subsequently struck down once challenged in the High Court as unconstitutional. These court decisions create important precedents and serve to limit the extent to which parliament may make changes to electoral processes to protect the representativeness of our Parliament. However, these decisions do not remove parliament's ability to make changes to electoral law and procedure in the future.

Current proposals by the Greens to extend the franchise to 16- and 17-year olds, if passed, would no doubt empower young people to participate in our liberal democracy. Sceptics may comment that such an initiative would most likely benefit left-wing political parties such as the Greens and Labor. Those proposing such change may, indeed, stand to benefit from it the most.

> *Political parties seek to make preference deals with other parties where possible to amplify their chance of success.*

Equally, political parties may also make **submissions to parliamentary committees** inquiring into or proposing changes to electoral law or procedures. Certainly, these political parties — if they have representatives in the parliament — may be actively contributing to a committee inquiry, such as the Joint Standing Committee on Electoral Matters (JSCEM) which reviews every federal election after it is concluded. As partisans, the political party representatives can represent the views of the party and contribute to the committee report when it is released.

Political parties also actively make submissions to the AEC when they are reviewing electorate boundaries and allocations. Major political parties are particularly active in this regard and the AEC has a challenging task to re-draw boundaries in a way that does not advantage or disadvantage political parties in an unfair way.

Preference guidance and affiliations

As a result of our compromise/hybrid electoral system, political parties in Australia also seek to influence the distribution of preferences. Major and minor political parties engage in **preference agreements** to bolster their chances of being elected in both houses. For example, the Nationals and Liberals often cross-preference each other's candidates, much like the Greens and the Labor Party, because they share similar ideologies and worldviews. Political parties then seek to make preference deals with other parties where possible to amplify their chance of success.

Because of the 2016 changes to the *Commonwealth Electoral Act 1918* preference deals have less direct impact on electoral outcomes. In the Senate, political parties no longer control the flow of preferences — this rests entirely with the voter. Preference assignment in the House of Representatives has always been in the hands of the voter. However, how to vote cards — which suggest to electors how to cast their vote — are influential in helping electors decide who to number on their ballots. Depending on the voter and their level of engagement and confidence in the political and electoral systems, they may or may not choose to follow the how to vote cards created by the political parties. See Table 12.1 for the effect that amendments to the Commonwealth Electoral Act 1918 had in the Senate in the 2019 election.

Political parties may also choose to form **alliances or coalitions** — prior to or subsequent to an election. These affiliations can influence how electors vote and may increase or decrease the probability of candidates being successful or the major parties winning government. The minority Gillard Government made an agreement with the Greens and some Independents to form government following the 2010 federal election. This agreement or affiliation, made necessary by the 2010 hung parliament result, impacted the governing processes of the Gillard Government and would have played a factor in the subsequent defeat of the Gillard-Rudd Government in 2013. In the 2017 Western Australian state election, the preference deal between the Barnett Government and the One Nation party was attributed with undermining the campaign of both political parties, resulting in the underperformance of each party compared with expectations, and the defeat of the Coalition. Rather than forming a temporary alliance, the Liberal Party and the Nationals are often in coalition, a fact known to voters both prior to and following an election. Perceptive students will note that alliances and agreements tend to be temporary, whereas coalitions often are long-lasting and predictable to electors.

Campaign strategies

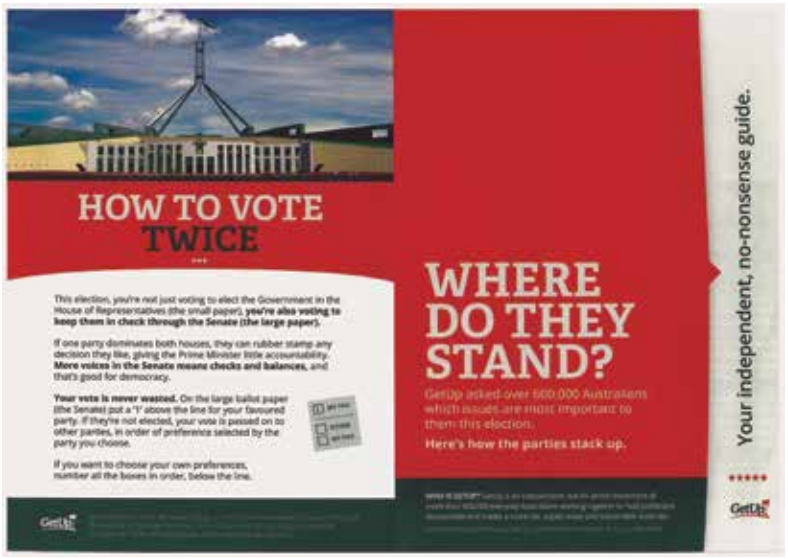
Prior to and during an election campaign political parties also seek to engage the community. They utilise numerous methods, including advertising, social media, direct community engagement through door knocking and community events, as well as policy announcements to solicit the support of citizens. Since 2007, political parties have also reconsidered their leadership prior to an election. Each of these strategies increase electors' understanding of what each political party will seek to do if elected and how they will represent them.

An example of a minor political party trying to exert influence through advertising is Clive Palmer's UAP in late 2018. The party was running a one and a half page advertisement in the format of a letter to the citizens of Western Australia, highlighting what UAP could do for the state and the nation. This very large yellow coloured advertisement was run in the major state newspapers across Australia for several weeks toward the end of 2018, in the lead up to the next federal election. Further, the UAP also funded large billboards in several prominent locations around Perth.

Students are required as part of the Unit 2 syllabus to study a recent election and the 2019 election provides an opportunity to look at contemporary examples of political party strategies at play and consider their impact. See Table 12.1 and the section on the 2019 Australian General Election for further information.

Court cases

Political parties have used legal action at times to try to prevent changes to legislation and to electoral processes. In *Day v Australian Electoral Officer for the State of South Australia & Anor (2016) HCA 20,* South Australian Family First Senator, Bob Day, supported by Tasmanian Senate candidate Peter Madden, also from Family First — now merged with the Australian Conservatives — challenged the validity of the *Commonwealth Electoral Amendment Act 2016*. They both argued that the amendments provided for ways of voting that were contrary to the sections 9, 7 and 24 of the Constitution and impaired the implied freedom of political communication and the system of representative government in Australia. Their case was unsuccessful, with the High Court



■ Figure 12.3 — 'How to vote' advice handed out by GetUp in the 2013 Federal election. GetUp have continued to advise members and the general public on the extent to which policies of political parties reflect the values of their pressure group.
Source: GetUP, 'How to vote twice. The GetUP guide to voting on the issues', 2013.

unanimously upholding the amendments to the *Commonwealth Electoral Act 1918* concerning the new form of the Senate ballot paper and the process for marking it. This ultimately meant that the form of optional preferential voting introduced in 2016 will remain valid and continue to determine the electoral process used in federal elections. While in this instance judicial interpretation was unfavourable to Family First, the Communist Party did see success through their own case[5] in the 1950s, which continued to allow them to participate in Australia's political processes over the next half century.

Pressure groups — Participation

Pressure groups utilise similar strategies of raising awareness, influencing, media, persuasion and coercion when participating in the processes of an election. The notable difference is that the goal is dual — to represent their members and to influence electors and, therefore, the outcome of an election.

Since its foundation in 2004, the most effective and influential pressure group in Australia would have to be **GetUp!** GetUp is an internet based pressure group with well over one million members focusing on values "in the fields of Environmental Justice, Human Rights, Economic Fairness and Democratic Integrity".[6] It has the capacity to organise mass email campaigns, electronic petitions, crowd-sourced funding and volunteering to put tremendous pressure on government law makers. It has proven itself a powerful force in modern Australian elections.

Electoral pressure

Electoral pressure involves pressure groups informing the community about the issues that concern them in the lead up to or during an election campaign. This can take place through marginal seat campaigns or advertising campaigns, and can influence how electors perceive candidates and political parties for election. It can, therefore, impact on who is elected as well as which political parties form government. Further, such action by pressure groups can result in policy announcements by political parties during election campaigns to address concerns raised by pressure groups.

In the 2016 federal election, GetUp successfully unseated Liberal MP Andrew Nikolic from the Tasmanian seat of Bass. GetUp sent ten paid staff and 80 volunteers to polling booths in the seat of Bass on election day. They spent approximately $300,000 on "TV and billboard advertising, phone calls, door-knocking and how-to-vote cards".[7] Paul Oosting, the national director of GetUp stated that they were broadcasting the "'clear facts' about cuts to health, education and renewable energy supported by Mr Nikolic".[8] The campaign was

5 This case is the Australian Communist Party v Commonwealth (1951) 83 CLR 1.

6 GetUp, 'Who we are', About us, <https://www.getup.org.au/about>.

7 Morton, Adam, 'Election results: Abbott-backer Andrew Nikolic blames GetUp! for swing that cost him seat of Bass', The Sydney Morning Herald, 2016, 4 July 2016, <https://www.smh.com.au/politics/federal/election-results-abbottbacker-andrew-nikolic-blames-getup-for-swing-that-cost-him-seat-of-bass-20160704-gpy38y.html>.

8 Morton, Adam, 4 July 2016.

largely enabled by support from its members, donating on average $18 each, an illustration of individual involvement in the electoral process. Mr Nikolic, himself, blamed GetUp for his loss, claiming they deceived the electors they spoke to in a "dishonest, nasty, personal campaign".[9] GetUp announced it would also target other seats during that election. Notably, in the seat of Mayo (South Australia) where they aided in the removal of former Liberal minister, Jamie Briggs and the success of the NXT candidate, Rebekha Sharkie.

> *During the 2007 federal election the ACTU also combined an advertising campaign with a marginal seat campaign in 24 electorates around Australia.*

GetUp's electoral targeting of Home Affair's Minster Peter Dutton in his Queensland electorate of Dickson was unsuccessful. Nevertheless, the election result in Mayo demonstrates a real effect from the participation of a pressure group in the electoral process. The action of GetUp influenced the decisions of electors when casting their votes, which ultimately affected the candidates elected to the federal parliament to represent their electorates.

More recently, in November 2018, **Advance Australia**, a centre-right pressure group was created in opposition of the more left-wing pressure group, Getup. A GetUp representative was quoted saying:

> *A group of wealthy arch-conservatives just set up a new organisation to counter the people power of GetUp members. Their goal is to reach 1 million members and have people at polling booths right next to GetUp members. The new group is out to defend tax loopholes for the wealthy and protect hard right, coal-backing politicians like Peter Dutton and Tony Abbott from our grassroots campaigns.*[10]

The creation of Advance Australia as a counter-weight to GetUp perhaps illustrates the success that the pressure group is having in representing their members and in participating in both the political system and the electoral system. GetUp is confident that despite the wealth and access to resources that this new pressure group may have, the fact that so many people from all walks of life believe in and support GetUp means they will continue enjoying great success in influencing politics in Australia through the participation of motivated individuals.

The **Chamber of Minerals and Energy** (CME) in conjunction with BHP and RioTinto dedicated $4.3 million dollars waging a campaign against the Western Australian Nationals and its former leader, Brendan Grylls. Their single issue campaign against his proposed increase to lease charges for iron ore saw the most expensive non-political party campaign in Western Australian history. Ultimately, Mr Grylls was defeated in the election which heavily targeted his electorate of Pilbara. New Nationals leader, Mia Davies described the campaign as a "serious and deliberate intervention into the political process by a vested commercial interest, the size and likes of which has never been witnessed before in WA".[11] This assertion further demonstrates the influence that pressure groups can have in effecting the decisions of electors when they cast their vote.

Multimillion-dollar **advertising campaigns** at election time can result in changes of government. The **Australian Council of Trade Unions** (ACTU) launched what is perhaps the most successful election-influencing campaign in recent history with an $8 million dollar television, radio and print advertising campaign. It developed the 'Your Rights at Work' campaign which targeted the unpopular Howard Government industrial relations policy known as WorkChoices. Furthermore, during the 2007 federal election the ACTU also combined this with a marginal seat campaign in 24 electorates around Australia.

The advertising and marginal seat campaign is credited with shifting public opinion and contributing to the defeat of the Howard Government in the 2007 election. It led to the defeat of 21 of the 24 coalition candidates in the marginal seats targeted, with a recorded three per cent higher swing than other parts of the country. It also led to the defeat of then Prime Minister Howard who became only the second Prime Minister in history to lose his own seat. In 2018 the ACTU organised the 'Change the Rules' campaign, hoping to influence the outcome of the 2019 election in a similar way.

9 Morton, Adam, 4 July 2016.

10 Benson, Simon, 'GetUp faces conservative rival', The Australian, 2018, <https://www.theaustralian.com.au/national-affairs/getup-faces-conservative-challenger-advance-australia/news-story/eb0e92c31377a790ea8902d4bfb08f63>.

11 Caporn, Dylan, 'Mine lobby spent $4.3m in Grylls war', The West Australian, 29 July 2017, <https://thewest.com.au/news/wa/mine-lobby-spent-43m-in-grylls-war-ng-b88551731z>.

Court action

Pressure groups may take **court action** to achieve their aims. GetUp has been effective in influencing electoral processes through two court cases.

In ***Rowe v Electoral Commissioner (2010)*** HCA 46, Shannen Rowe and Douglas Thompson challenged the Electoral Commissioner (on behalf of the government) in relation to the amendments to the *Commonwealth Electoral Act 1918*. The Howard Government had reduced the time period in which people could enrol to vote to the day of the issuing of the writs, and reduced the time available to alter their enrolment to the end of the third day following the issue of the writs. Previously, new electors and electors changing their enrolments had seven days from the issue of the writs to fulfil their enrolment. Because the case was initiated and funded by GetUp member contributions, it is considered to be the action of a pressure group. However, it was necessary to identify appellants with standing to proceed. Shannen Rowe had turned 18 years old, but failed to enrol to vote, whilst Douglas Thompson was enrolled to vote, but at an old address, meaning he could not vote for a representative in the electorate in which he currently resided.

> *The Rowe decision meant up to 100,000 additional citizens were able to vote in the 2010 federal election.*

The High Court found by a four to three majority that the amendments were unconstitutional, due to Sections 7 and 24 of the Constitution, thus reinforcing an implied right to vote. The law therefore reverted to its pre-amendment state. This meant up to 100,000 additional citizens were able to vote in the 2010 federal election, namely those who had already enrolled or transferred their enrolment within seven days of the issue of the writs. This required the AEC had to produce a supplementary electoral roll. Following the election of the Rudd Government the Commonwealth Parliament passed a series of laws to codify the decision into statute once again.

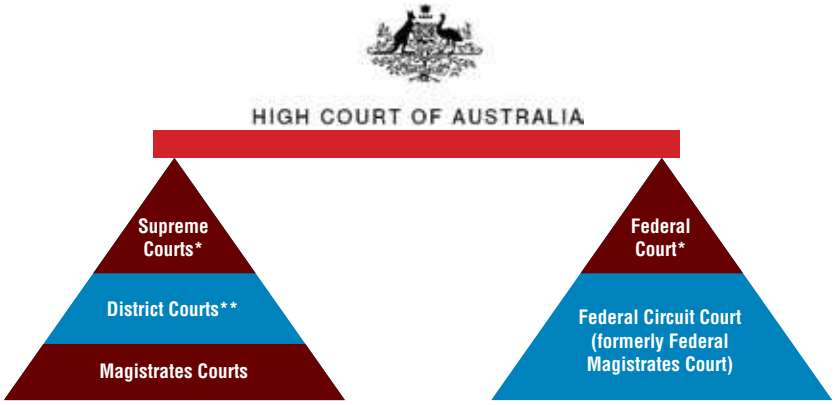
In ***GetUp Ltd v Electoral Commissioner 2010*** FCA 869 the Federal Court of Australia challenged whether electronic enrolment was consistent with the *Commonwealth Electoral Act 1918* and the *Electronic Transactions Act 1999*. Sophie Trevitt used the services provided by GetUp on the website 'ozenrol.com.au' to electronically enrol for the first time for the 2010 federal election. The Electoral Commissioner decided not to accept her enrolment electronically as it contained an electronic pen signature, and insisted that she would need to complete a paper-based enrolment, as was typical at the time. Following the hearing in the Federal Court of Australia, Judge Perram determined that Ms Trevitt's enrolment application was, indeed, valid and should be counted. As a result, Ms Trevitt was subsequently enrolled and was eligible to vote in the 2010 federal election. Following this decision, all citizens are now eligible to enrol electronically for the federal electoral role — a clear impact on the electoral processes in Australia.

Other political action

Like other political actors, pressure groups also make submissions to parliamentary committees on election inquiries and electoral reform proposals. They are more active in this when seeking to represent their interests or causes.

Individuals, pressure groups and political parties

Table 12.1 on the following page compares the ways that individuals, pressure groups and political parties participate in the electoral system with examples from contemporary and recent elections.



	Aims	Strategies	Outcomes	Examples from 2019 election
Individual	To pressure government to make changes to existing laws or to make new laws	• Voting in elections	Compulsory voting 'forces' individual participation	Elections determine the government
		• Letters to MPs • Direct contact with MPs • Attending community forums	Keep MPs informed about what is going on in his/her electorate May not result in change unless the MP takes on the individual's cause	Tony Abbott's attitude to climate change and same sex marriage did not match with what his electorate wanted. They voted him out in the 2019 election.
		• Running a personal campaign	Can be very effective if there is enough community support	A local businessman ran an anti-Abbott campaign starting in 2018, selling t-shirts that said "Vote Tony Out"
		• Submissions to the Commonwealth Parliament or its committees	Can have an impact if the government accepts the findings of the committee	Government not obliged to take action on committee findings
		• Petitions to parliament	Petitions rarely result in a positive outcome	Government not obliged to take action—petition may not fit with legislative agenda
		• Use of Twitter and other social media	Can have a significant effect in achieving desired outcome but may also backfire	GetUp & Advance Australia Ltd both had campaigns backfire on them. Stop Adani campaign used it effectively as part of its campaign building a membership to 2 million plus.
		• Working for the Electoral Commission at elections	Contributes to political life, reinforcing confidence in the integrity of democratic processes	Provides greater transparency to the electoral processes
		• Initiating court cases	May result in important change	*Vicki Lee Roach v Electoral Commissioner (2007)* changed electoral law
		• Joining a political party	Can be very effective in achieving personal goals	Same Sex marriage laws successfully publicly advocated for by Liberal Party Senator Dean Smith
		• Joining a pressure group	Can be very effective in bringing about change	Individuals in the Warringah electorate formed action groups to oust Abbott, putting their support behind Independent Zali Steggall.
		• Standing for election as an independent	Can be very effective especially in a balance of power situation. Not as effective as standing for a political party	Zali Steggall stood as an independent in the electorate of Warringah, ousting former PM Tony Abbott.

	Aims	Strategies	Outcomes	Examples from 2019 election
Pressure groups	To pressure government to make decisions or laws advancing their social or economic interests	• Advertising campaigns & political donations	Sectional pressure groups are usually more effective than cause based pressure groups. They have greater resources & access to power.	Coal lobby & fossil fuel companies donate significant sums of money to the ALP, LPA & Nationals, and have the money for major advertising campaigns. For more information, see: <www.marketforces.org.au/politicaldonations2019/>. The coal lobby ran very large advertising campaigns in 2018 in advance of the 2019 election.
		• Public rallies & marches	If the public take on a cause or a group has access to a parliamentary 'insider', they can be very successful.	The 'Stop Adani 'campaign received a lot of media coverage, but failed to achieve its goal. 'Stop Adani' showed that it could mobilise resources and people just like a major political party—a coalition of 13 key environmental groups with over two million members—but they were unsuccessful in influencing the outcome of the 2019 election and, therefore, the Adani coalmine's construction. The' Stop Adani' convoy was not well received in QLD. They did, however, successfully persuade many banks and insurers to turn their backs on Adani. For more information, see: <https://www.marketforces.org.au/>.
		• TV & billboards • Door knocking, phone calls & how to vote cards • Use of both paid staff and volunteers at polling booths on election day • Use of crowd funding • Posting & sharing on social media • Websites • Email campaigns & electronic petitions as well as standard petitions • Direct lobbying of MPs	A variety of strategies used together make up an effective campaign. They are popular techniques used by all participants in the electoral process.	GetUp! used a lot of these techniques very effectively. A tasteless social media campaign against Tony Abbott backfired on them. Zali Steggall—the independent candidate they were supporting in Warringah—distanced herself from them. She did win, however, and GetUp! claimed Tony Abbott's scalp as their achievement. Stop Adani used all of these techniques to build their support base with good effect. Their website is very comprehensive, and includes teaching people how to write effective letters to MPs or to manage a meeting with them. It appears, however, that their activities actually disadvantaged the Labor Party in QLD electorates. Advance Australia used social media and videos to run a smear campaign against independent candidate, Zali Steggall. They tried to suggest she was a stooge of the Labor Party, GetUp! and the environment movement. This backfired on them and they were forced to take down their online materials or face court action. Advance Australia also try tried to paint GetUp's door knocking and phoning campaigns as insidious and dangerous to electors.
		• Specifically targeting seats	An effective way to bring large amounts of resources into a small number of significant electorates.	GetUp! targeted specific electorates in QLD as did Advance Australia. Advance Australia helped keep sitting Liberals in office. GetUp! was completely unsuccessful in QLD but helped unseat Tony Abbott in Warringah (NSW).
		• Court cases	Have the potential to be very powerful in achieving aims	Australian Conservation Council mounted a successful court challenge to the federal government's decision to not refer the North Galilee Water Scheme project. The Minister for Environment was deemed to have failed to consider thousands of public comments when making the decision. For details, see: <http://www.environment.gov.au/epbc/what-is-protected/water-resources>.

table continued overleaf

	Aims	Strategies	Outcomes	Examples from 2019 election
Political parties	The major parties want to form a majority government and implement their party's political and ideological agenda while minor parties want seats in the House and Senate to influence legislative outcomes and hold the government to account	Strong ideology that is representative	Major parties offer ideological choice - clear, easy options at elections	Coalition clearly differentiated itself from Labor with their 'scare campaign' about taxes
		Large party machines	Can mobilise resources and people to run a campaign more effectively than smaller parties	Pressure groups like GetUp! and 'Stop Adani' have shown that they can mobilise people and money at least as effectively as a major party, and are challenging the power of the major parties. The Australian Greens have now established themselves as a serious third force in the Australian political system.
		Sectional pressure group supporters	Support from powerful pressure groups which provide money and volunteers	**Liberal supporters:** • Business Council of Australia (BCA) • Minerals Council of Australia (MCA) • Australian Chamber of Commerce and Industry (ACCI) • Advance Australia Ltd Coal lobby & fossil fuel companies like Woodside donated significant sums of money to all three major parties. For more information, see: <https://www.marketforces.org.au>. **Labor supporters:** • Unions (ACTU) • Welfare groups e.g. Australian Council of Social Services (ACOSS) • GetUp! ACTU ran a *Change the ruler* campaign to change the government, rewrite the industrial laws, and fight insecure work and low wages growth. Had sixteen target seats
		Door knocking during election campaigns	Can be effective in changing people's voting decision. Needs large numbers of volunteers to make a difference	All parties, pressure groups and independents use this technique to varying effect—personal contact with an elector can change their voting decision. Independent Zali Steggall 'flooded' Warringah with her volunteers in turquoise t-shirts, clearly outnumbering the Liberal Party volunteers and winning the seat.
		Large and expensive media campaigns during an election	Large parties spend a lot of money.	Morrison government spent over $200m on advertising for the election, succeeding in painting the Labor Party as the 'scary' option Clive Palmer's UAP spent over $50m on advertising, but gained no seat in either house.
		Style of campaign	Presidential style campaign v policy driven	Morrison government's presidential style campaign was very effective against Labor's policy driven campaign
		Scare campaigns	A very successful method in 2019	Coalition won in QLD because of preference flows from UAP and PHON. The coalition had a preference agreement with UAP. Winning in QLD was significant in returning the Morrison Government.
		Televised debates before an election	Can be persuasive	Had no influence in 2019
		Preference deals/ alliances with other parties	Very effective for a major party	Coalition won in QLD because of preference flows from UAP and PHON. The coalition had a preference agreement with UAP. Winning in QLD was significant in returning the Morrison Government.
		Making submissions to the Electoral Commission that could be in a party's favour	Commonwealth Electoral Act 2018 - preference deals now have less impact	Coalition improved its numbers in the Senate, Labor and the Greens had no losses but the crossbench was significantly changed with 5 minor parties losing their seats
		Targeting specific electorates	Allows parties to concentrate their resources in marginal electorates	Morrison 'battle plan'—defend sitting Liberals in QLD and NSW, expect losses in Victoria and modest gains in Tasmania, WA and NSW **Liberals targeted:** Herbert (QLD), Lindsay and Wentworth (NSW), Bass, Braddon and Lyons (Tas), Indi (Vic), Lingiari and Solomon (NT), Cowan (WA) **Labor targeted:** Corangamite, Chisholm, Dunkley, Deakin, Fraser and La Trobe (Vic), Gilmore, Page and Reid (NSW), Flynn, Forde and Petrie (QLD), Hasluck and Stirling (WA), Bean (ACT), Boothby (SA) Morrison Government was very effective in QLD despite strong activity by GetUp! in sitting Liberal seats For analysis of 2019 election results, see the AEC website: <https://results.aec.gov.au/24310/Website/HouseDefault-24310.htm>
		Polling and pundits	Suggested a Labor win	The polls were shown to be wrong, a big surprise to everyone. 'Robo' calling was said to be a factor in the failure of the polls. A 'coffee bean' poll at Miss Maud's in WA was more accurate—it predicted a Coalition win.

■ Table 12.1 — Comparison of ways individuals, pressure groups and political parties participate in the electoral system
Source: Rosslyn Marshall, 2019

2019 Australian general election

The 2019 general election, held on 18 May, elected the 46th Commonwealth Parliament. On 11 April, Prime Minister Scott Morrison called upon the Governor-General, General Sir Peter Cosgrove AK, CVO, MC, to dissolve the Parliament and issue the writs for the election. It was a general election with all 151 seats of the House of Representatives and half the Senate (36 state seats and 4 territory seats) up for re-election.

Australian parliaments are limited by Section 24 of the Constitution to a three-year maximum term. The Prime Minister has the power to call an election before the expiry of the three years. This power is an advantage to a Prime Minister because they can time an election to suit the government.

The contesting parties

The Coalition government

The Turnbull Government formed with a slim one seat majority after the double dissolution election in 2016. It suffered weakness in parliament and disunity in its ranks. Two years into his term, Malcolm Turnbull suffered the defeat of his signature National Energy Guarantee policy in the party room. Shortly afterwards he was challenged for the Liberal leadership by Home Affairs Minister, Peter Dutton. After a Liberal Party leadership ballot in August 2018, Scott Morrison emerged as the new Liberal leader and Prime Minister of Australia. The circumstances of Morrison's rise to power was a demonstration of the recent instability of the office of the Australian Prime Minister. It gave him minimal time in which to rebuild a damaged Liberal Party and Coalition Government to be ready for the 2019 election.

After being deposed, Turnbull resigned from parliament, causing a by-election in his seat of Wentworth. Independent, Prof. Kerryn Phelps won the October 2018 Wentworth by-election by a small margin. Disgruntled Liberal voters had punished the party for the Turnbull affair, a warning of what might be expected in the general election. One of Prof. Phelps' by-election proposals was a change to the law to enable the medical evacuation of sick asylum seekers and refugees in overseas detention to Australia. The loss of Wentworth put the Morrison Government into minority, forcing it to rely on Independents to provide confidence and supply on the floor of the house. Shortly afterwards, Liberal MHR, Julia Banks resigned from the Liberal Party over accusations of bullying within the party during the leadership crisis, and joined the growing independent crossbench, weakening the government still further.

In the first sitting week of 2019, when the house approved a Senate amended bill to include Prof. Phelps' medical evacuation proposal, it inflicted a historic legislative defeat on the government. The first such defeat on the floor of the House of Representatives in 80 years, it was a humiliation for the minority Morrison Government. The government opposed the law, so the passage of the 'Medevac Bill' seemed to suggest it had lost control of the parliament. It was the culmination of years of difficulties endured by the Coalition Government, the decline beginning with the former Abbott Government's 2014 budget.

Given the history of the government and its predicaments in early 2019, its re-election did not seem likely.

The ALP opposition

Since Labor Prime Minister Kevin Rudd was deposed by his party in 2010, Australia has had a series of Prime Ministers whose terms in power have been short lived. Julia Gillard replaced Kevin Rudd as Prime Minister in 2010 shortly before the end of his first term in office. Gillard led the Parliamentary Labor Party to the August election as Australia's first female Prime Minister, but this election resulted in a hung parliament which required the votes of three Independents to pass legislation. Kevin Rudd staged a 'coup' in 2013, returning to his former role as Labor leader and Prime Minister just before the 2013 election, but they lost to the Coalition. In an attempt to prevent further instability in the ALP, after the loss of the election, it changed its rules for selecting the leader. Bill Shorten benefitted from this change, serving six years as Labor Opposition Leader from 2013 to 2019. He was able to present himself and the ALP as the party which could deliver stable government.

In that time, the ALP developed a comprehensive policy platform and a united leadership team, in contrast to the Coalition's woes over the same period. The Opposition also used its strength in the house against the weak Turnbull and Morrison governments to full advantage.

Since the early days of the Abbott government, the ALP had consistently outperformed the Coalition in opinion polls. This factor gave encouragement to the ALP and dismayed the Coalition. Significantly, however, Bill Shorten never beat either Turnbull or Morrison on

the question of preferred Prime Minister. His unpopularity was seen as the Achilles heel of the ALP and encouraged the Coalition to implement a so-called 'Kill Bill' strategy to seek advantage from Bill Shorten's low approval ratings.

It was expected that the ALP would have a strong chance of winning the 2019 election due to the predicament of the government and its own medium-term history of stability and policy development.

Factors influencing elections

The factors that affect elections can be described as long-term, such as social class, medium-term, such as the stability of the government, short-term, such as the 24/7 news cycle, and proximate factors such as 'fake' news.

Long-term factors

Long-term factors include the tendency of electors to adopt the voting patterns of their family or social class; hence working class people tended to support the ALP, and small business people and professionals supported the Liberals. Long-term factors have diminished in importance as economic and social changes have caused people's identification with class, occupation and family political allegiance to weaken. Another long-term factor affecting the outcome of elections has been the decline in support for the two major parties as compared to the increasing importance of minor parties and, more recently, independents. This factor was important in 2019. It is important to note that voting behavior is less predictable than it was in the past, and this fact means that one can no longer be confident in polling.

Medium-term factors

Medium-term factors include the stability of the government, the quality of its leadership, its economic performance and any significant events within the lifetime of a government. For example, the long mining boom of the early 2000s saw the Australian economy thrive. The Howard Government, which was in power, received much of the credit for 'sound economic management'. Likewise, the 2001 terrorist attacks in New York and the growth in the number of asylum seekers saw national security rise as a critical election issue. National security tends to favour the party in government because electors are more anxious about possible change. Howard's leadership was widely respected, contributing to the re-election of his government at four consecutive elections. Medium-term factors were very important in the repeated re-election of the Howard Government. This is why it was expected that the Morrison Government might lose the 2019 election.

Short-term factors

Short-term factors are those that influence elections during the campaign itself. In recent elections, short-term factors have been very significant. The 24/7 news cycle is a critical factor. Today's electors are bombarded with political news which can suppress the influence of medium-term factors that might otherwise stay in the mind of electors when they consider how they will vote. Additionally, political parties can enter into preference deals during a campaign. The nature of these deals can influence electors' attitudes, and the flow of preferences they create can influence electoral outcomes. Evidence for this claim is the 2017 Western Australian election. Colin Barnett's Liberal Government's preference deal with PHON is widely credited with contributing to its landslide loss in that election. In an era of diminishing support for major parties, preference flows have become important to achieve the absolute majorities needed to win electorates. This has forced the Liberal Party, in particular, to risk preference deals with the more extreme minor parties on the right of the political spectrum, potentially damaging its traditional support base. However, in the 2019 election QLD was transformed into a strong hold for the Coalition as a result of a preference deal between the Liberal Party and the United Australia Party and, a separate deal between the Nationals and PHON. These preference deals helped deliver the Morrison Government a majority in the election.

Proximate factors

Proximate factors are those which can change the dynamics of an election in days. These factors have emerged since the transformation of communications and news sources with the arrival of the digital revolution. News can now spread instantaneously, and it can come from any source, including sources that cannot be regulated by Australia's electoral laws. The emergence of social media, which can amplify the spread of political news and 'fake news', has come to strongly influence contemporary elections. Fake news is a reality in contemporary elections in all democracies. It undermines informed participation and representation.

The 'Mediscare campaign' was a proximate factor in the 2016 election. The ALP launched the campaign in the days leading up to the election. The campaign had a significant

impact on the election result. It contributed to reducing the Coalition Government's 14 seat majority to a single seat. The 'Mediscare campaign' was conducted using robo-calling. It targeted electors in the marginal seats where the election would be decided, creating fear that the Coalition Government would dismantle Medicare. Once fear takes hold, it can spread virally via unregulated media such as voters' social media networks, with little regard for the truth.

Frightening voters with powerful negative advertising and stimulating the viral spread of misinformation through social media is an example of how proximate factors can influence elections and overwhelm long and medium-term factors.

Factors influencing the 2019 election

It was predicted that medium and short-term factors would dominate the 2019 election.

The record of leadership instability and disunity in the Coalition during the period 2013–2016, compared to the stability of the Opposition, were medium-term factors in 2019. Big issues such as climate change and tax reform were significant over the preceding three years. The economy, particularly wage stagnation and the poor performance of the banks (the Coalition had obstructed an inquiry into the banks for years before finally agreeing to a Royal Commission) were important factors. The proposed development of the Adani coal mine in Queensland divided the community and the ALP. The influence of preference deals, leadership performance and the impact of negative political advertising—delivered through both traditional means and social media—were the short-term factors expected to count.

Few commentators and experts predicted that medium-term factors would have little effect on the outcome of the election. Surprising everyone, the 2019 general election was almost wholly dominated by short-term and proximate factors which outweighed most other influences.

Medium term factors had almost no impact

It has always been claimed that 'disunity is death' in politics. The 2019 election turned this claim on its head.

The government had been struggling with internal disunity and tension between its moderate and conservative wings, and between the Liberal and National Parties. The tensions led to instability and the fall of two Prime Ministers—Tony Abbott and Malcolm Turnbull. Moreover, the government had failed to legislate adequate energy and climate change policy, and had difficulties with a challenging Senate, including being embarrassed by accidentally supporting a racially motivated motion 'It's OK to be white' moved by Senator Pauline Hanson. The final straw that indicated a potential election loss was the perception that the government had lost control of the House of Representatives after the Wentworth by-election result. In the past, such chaos over the medium-term would have been fatal to a government.

"The 2019 general election was almost wholly dominated by short-term and proximate factors which outweighed most other influences."

In contrast, the years before the election saw the ALP present itself as a stable and united leadership team with a comprehensive policy program for the electorate. The Labor Opposition had spent considerable time and effort planning a medium-term strategy aimed at defeating a Turnbull Government in 2019. It sensed that the electorate was ready to embrace a progressive agenda and would accept a 'tax and spend' program aimed at levelling out the growing inequality of wealth and income in contemporary Australia. It believed its policies represented the community zeitgeist.

Malcolm Turnbull was the target of Labor's strategy, so when he was replaced by Scott Morrison, the strategy was derailed. Morrison proved more politically savvy than Turnbull. He was able to communicate using straight-talking language and turn the focus onto Labor's tax and spend program, rather the Coalition's medium-term performance. The unpopularity of Bill Shorten as leader was another medium-term factor contributing to Labor's loss.

Against an international backdrop of increased political and economic instability in Western democracies, other medium-term factors included a deteriorating economy, the divisive Adani coal mine development in Queensland, growing climate change concern, drought and the risks to global trade of United States (US) and Chinese rivalry. These important issues, some of which may seriously affect Australians over the next century, played almost no part in the 2019 result.

Short-term factors were critical

A 'presidential' style campaign versus a 'policy' campaign

Scott Morrison has a background in advertising. He worked in New Zealand on its famous '100% Pure New Zealand' campaign before returning to Australia and becoming Managing Director of Tourism Australia in 2004. He was able to turn his marketing and advertising skills to selling himself as a Prime Minister, rather than the Liberal Party as a government. A 'presidential' strategy is leader centric. It emphasises the personal qualities of the potential Prime Minister, rather than the political, economic and social policies of his or her party. The strategy was necessary for 2019 because the Liberal Party brand was thought to be damaged by the recent history of the government. Instead of trying the sell the Liberal Party on its record, the focus would be on its new leader. The Liberal's presidential-style campaign was a deliberate attempt to downplay medium-term factors and focus on short -term ones.

Morrison presented himself as a likeable family man and ordinary Australian. He used his ministerial record to show his credentials as a competent leader. His campaign included many photo opportunities in high-viz workwear and sharing drinks with ordinary Australians in local pubs and clubs. His achievements when Minister for Immigration in the Abbott Government and Treasurer in the Turnbull Government helped establish his leadership credibility. In contrast, Bill Shorten, whose personal unpopularity made an ALP 'presidential' campaign unworkable, focused on the record of the Liberals in government, contrasting it with Labor unity and its depth of policy.

Morrison turned the focus firmly on Labor's policy platform by converting its complex policies into simple negative concepts. Labor's complicated franking credits reform became a 'retiree tax', and its negative gearing reform became a 'housing and rent tax'. Adding to this a social media scare campaign run by unofficial sources on death taxes—which was never a Labor policy—Morrison was able to paint the ALP as a threat to incomes, wealth and the economy because it would implement high taxes across the board.

Figure 12.4 — Prime Minister Scott Morrison
Source:https://upload.wikimedia.org/ ptimize / commons/thumb/0/0a/Scott_Morrison_2014.jpg/629px-Scott_Morrison_2014.jpg

Figure 12.5 — Bill Shorten, Leader of the Opposition 2019 Commonwealth Election
Source:https://upload.wikimedia.org/ ptimize / commons/thumb/8/86/Bill_Shorten.jpg/320px-Bill_Shorten.jpg

Both leaders performed well in three televised debates, but they had little impact on the outcome.

Scott Morrison out-campaigned Bill Shorten. The presidential-style campaign triumphed against a campaign based on rich policy development and a vision for change. In the end, the ALP's policy-driven strategy was too complicated, too detailed and too vulnerable to negative campaigning by the Liberal Party and its supporters. Many compared the 2019 election to the famous 1993 Fightback! election when Liberal Opposition leader, Dr John Hewson, lost the 'unlosable election' against an unpopular Keating Government at the height of an economic recession by promising comprehensive tax reforms.

Queensland and the Stop Adani Convoy

Queensland is a unique Australian state in that it is the most decentralised state in Australia. The distinctions between its city and regional electors is the most pronounced in the country. It has 30 seats in the House of Representatives, making it the third most significant state in the House of Representatives. Labor needed to do well in Queensland to win the election. This required it to win both the Brisbane-based progressive city electorates and more conservative regional electorates. The difficulty for both major parties was winning both these constituencies.

The Liberal Party struck a controversial preference deal with Clive Palmer's United Australia Party (UAP) during the campaign.

Clive Palmer, a Queensland mining billionaire, is a former Member for Fairfax. Controversy has surrounded him for a number of years over his failure to pay back entitlements to hundreds of workers whose jobs were lost when his QLD nickel mine went bust in 2016. Just prior to the 2019 election he announced he would pay back the entitlements. Some believed this was a cynical attempt to canvas votes. In a lawsuit beginning in July 2019 he was found liable for these entitlements and now has no choice but to pay back the workers. Palmer's reputation was thought by many to be politically toxic. It was feared the UAP deal would hurt the Liberal Party in the same way a similar deal with PHON damaged the Western Australian Liberal Party's chances in 2017.

The Adani coal mine development in Queensland proved to be a critical factor in the election. The proposed mine was a problem for the ALP because of Queensland's two constituencies — progressive urban versus conservative regional. Bill Shorten could not support the mine without losing Labor's progressive inner-city support in Brisbane (and Melbourne, where the issue was also important) to its left-wing rival, the Greens. Its failure to declare support for new coal mines alienated traditional blue-collar mining workers and conservative electors in regional Queensland. By 'sitting on the fence' regarding the future of Adani, Labor weakened its support in both constituencies during the election campaign.

A convoy of progressive activists, led by former Greens leader, Bob Brown, turned the medium-term Adani factor into a short-term one by arriving in Queensland during the campaign. The Stop Adani Convoy originated in the southern states and made its way into the heartland of Queensland coal mining where it arrived in the coal-rich town of Clermont in April. There was much hostility between the residents and the southern city-based activists. In the absence of an ALP declaration of support for the mine, the convoy galvanized support for the United Australia Party and PHON. Both minor parties formed in and represented regional Queensland more than any other region of Australia. The deal with the UAP funneled preferences overwhelmingly to the Coalition, boosting its vote in critical seats. PHON preferences followed a similar pattern. Despite spending more on political advertising than both the Liberal and Labor Parties combined, Clive Palmer's UAP failed to win a seat in either House. UAP preferences, however, contributed to the suppression of the Labor vote and helped the Coalition win critical seats in Queensland.

Figure 12.6 — Stop Adani Campaign
Source:https://upload.wikimedia.org/ ptimize /commons/thumb/3/32/JMP_6473_SS4C_Melbourne_%2846848507445%29.jpg/1024pxJMP_6473_SS4C_Melbourne_%2846848507445%29.jpg

The Coalition won 21 of the 30 seats in Queensland, essentially ending any hope that the ALP would be able to form a government. Western Australian polling booths closed hours after the results in Queensland were known. The ALP held out hope on election night that it would pick up contestable seats in the west but, like Queensland, the big mining state fell in behind the Coalition.

Other Proximate factors were significant

Advertising through unregulated social media channels was a feature of the 2019 election. Its impact on political representation and participation is a concern because of its capacity to distort the truth.

Results

The Government

The Morrison Government was returned to office. The Coalition won 77 seats, giving it a two-seat majority in the House of Representatives. Scott Morrison was able to form a majority government.

On the surface, not a great deal seemed to have changed since 2016 when Malcolm Turnbull formed a one seat majority government. The authority of the Prime Minister, however, was substantially enhanced. Turnbull lost 13 of the Abbott Government's 14 seat majority in the 2016 election and was diminished by the perception he had squandered the Coalition's strength. By comparison, Scott Morrison had won the 'unwinnable election' against all expectations. His stature as a leader was much stronger than Turnbull's.

House of Representatives

Eight seats changed hands in the House of Representatives. The Liberal Party won Bass and Braddon in Tasmania, Herbert and Longman in Queensland, and Lindsay and Wentworth (Turnbull's old seat) in New South Wales (NSW). The ALP won Gilmore in NSW—its sole gain. The Liberals lost the NSW seat of Warringah to Zali Steggall, an independent who challenged and defeated former Prime Minister Tony Abbott in the seat he had held since winning it in the by-election of 1994.

The ALP won 68 seats, making it the second largest party in the House of Representatives.

The Greens retained Melbourne, and four Independents were re-elected. Retiring Independent, Cathy McGowan was followed by new Independent, Helen Haines in the Victorian seat of Indi. Dr Haines is the first Independent in history to have won a retiring Independent's seat.

The Coalition lost Longman to Labor in a 2018 by election caused by the Section 44 citizenship crisis.[12] It was a Liberal seat and it would have been very difficult for Labor to hold in a general election. Herbert—Australia's most marginal seat—was won by the ALP by 37 votes in 2016. Both Queensland seats returned to the Liberal Party.

Braddon and Bass in northern Tasmania are famous for ejecting sitting members. Before the election, both electorates were held by the ALP. Both seats received significant attention from the Liberal and Labor parties. Bass was promised more than $220 million in spending commitments by the Coalition, while Braddon was offered more than $100 million. Morrison and Shorten visited both seats on several occasions during the campaign.

The Victorian Liberal seat of Higgins was thought to be vulnerable. Labor optimism in capturing this seat in the election was based on the fact that the state Liberal Party had a crushing defeat in their recent state election and the prominent sitting Liberal member and minister, Kelly O'Dwyer, was retiring. Higgins' vote swung to the ALP, but not enough. The Liberal Party retained the seat.

In short, the expected swing to the ALP did not eventuate. The unexpected Coalition losses in the 2016 election and the loss of seats in by-elections during the term of the 45th Parliament were 'corrected' in 2019.

12 Section 44 of the Commonwealth of Australia Constitution Act 1900 sets out restrictions on who can be a candidate for the Commonwealth Parliament, with one of those restrictions being a subject or a citizen of a foreign power.

Figure 12.7—Dr Helen Haines, Member for Indi, Vic. First Independent in Australian history to follow a retiring Independent in the Commonwealth Parliament.
Source: Amanda Aldous

Senate

While Senate election results are not critical to who forms the government, it can hold an elected government in check. Whoever holds power in the Senate determines how successful a government can be. The composition of the Senate is proportional to votes received by parties and independent candidates. The quota needed to win a seat is approximately 14 per cent of the formal vote. (See Chapter 9 for more details about quotas in the Senate).

2019 was the first general election to follow the 2016 double dissolution election. The importance of this lies in the fact that the size of the quota in a double dissolution election is halved because all 76 seats are elected. This makes it easier for minor and micro parties and independents to get elected. As a consequence, the Senate in the 45th Parliament was very diverse, with a large crossbench sharing the balance of power. A Senate of this nature is difficult for the government to manage because it must negotiate a lot with the upper house to pass bills. The 2019 general election 'normalised' the Senate making the crossbench smaller and more likely to be comfortably managed by the government.

Thirty-six senators were continuing from 2016 being only halfway through their six-year term and therefore not up for re-election. The most significant changes in the Senate in 2019 include an increase of four seats to the Coalition and the demise of four minor parties which were unable to retain the seats they had gained in the 2016 election. See Figure 12.2

Opinion polls and social media

Newspoll, Essential and Galaxy are three major polling companies which conduct polling between elections. Since Tony Abbott's time, opinion polling had consistently put the ALP ahead as preferred government.

Polling has come to dominate the modern 24/7 news cycle because of its need for constant

	45th Parliament (2016)	46th Parliament (2019)
Liberal National Coalition	31	35
ALP	26	26
Australian Greens	9	9
Centre Alliance	2	2
Pauline Hanson's One Nation	2	2
Jacqui Lambie Network	0	1
Independents	2	1
Australian Conservatives	1	0
Derryn Hinch's Justice Party	1	0
Liberal Democrats	1	0
United Australia Party	1	0

Table 12.2 — 'Normalisation' of the Senate—Commonwealth Election 2019
Source: Stephen King, 2019

news content to fill the pages, airwaves and web pages of the media. Poll results are reported, discussed and continuously interpreted, and have come to occupy the minds of political leaders, parties, journalists and the public.

The effect of constant polling has been to significantly enhance the influence of short-term and proximate factors, and to crowd out medium-term factors, which arguably should be more critical when holding parliaments and governments to account. Another effect of polling is to turn modern politics into a battle of popularity, rather than a contest of ideas.

Poll results are cheap for news organisations to gather and report. They fill the greatly expanded time devoted to 'news'. Polling has always been useful and relatively reliable. However, contemporary polling suffers from diminished accuracy as pollsters have applied new technologies. Some pollsters use robo-calling (automated) because it is low-cost; however, it seems to be less accurate. Worse, all polling is based on statistical probabilities which have a margin of error. Many changes in poll results are within the margin of error, making the results statistically meaningless. Pollsters report their margins of error, but news organisations seldom explain how unreliable it is to presume electors' voting intentions from such polling results.

The result of pressure for constant news is that much political news has become hollow reporting and interpretation of meaningless poll results. It is the responsibility of the media to use poll data responsibly and communicate its significance, or otherwise, to the Australian voter. The 2019 election confirmed the dangers of political parties relying on such information when they plan their election campaigns.

Finally, the issue of misinformation is a concern for the future of Australia's electoral democracy. 'Fake news' has become a term to describe the phenomenon of deliberate misinformation. The advent of social media has wrought a communications revolution. Its emergence, growth and impact on information sharing has far outstripped the ability of electoral laws to keep pace. Electoral laws strictly regulate political advertising to check the spread of misinformation and ensure political messages are accredited to parties, pressure groups and candidates. Social media allows anyone to circumvent these laws.

The spread of misinformation was a damaging feature of the 2019 election. Many Australians share 'news' through social media without checking its truthfulness or authenticity. In this way, a misinformation campaign initiated by those with intent to mislead can spread virally. This is an area which will require effective reform if electoral democracy in Australia is to retain the confidence of Australians. In the meantime, it is the responsibility of Australian voters themselves to be adequately informed when consuming 'news' via social media.

Comparing campaigns in one electorate

In the 2019 election former Prime Minister Tony Abbott lost his seat of Warringah, NSW to independent candidate Zali Steggall. Abbott had held the seat for the Liberal Party for 25 years. Table 12.3 compares the 2019 election campaigns of Abbott and Steggall.

 **Zali Steggall OAM**	 **Hon Tony Abbott**
Slogan: Together we create a positive future for Warringah	Slogan: Building our economy. Serving your future
Background: • Former Olympic champion—Australia's first individual medalist in the Winter Olympics, first female medalist and only medalist in Alpine skiing • Admitted to the NSW bar in 2008 • Awarded an OAM in 2007 for her services to Alpine skiing and her community work	Background: • Journalist, manager and political adviser before entering parliament in 1994 • Member for Warringah 1994–2019 • Liberal leader 2009–2015 • Leader of Opposition 2009–2013 • 28th Australian PM 2013–2015
Platform: • A business-friendly economy • Improve our commute • Boost our health care • Effective climate strategy Steggall describes herself as a moderate Liberal.	Platform: • A strong economy • Secure borders • Northern Beaches tunnel Promises to Warringah if he was returned as the Member: • $50m for Northern Beaches tunnel • $21.4m for Sydney Harbour Trust • $5m for Big Bear House • $5m for Manly Surf Life Saving
Campaign • Used hundreds of very large posters of herself on buildings, in apartment windows, on mansions and in storefronts around the seat of Warringah • Supporters were clearly identified in turquoise t-shirts and greatly outnumbered the Liberal blue supporters during door knocking campaigns. • GetUp! was out in force in orange t-shirts with an army of volunteers to support Steggall. GetUp! supported her and played a part in her triumph at the polls, but she distanced herself from them over the Abbott Surf Lifesaving video. See: <https://www.abc.net.au/news/2019-04-24/getup-pulls-tony-abbott-ad-over-climate-change/11041878>. • Backed by three local pressure groups that had joined together with the aim of ousting Tony Abbott—People of Warringah, Voices of Warringah, and Northshore Environmental Stewards (included several prominent Liberals). The three groups held an informal pre-selection process and chose to support Zali Steggall rather than field three independents. • About a year ago moderate members of the Liberal Party started a move to get rid of Abbott because of the role he had played in blocking meaningful action on climate change, including his own party's National Energy Guarantee. It snowballed. • Steggall's campaign was helped by the private campaign to unseat Abbott by surfboard company owner, Mark Kelly. He had been running a campaign against Abbott for about 12 months prior to the election, selling thousands of t-shirts and other items saying 'Vote Tony Out'. Zali Steggall started out with one of Mark Kelly's t-shirts before she decided to run as a candidate. Kelly said he got support for the cause by talking to people he knew and encouraging his group to talk to their peers and family, which is quite different to how GetUp! operates; they marshal volunteers to speak to people they do not know.	Campaign • Abbott ran a very low key campaign, relying on his local contribution to community groups like Surf Lifesaving. He has been a strong supporter of the Beaches Link Tunnel which Steggall also supports. • Pre-selection issues—won 68% of the vote, but there was quite a lot of angst over pre-selecting him again because of his destabilizing behaviour in the party. Back benchers had called on him to retire after Scott Morrison won the leadership from Malcolm Turnbull, but Abbott still thought he would be called upon to return to the leadership. He appeared to be completely out of touch with the party's mood. • Rarely appeared in community forums and was generally unavailable to mainstream media. When he did appear, he was often asked the same question: "why did you abstain from voting in the Same Sex Marriage Bill when 75% of the electorate voted for it?" He explained there were two theories of representation where the member: (1) takes soundings from the electorate and takes their views back to Canberra; and (2) acts on their own conscience. Abbott believes in the latter approach. This was a very unpopular response. • He also appeared at a Sky News Pub Test where a young voter asked him about housing affordability and the cost of living in the Northern Beaches. He blamed immigration for the issues and this brought jeers from some of the crowd and a reminder that he himself was an immigrant. • There was also anger in the electorate over his inaction on climate change and the National Energy policy failure. • It was easy for GetUp! to target these failures, and Abbott's attitude and actions around climate change, in particular. • Liberal groups formed to oust him e.g. People of Warringah. See opposite for details.

• The only public poll in Warringah was conducted by Lonergan for GetUp! and it pointed to an Abbott defeat. • The Liberal Party and the right-wing conservative group Advance Australia attempted to portray Steggall as a stooge of the Labor Party, GetUp!, the environment movement, the Greens and Stop Adani. • Advance Australia created a Twitter video clip during the election campaign featuring 'Captain GetUp!', a character they had created. The character was shown rubbing up against Steggall's face on a poster in which she had been photoshopped next to Bill Shorten. The character moved very suggestively. It caused a storm on Twitter and calls for an apology. Steggall wrote to Abbott and Morrison on twitter saying, "You accept AA support. Does Captain GetUp represent your values?" [12] She threatened Advance Australia with a lawsuit, and they withdrew the video clip. • GetUp! claimed Tony's 'scalp' as their own, but it was really local people who were at the heart of unseating him.	• Mark Kelly, the creator of the 'Vote Tony Out' t-shirts, used social media to great effect creating a funny singing video called 'Come on Warringah' as part of his campaign to oust Abbott. • GetUp! put out a campaign video showing Abbott sitting on the beach dressed as a surf life saver, but failing to help a drowning man. This drew a lot of criticism, especially from the surf lifesaving community. Steggall distanced herself from GetUp!'s campaign, and it was withdrawn. • GetUp! held a 'retirement' party outside Abbott's office the day he celebrated his 25 years in parliament. It made the party into a meme and shared it on social media. • Some very nasty posters about Abbott were put up during the campaign by an unknown source. One such poster was plastered on a day-care centre which then received very abusive phone calls from Abbott supporters. A police investigation followed (outcome unknown). Steggall used Twitter to make it clear that neither she nor her supporters would put up posters of this nature. • Abbott made a series of videos about his local credentials, but did not include anything on his parliamentary record.
Website: <https://www.zalisteggall.com.au> For campaign videos, see: <www.facebook.com/Zali4Warringah/>.	Website: <tonyabbott.com.au> For campaign videos, see: <www.facebook.com/HonTonyAbbott/>.

■ Table 12.3 — Comparison between the election campaigns of Zali Steggall and Tony Abbott for the Seat of Warringah, NSW Commonwealth Election 2019
Source: Rosslyn Marshall, 2019

■ Figure 12.8 — Zali Steggall.
https://upload.wikimedia.org/wikipedia/commons/thumb/4/42/Zali_Steggall_official_campaign_image.jpg/220px-Zali_Steggall_official_campaign_image.jpg

■ Figure 12.9 — Prime Minister Tony Abbott.
By Department of Foreign Affairs and Trade website – www.dfat.gov.au, CC BY 3.0 au, http://bit.ly/2fCIeml

12 <https://www.facebook.com/Zali4Warringah/>.

Comparison of two pressure groups

In the 2019 election, pressure groups GetUp! and Advance Australia were very active in a number of electorates across Australia. Table 12.4 compares the two pressure groups, examining aspects of them as organisations and looks at some of their activities during the election campaign.

	GetUp!	Advance Australia
Aligned with:	Left-wing pressure group. Claim not to be aligned with any party, but viewed as a Labor support group	Right-wing conservative pressure group. Claim not to be aligned with any party, but viewed as a Liberal support group
Website:	<https://www.getup.org.au>	<https://www.advanceaustralia.org.au>
Slogan:	People. Power. Impact	Your voice for a fair go
Founder/ background/ current Board:	• Founded in 2005 by Jeremy Heimans, David Madden and Amanda Tattersall • Created in response to the Howard Government gaining control of the Senate • Early members of the Board were drawn from across the political spectrum, including Bill Shorten (Labor), John Hewson (Liberal), Cate Faehramann (Greens) and Evan Thornley (entrepreneur) • Current director: Paul Oosting. He led the campaign to stop Gunns proposed pulp mill in Tasmania. Ranked in the top 10 of Australian Financial Review's 2017 Power Index of covertly powerful people. • Board is made up of four women and five men, mostly young. Backgrounds include: policy strategists, human rights, social justice and conservation advocates, and an entrepreneur. See website for more details.	• Founded in 2018 by Gerard Benedet, a former Liberal Party staffer and former national director of the failed Careers Australia • Created in response to GetUp!'s success in unseating Liberal MPs at previous elections • Backed by a group of prominent businessmen such as Sam Kennard (the storage king) and former ABC chairman Maurice Newman • Board is made up of four men and five women of varying ages, all high flyers in their own fields which include public and private company directors, banking, the arts and humanitarian work. See website for more details.
Priorities	2019 Election • Unseating of Liberal MPs with the aim of bringing down the Morrison Government In general • Fighting for a safe and healthy climate • Protecting the future of our reef • Holding governments to account • Stopping the world's biggest coal mine • Defending refugees and asylum seekers Campaigning for a fair and just Australia	2109 Election • Preventing GetUp! from unseating Liberal MPs and bringing down the Morrison Government • Opposed to Labor's so called 'retiree tax' and its carbon dioxide emissions targets In general • Protecting personal freedoms • Fighting political correctness • Restoring a 'fair go' and family values • Ensuring a safe and secure nation • Creating economic opportunity Maintaining Australia Day on 26th January
Funding:	A variety of sources including donations from overseas organisations, but a lot of their money comes from individual donations. 2019 campaign—$12m	Much of their funding comes from wealthy business people.
Tactics:	Targeting of specific electorates like Warringah, NSW to unseat Tony Abbott, and Peter Dutton's seat of Dickson in QLD Huge number of volunteers out in force in orange t-shirts for a door knocking campaign, rallies etc. Use of social media For other examples, see Table 12.2.	Targeting of specific electorates, especially in QLD where GetUp! was trying to unseat sitting Liberals Use of social media and videos to get their message across
Success rate:	Smear campaign against Tony Abbott backfired, but Zali Steggall, who they supported, still won. However, lots of other factors contributed to her success. See Table 12.3. Unsuccessful in most other electorates where conservative Liberals were targeted	Captain GetUp! cartoon video smear campaign against Zali Steggall unsuccessful. Steggall won the seat. They were very successful in other seats, particularly in QLD, in support of sitting Liberal MPs.
Response by opposing groups:	Liberals have called on the AEC to do a further investigation of GetUp! Three previous ones have shown GetUp! to be independent.	

■ Table 12.4 — Comparison of two pressure groups in 2019 Australian Election
Source: Rosslyn Marshall 2019

Conclusion

We see in Australia's liberal democracy the competing political actors seeking to influence the election process and outcomes to benefit society, their membership and/or themselves. All political actors—individuals, political parties and pressure groups—seek to optimise the representation of their worldviews, interests and causes by participating in electoral processes. Each achieves this to a different extent at different times in the cycle of elections and within the Australian political system.

Summary

- Individuals act of their own accord, in their own interests or in the public interest. As sole persons they undertake the action themselves, not as a representative or spokesperson for a political party or pressure group.
- Political actors—individuals, political parties and pressure groups—play an important role in Australia's liberal democracy through their participation in the political, legal and electoral systems.
- Democracies tolerate pluralism, a system in which there is a contest between many political views. The equal political freedoms and political rights allow citizens to engage in political participation in the pursuit of their views, interests and causes.
- Individuals can influence elections and electoral processes through their vote, running as an independent candidate, working for the electoral commission, initiating court cases, and other political action.
- Political parties undertake all actions they can to encourage participation of citizens in the party and to persuade citizens to vote for them at elections so that they may form government.
- A large range of minor and micro parties represent a great diversity of political ideologies and worldviews in contemporary Australia and provide opportunities for citizens to participate in electoral processes. The Senate voting system gives them a powerful voice in the political system. The Australian Greens (environmentalism) and Pauline Hanson's One Nation (nationalist populism) are examples.
- Political parties optimise their impact on election processes through diverse strategies including candidature in the Senate and the House of Representatives, parliamentary strategies, preference guidance and affiliations, campaign strategies and court cases.
- Pressure groups represent interests and causes. They have a narrower focus than political parties and are made up of individuals who share common interests or causes. They offer a key opportunity for citizens to participate in the political and legal system.
- Pressure groups use a variety of strategies to influence elections. They attempt to affect election outcomes through direct action, co-opting people with influence, applying electoral pressure, advertising campaigns and court action to change electoral laws.
- The outcome of the 2019 Commonwealth election was a surprise to pollsters and pundits alike. The polling was inaccurate, the Morrison Government ran a presidential-style campaign that outclassed the Labor Opposition's policy rich approach, and the government was aided by preferences from minor parties.

Activities

Short answer

1a) Explain the term 'political actor'.

1b) Identify three ways in which a citizen can participate in the Australia political system.

1c) Briefly explain how an individual can become a member of parliament without joining a political party.

2a) Explain the term 'fake news'.

2b) Distinguish between a 'preference agreement' and a 'coalition'.

2c) Discuss the impact of recent changes to Australian electoral laws on the make up of the Senate after the 2019 election.

3a) What is meant by a 'presidential-style' campaign as it applies to the Australian election of 2019?

3b) Identify three specific factors that affected the outcome of the 2019 election.

3c) Briefly outline the tactics used by pressure groups such as GetUp! and Advance Australia in the 2019 election.

Source analysis

Read the source information below and answer the questions that follow.

> *Clive Palmer has previously achieved electoral success. In 2013 he was elected as the representative for the House of Representatives seat of Fairfax. Additionally, his party, Palmer's United Party (PUP) secured three Senate seats. However, despite initial success, Palmer failed to maintain party unity, with Senators Jacqui Lambie and Glenn Lazarus becoming Independent Senators within 12 months.*
>
> *In 2018 Palmer announced his hopes to re-enter Australian politics as the leader of the newly formed United Australia Party (UAP), a re-formation of PUP. Palmer began promoting his new party with large yellow billboards. The billboards had slogans that read, 'Make Australia Great Again', and were reminiscent of US President Donald Trump's 2016 presidential campaign.*

4a) Define the term 'minor party' as it applies in Australia.

4b) With reference to the source and your own knowledge, explain two ways that political parties can participate in the electoral processes in Australia.

4c) With reference to your own knowledge of the 2019 election discuss the strategies used by the UAP to achieve its goals and assess their effectiveness.

4d) Evaluate the extent to which political actors can participate in electoral processes in Australia.

Essay response

5) 'Major, minor and micro parties combine to provide effective opportunities for citizens to participate in the political system of the diverse voting population in Australia'. Evaluate the validity of this statement.

6) 'Pressure groups have the most influence on electoral processes in Australia.' Assess this statement.

7) Analyse how Australia's political rights, freedoms and laws empower participation of individuals and pressure groups in the Australian political and legal system.

continued overleaf

Investigation & discussion

8) Investigate a recent federal election—for example, the 2016 double dissolution election, or the 2019 federal election—and collate and discuss examples of different political parties participating in the electoral process including the:

   8a) candidates running for the House of Representatives and Senate;

   8b) major policies announced prior to or during the election;

   8c) advertising and campaign strategies; and

   8d) preference guidance and affiliations.

UNITS 1 & 2

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.**

There is more than one way to the truth.

A trial is a procedure for the discovery of truth. The world's two great trial systems — the adversarial and the inquisitorial — are founded on different assumptions about how to find the truth:

- the adversarial trial assumption that truth is revealed through a contest between the parties presenting evidence before a *passive* adjudicator; and
- the inquisitorial trial assumption that truth is discovered through a vigorous investigation leading to the discovery of evidence by an *active* inquirer.

Common law countries like Australia share a legal inheritance from Britain that includes the adversarial trial. European countries like France share a legal inheritance from ancient Rome that includes the inquisitorial trial.

This chapter outlines the inquisitorial trial and evaluates the inquisitorial and adversarial trials using questions such as:

- how impartial is the adjudicator?
- what is the quality of evidence used?
- do both parties have opportunities to present their case? and
- how secure are the rights of the accused?

Broader questions will also be addressed, including:

- which system is best for access to justice?
- what are the costs of the system? and
- who bears the costs?

Civil law countries

Civil law — An overview

The inquisitorial trial is used in civil law countries. Civil law is derived from Roman legal codes and has undergone great change over many centuries. Its long history is separate from the history of English common law. Different histories and separate development can explain the differences between common law and civil law, including their trial systems.

■ Figure 13.1 — Enlightenment writers and philosophers such as Voltaire were influential in the development of the French legal system.
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>

After the fall of Rome, civil law developed differently across the continent of Europe. It deteriorated in some countries during the medieval period before reviving in the modern age. France provides a good example. Civil law was considered the 'law of the conqueror' in medieval France. After the Enlightenment and the French Revolution,[1] French civil law was modernised and re-codified by Napoléon Bonaparte. Napoléon was France's great military leader who conquered most of Europe. 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]

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.

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.

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.

Codification is the systematic collection and recording of laws and rules into written codes. Civil law codes are equivalent to statute. In contrast, Australian common law is found in *ratio decidendi* the reasoning of judges. It is not gathered up and written in special codes; instead, it 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.


JOURNAL OFFICIEL
DE LA RÉPUBLIQUE FRANÇAISE
PARTIE OFFICIELLE

■ Figure 13.2 — To be official, laws of France must first be published in the Journal Officiel de la Republique Francaise. The copy depicted here is from 7 October, 1907.
Source: Guy Boulianne, Journal officiel de la République Française. Lois et décrets. Journaux officiels (Paris), (Official journal of the French Republic. Laws and decrees. Official journals), 1907, Public Domain, <https://en.wikipedia.org/wiki/Journal_officiel_de_la_R%C3%A9publique_fran%C3%A7aise#/media/File:Journal_officiel_de_la_R%C3%A9publique_fran%C3%A7aise._Lois_et_d%C3%A9crets._Journaux_officiels_(Paris)_1907-10-07.jpg>

The French inquisitorial trial

As noted, Napoléon Bonaparte re-codified civil law during his rule of France.

The French trial system, like the adversarial trial, deals with both minor (summary) offences and serious (indictable) offences. For ease of the discussion of the French system of inquisitorial trial, the following will focus predominantly on trials for serious criminal cases.

Parts of the French inquisitorial system

The four main parts to the French system of inquisitorial trial are:

1. the prosecution (called *parquet*);
2. the defence;
3. the investigating judge (called *juge instructeur*) and other specialist judges; and
4. evidence of 'proof by any means'.

Other factors include:

- the onus or burden of proof;
- the standard of proof; and
- the rights of the accused.

> *The parquet is a branch of the French executive (the government) trained in the initial investigation and subsequent prosecution of criminal trials.*

Parquet — Standing judges and prosecution

The *parquet* (the Public Ministry) is composed of a department of experts trained as investigating judges. It is also called the **standing judiciary**. Despite the name 'standing judiciary', members of the *parquet* are not trial judges or part of the judicial arm of government. Rather, the *parquet* is a branch of the French executive (the government) trained in the initial investigation and subsequent prosecution of criminal trials. It

Figure 13.3 — Eric Halphen is a former French investigative judge well known for his inquiries into corruption.
Georges Seguin, Rencontre avec Éric Halphen pour Le bal des outrés, en présence de Dominique Barell (Meeting with Éric Halphen for Le bal des outrés, in the presence of Dominique Barell), 2006, Creative Commons BY-SA 3.0, <https://commons.wikimedia.org/wiki/File:Eric_Halphen_20060627_Fnac_04.jpg>

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.[4]

Roles of the *parquet*

The *parquet* fulfils the role of prosecutors and magistrates for minor offences. This means that minor criminal offences, similar to summary offences in Australia, can be dealt with entirely by the *parquet*. The *parquet* performs a combined judicial and executive function when resolving minor criminal cases. Perceptive students might note the lack of an effective separation of powers and judicial independence in this system of summary trial.

The process is different for serious criminal offences. There is a stronger separation of the executive and judicial powers, and the judge is more independent. The *parquet* is responsible for initiating a trial for a serious offence. As the accusing party, a member of the *parquet* must start the trial by conducting an initial investigation to determine if a case should be referred to a *juge instructeur*.

The *parquet* commences a serious criminal trial by 'seizing' an investigating judge, a *juge instructeur*. Seizing an investigating judge is a formal procedure performed by requesting a *juge instructeur* to carry out any act that will assist in the discovery of the truth.

Critically, a *juge instructeur* is not part of the *parquet*; they are part of the separate judiciary. The *juge instructeur* is the trial judge.

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

4 Bullier, Antoine J, How the French understand the inquisitorial system, Lecture, Australian Institute of Administrative Law (Western Australian Chapter), 24 May 2001 in Perth WA, p 48, <http://classic.austlii.edu.au/au/journals/AIAdminLawF/2001/10.pdf>.

Figure 13.4 — The Court of Cassation is the court of final appeal for civil and criminal matters in France.
Source: Cour de Cassation, Paris, (The Court of Cassation in Paris), 2014, Daniel Vorndran/DXR, Creative Commons BY-SA 3.0, <https://commons.wikimedia.org/wiki/File:Cour_de_Cassation,_Paris_140320_1.jpg> and <https://commons.wikimedia.org/w/index.php?curid=31704285>

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.

Defence — The accused

The defence is the accused person.

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. The defence, therefore, is at the mercy of the judge.

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 prealable de culpabilite*

> *Once a juge instructeur takes action to discover the truth, the 'machinery of trial' is engaged by law and cannot be stopped. The trial itself is now independent of the parties, and in the hands of the judiciary.*

translates as 'appearance on prior recognition of guilt'), but pleading guilty is limited in the following ways:[5]

- 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.

> *A major difference from the adversarial trial is in the pleading. There is no plea of 'not guilty' and the ability to plead guilty is limited in a number of ways.*

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 legal assistance can be temporarily suspended (12 hours for a minor offence or 24 hours for more serious offences) by the *parquet* if considered necessary because of an urgent need to gather evidence or to prevent another offence.

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.

5 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 13.5 — A juge instructeur has the power to direct the police to investigate and gather evidence.
Source: Kevin B, Manifestation des taxis le 10 janvier 2013, parc de l'Etoile à Strasbourg (Policemen with motorcycles and a car in Strasbourg. 10 January 2013), Creative Commons BY-SA 3.0, <https://commons.wikimedia.org/wiki/File:Manifestation_Taxis_10-01-2013_Strasbourg_04_-_Police_nationale.jpg> and <https://commons.wikimedia.org/w/index.php?curid=23805447>

Since 2001, the power to detain a defendant resides with the *juge des libertés et de la detention* or Judge of Freedoms and Detentions. The removal of this power from the *juge instructeur* has improved the rights of the accused to retain their liberty prior to conviction.

Juge instructeur — Trial judge and investigator

The judge is critical to the inquisitorial trial.

The *parquet* must initiate a trial by seizing a judge, but once that occurs the judge is in full control of the trial. This is a major difference between the inquisitorial and adversarial trials; a *juge instructeur* may control trial processes that are fixed by strict rules and procedure in the adversarial trial.

The judge's inner conviction and belief (*intime conviction*) is the equivalent of the standard of proof. His or her firm conviction based on the evidence is what decides guilt or innocence.

Judges play a fundamental role in weighing the value of evidence and directing the investigation.

A *juge instructeur* is a member of the separate judiciary. Perceptive students will 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 and adjudicates. Students will also note the investigative role 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[6] to investigate and gather evidence;
- direct the gendarmerie[7] 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;
- interrogate the defendant *in camera*[8] 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;[9] and
- widen the scope of the inquiry as long as it is related to the *parquet's* instructions.

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. Note the power of the *juge instructeur* to direct the police and gendarmerie — both parts of the executive (the judiciary can direct the executive to investigate and report). In the adversarial system judges do not instruct the police or the Department of Public Prosecutions (DPP)[10] to gather evidence; they only make judgments about the evidence gathered by the police or DPP on their own initiative.

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*. This reform addressed the inquisitorial system's lax protection of the rights of the accused.

Juries can assist judges

In very serious criminal trials — heard in Assize Courts[11] — there may be a panel of six jurors. The jury is a random selection of citizens who sit with three *juge instructeurs* (one of whom is the judge in charge) and assist in determining guilt by *intime conviction*. 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.

> *Once instructed a juge instructeur has a wide range of resources and powers at his or her disposal to discover the truth through investigation including the power to direct the police and gendarmerie— both parts of the executive.*

Evidence — 'Proof by any means'

The English word 'evidence' cannot be directly translated into French. The French word 'évidence' means 'obviousness', which is not quite the same as the English 'evidence', which means a 'body of facts indicating whether an allegation is true'. Obviousness is a less demanding definition. It implies a strong suggestion of proof rather than rigorously convincing proof.

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'. Note the different attitude to the quality of evidence suggested by this definition. Rather than the adversarial system's admission of only high quality evidence, the inquisitorial approach admits any relevant evidence.

Figure 13.6 — The evidence gathered by the parquet, police and/or gendarmerie is collected in a dossier which is handed up to the juge instructeur.
Source: Kiddo, Dossier, Noun Project, <https://thenounproject.com/search/?q=dossier&i=1361482>

6 The French police are national law enforcement under control of the executive (Ministry of the Interior).

7 The French gendarmarie are a paramilitary force under control of the executive (Ministry of Defence).

8 In camera is Latin for 'in a chamber', and means out of sight or in private.

9 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.

10 The Western Australian Department of Public Prosecutions is the branch of the executive that prosecutes indictable offences in the state's criminal trial system.

11 Assize Courts (cour d'assises) are high level courts with original and appellate jurisdictions for the most serious crimes.

Evidence is gathered by the *parquet* in the first instance and then, once an investigating judge is 'seized' and takes over the case, it is gathered by the police or gendarmerie on instructions of the *juge instructeur*.

The evidence gathered by the *parquet*, police and gendarmerie is collected into a dossier which is handed up to the *juge instructeur*.

All the evidence in the **dossier** is selected, assessed and weighted by the *juge instructeur*. The only rule of evidence 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 judge to weigh evidence according to its quality. Here lies another key difference from the adversarial trial.

Witnesses

Most evidence is written and contained within the dossier. However, oral testimony from witnesses can also be used as evidence, especially in Assize Courts. 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 *juge instructeur.* Witness evidence is not subject to rigorous testing through cross-examination by the parties.

> *The standard of proof in inquisitorial trials is an intime conviction. They must be convinced to the level of a firm and strong personal belief. An inner conviction is a profound sense of certainty.*

Burden of proof

There is no formal burden of proof in the inquisitorial trial. Although the system requires the *parquet* to initiate a case by commencing, investigating and seizing the *juge instructeur*, the prosecuting *parquet* does not have to prove guilt.

Instead, the overriding aim is to find the truth. The person with responsibility for the discovery of truth is the *juge instructeur*. The *juge instructeur* bears the burden of finding the truth, not proving guilt.

The accused has a presumption of innocence and this makes it harder to prove guilt.

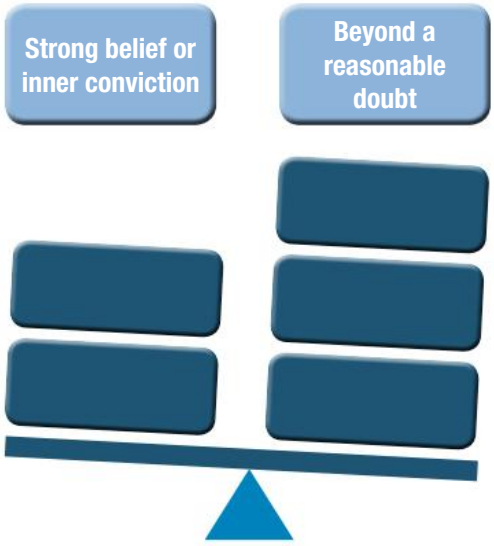


Figure 13.7 — Being convinced of something to the level of a strong belief or inner conviction is a lower standard than being convinced beyond reasonable doubt.
Source: Nicol Davis, 2018

Standard of proof

The standard of proof in inquisitorial trials is an *intime conviction*, translated as 'inner belief and intimate conviction'.

The *juge instructeur* must be convinced to the level of a firm and strong personal belief. An inner conviction is a profound sense of certainty. An *intime conviction* must be based on evidence contained in the dossier as weighed by the judge, or the judge and jury in very serious Assize Court criminal cases.

Students should appreciate that to be convinced of something to the level of a 'strong belief or inner conviction' is a lower standard than to be convinced 'beyond reasonable doubt'. It means that guilty verdicts are easier to obtain in the inquisitorial trial than the adversarial trial.

Trial procedure

Whereas the adversarial trial is highly procedural to ensure a fair trial (**procedural fairness**), the inquisitorial trial has more relaxed procedural rules.

The judge in an adversarial trial is the referee of strict procedure — that is how fairness is assured. The claim that a judge did not uphold 'proper procedure' is one of the greatest causes of appeals in the adversarial system. The *juge instructeur* in charge of an inquisitorial trial has much more flexibility to decide how the trial proceeds.

While the following table outlines the general process, students are reminded that this is flexible. The *juge instructeur* is actively in charge of 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 and, if so, if there is sufficient evidence to seize a *juge instructeur.* At this stage the parquet is in control of the case. Minor criminal offences (equivalent to summary offences in Australia) can be dealt with entirely by members of the parquet (acting as magistrates).
Parquet seizes *juge instructeur* and provides a dossier of evidence	If the parquet is convinced a serious offence has been committed and has gathered enough evidence to warrant a prosecution, the case is passed to a *juge instructeur.* This process is referred to as 'seizing' the judge. 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.
Juge instructeur takes charge of the case The case cannot be stopped by either party. (That is, the parquet cannot abandon the case. Nor will a defendant's guilty plea automatically end 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); • 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; and • assists the court by directing the parties to answer the judge's questions or provide evidence as instructed.
Sequence of proceedings	• Victim's lawyer addresses the court. • *Parquet* addresses the court. • Defendant's lawyer addresses the court. • Defendant invited to add anything they wish to after their lawyer has spoken. • *Juge instructeur* asks the parties if they have further questions. • *Juge instructeur* asks parquet for a recommendation for sanction if the defendant is found guilty.
Evidence is compiled in a dossier	Relevance is the only rule of evidence. Most evidence is written. *Juge instructeur* selects and weighs evidence for inclusion in the dossier. Only evidence presented in the dossier can be used in the trial and to make judgment.
Standard of proof and Verdict	The *juge instructeur* must be convinced to the standard of *intime conviction* (strong inner belief, a firm conviction) that guilt is 'obvious' according to the evidence. *Juge instructeur* decides guilt or innocence using only the evidence in the dossier.

■ Table 13.1 — The inquisitorial trial for serious criminal offences — the process from initial investigation to verdict.
Source: Stephen King, 2018

Comparative summary of inquisitorial and adversarial systems

	Inquisitorial Trial	Adversarial
Prevalence	• Derived from Roman law and practice • Inherited by most countries that were part of the Roman Empire (that is, most of modern Europe) • Introduced by European countries, such as France and Spain, into their colonies • Most European, South American and Asian nations are examples	• Developed over centuries in Britain • Introduced by Britain into its colonies • Most nations that were formerly part of the British Empire • UK, US, Canada, NZ, India and Australia are examples
Role of judge	• Inquires after the truth and controls investigation • Compiles evidence dossier • Calls and examines witnesses • Determines procedure • Is active and impartial • Applies law — almost exclusively from statutory sources • Weighs the value of evidence based on its reliability • Is the finder of facts and decides on the remedy/sanction (with other judges and, in 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 or common law sources • Is the finder of facts (if no jury) and decides on the remedy/sanction
Role of parties	• Respond to directions of the court • Make suggestions to the *juge instructeur* • *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 legal representation	• Not critical • Assist the *juge instructeur*	• Critical • 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 • 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) • Parties must object to evidence if the judge is to make a ruling on the validity of the evidence • High reliance on oral evidence, but importance of written evidence is growing • Witnesses answer questions asked by parties • Character of the defendant is not allowed as evidence
Burden of proof	• No burden of proof on the prosecution • Instead, *juge instructeur* 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 *juge instructeur* • Lower standard of proof	• Beyond reasonable doubt • Very high in criminal cases
Separation of powers	• Weak in minor cases — the *parquet* is a judicial body fused with the executive. It deals with minor offences without the involvement of a *juge instructeur* (separate judiciary) • Stronger in serious cases, which are handled by a *juge instructeur*	• Entirely separate judicial and executive roles in all cases
Rights of the accused	• Presumption of innocence (improved since 2001) • Limited right to remain silent	• Presumption of innocence • Robust right to remain silent

■ Table 13.2 — Comparing key parts of the two legal systems.
Source: Stephen King, 2018

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;
- has less biased witnesses;
- reduces costs for the parties; and
- is more likely to convict a guilty offender.

Its main weaknesses are:

- a less impartial judge;
- lower quality of evidence (including the inclusion of the defendant's character);
- that parties surrender control;
- an overreliance on one person's skill;
- 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.

Less biased witnesses

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.

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 accused 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.

Figure 13.8 — The inquisitorial trial system has higher conviction rates for serious criminal offences, resulting in many offenders being sent to prisons such as La Santé Prison.
Source: Michael C Berch, La Santé Prison, Paris, France, 2007, Creative Commons BY-SA 3.0, <https://en.wikipedia.org/wiki/Ministry_of_Justice_(France)#/media/File:La-Sante-Prison-MCB.jpg> and <https://commons.wikimedia.org/w/index.php?curid=4236249>

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

A less impartial judge

For minor offences, trials are handled entirely by the *parquet*. Remember, the *parquet* is a judicial body fused with the French executive. This weak separation of powers between the accuser/prosecutor and the adjudicator is a weakness of the inquisitorial system. Arguably, it compromises the impartiality of the adjudicator, a principle of natural justice. However, the problem is mostly confined to minor criminal trials where the consequences for the defendant are not so serious.

■ Figure 13.9 — Hearsay evidence, circumstantial evidence and opinion evidence are permissible in the inquisitorial system, but are potentially unreliable.
Source: Milky–Digital innovation, Rumor, Noun Project, <https://thenounproject.com/term/rumor/105925/>

For more serious offences there is a stricter separation of powers. The *parquet* remains the prosecuting party, but the *juge instructeur*, who is not part of the executive, becomes the adjudicator. Once the *juge instructeur* is seized and takes charge of the trial the *parquet* loses control of the trial and becomes the prosecuting party.

Assize Court trials with a jury are better still because the jury is composed of citizens with equal power to the judges to decide guilt and impose the sentence. Six citizen jurors, who are neither members of the executive nor judicial officials, balance the three judges and outweigh them in the final verdict.

Nevertheless, there is a closer association between a French *juge instructeur* and the prosecuting *parquet* than between an adversarial judge and the DPP in a Western Australian criminal trial.

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 — there is no cross-examination for example. Weak evidence may be included by a less competent or inexperienced *juge instructeur* in the dossier and then used to form his or her *intime conviction,* with no accountability for its inclusion other than it looked obvious to the inexperienced judge.

> *'Proof by any means' can result in low quality, potentially unreliable evidence being allowed to influence the judge. Evidence is also not subject to rigorous testing by the parties.*

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. However, students should note the consequence of the first disadvantage described above — the less impartial judge. The association between the prosecution and the judge may result in bias in the collection or weighting of evidence. In other words, a judge may give more weight to low quality evidence from the prosecution side than it really deserves.

The *juge instructeur* is not required to explain how they weighted the evidence, only to reach an *intime conviction* within the limits of their own conscience. Appeals can be hampered by the lack of clarity about how a guilty verdict was reached.

Parties surrender control of the trial

The active judge and passive parties mean the parties have little influence over the trial. Neither party can end the trial, either by abandoning it (*parquet*) or by pleading guilty (defendant). Only the *juge instructeur* can bring a trial to an end.

A guilty plea is only regarded as evidence, not as 'evidence *par excellence*'. A guilty plea in an adversarial trial is 'evidence so strong' (*par excellence*) it ends the trial immediately. Importantly, it is within the power of an Australian defendant to make the plea and, in doing so,

end the trial. 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 is likely to feel at the mercy of the court, with little prospect of making their own case or seeking to influence the outcome by their own evidence and argument. At best they may request the *juge instructeur* to investigate.

> *The previous criminal history of the defendant is admissible and can be used to reach a verdict.*

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.

Overreliance on one person's skill

As stated above, the *juge instructeur* is the critical element of the inquisitorial trial. Quite simply, justice depends almost entirely on the competence and impartiality of the judge.

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 the judge is bound to uphold and cannot change, 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 inattentive judge is not always sufficient grounds for an appeal on the claim of an unfair trial.

An incompetent inquisitorial judge can have a far more devastating effect on natural justice than an adversarial trial judge.

The four principles of natural justice

The following evaluation of the inquisitorial judge using the criteria of the four principles of natural justice provides a useful overall evaluation.

Impartial adjudication

In minor criminal cases, the *parquet* may carry out the roles of the executive (police investigation and prosecution) and the role of the judiciary. This can lead to perceptions of bias. It can also lead to actual bias.

In serious criminal cases the *juge instructeur* and *parquet* (the prosecuting party) have a closer relationship than the *juge instructeur* does with the defendant.

Assize Court jury trials are the best form of inquisitorial trial in terms of impartiality of adjudication.

Hearing both sides

There is no procedural guarantee that the defendant will be able to present their case to the same extent as the prosecution. Procedure is more flexible and the judge can control it to a great extent.

Therefore, the degree to which both sides can make their case is controlled more by the discretion of the judge and less by trial procedures which are independent of the judge.

Evidence is selected and weighed by the judge, not presented and contested by the parties. Neither party can be certain the judge is finding evidence that assists their case.

The impartiality of the judge is not as strong as for an adversarial judge.

> *Because there is no procedural guarantee, the degree to which both sides can make their case is controlled more by the discretion of the judge.*

Evidence based decisions

Although the inquisitorial trial is very good at bringing forth evidence because of its limited relevance rule and impartial collection, useful evidence must be selected for inclusion in the dossier and then weighted appropriately by the *juge instructeur*. This process puts the burden on the judge and not on well-defined rules to decide which evidence is used and how.

Furthermore, the standard of proof is dependent entirely on the inner belief and conviction of the *juge instructeur*. In the adversarial criminal trial the standard of proof is both higher and more transparent — the parties and the public can assess for themselves whether proof really is 'beyond reasonable doubt'. An inquisitorial judge only has to be thoroughly convinced in their own mind. The inquisitorial trial's standard of proof is highly personal — it depends heavily on the judge's character, values and attitudes. Some judges may be more easily convinced than others.

Transparency and openness

As outlined above, dependence on the inner thinking and judgments of the *juge instructeur* make transparency harder to achieve.

Trial processes are less formal and less predictable, the evidence dossier is mostly written and less accessible to court reporters and the media, and the judge is not required to explain how they reached their *intime conviction*.

One of the keys to a good justice system is that justice is not only done, it is seen to be done. Seeing justice done is harder in an inquisitorial trial.

Weaker separation of judicial and executive power

As outlined above, the *parquet* is part of the executive, but has judicial functions. For minor cases, where the *parquet* deals with a case through to its end, it means the prosecutor and the adjudicator are both within the executive branch. In overly simple terms to make the point, 'the accuser and judge are the same'.[12]

Separation of powers and judicial independence are much stronger for serious criminal trials investigated by a *juge instructeur* or an Assize Court.

12 This oversimplification does not recognise the functional separation between the parquet and executive.

> *Seeing justice done is harder in an inquisitorial trial.*

Weaker protection of the rights of the accused

The accused is presumed innocent and has a right to silence, but these are both weaker in the inquisitorial trial than in the adversarial trial.

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.
- **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.[13] 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 not involved in 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 theinnocence of an accused. However, the 2001 reform addressed this shortfall and the system is now better at protecting this important legal right.

13 The lack of separation of the investigative and judicial functions of a juge instructeur was described by French legal experts as "the impossibility 'of cycling whilst also watching oneself pedalling'". See: Pre-trial detention in France, Communiqué issued after the meeting of the Local Expert Group (France), 13 June 2013, p 1.

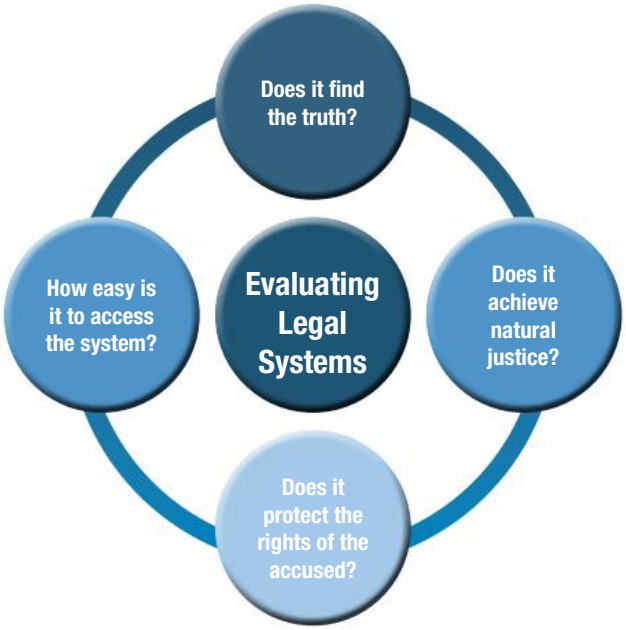


Figure 13.10 — The criteria against which legal systems should be judged.
Source: Nicol Davis, 2018

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:

- finds the truth;
- achieves natural justice;
- protects the rights of the accused; and
- facilitates access to the legal system.

> *Justice should not only be done, but should manifestly and undoubtedly be seen to be done. Lord Hewart CJ*

Evaluating the adversarial trial

Students are strongly encouraged to refresh their understandings 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'.[14] 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.

14 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'.

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.

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 adversary 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.

Figure 13.11 — Jurors awaiting selection.
Source: Steve Bott, About 50 prospective jurors awaiting jury selection, 2007, Creative Commons CC BY 2.0, <https://commons.wikimedia.org/wiki/File:Jury_duty.jpg> and <https://commons.wikimedia.org/w/index.php?curid=2715098>

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.

Figure 13.12 — The right to silence is embedded in the adversarial system.
Source: Luis Prado, Silence, Noun Project, <https://thenounproject.com/search/?q=silence&i=9784>

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[15] is an ancient legal right enabling a person to appear before court, hear the charges

15 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.

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.

■ Figure 13.13 — A disadvantage of the adversarial system is the high cost of legal advice.
Source: Alan Moir, 2010, <https://www.nytsyn.com/cartoons/cartoons/407798.html> and <https://www.moir.com.au>

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.

> *Access to justice is a right. It should not be dependent on wealth. Access and representation are costly in the adversarial system, and that is a serious flaw.*

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 judgment in the jury room.[16] 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.

Figure 13.14 — The advent of technology such as the smartphone has impacted trials.
Source: Senado Federal, Two smartphones: a Samsung Galaxy J5 (left) and an iPhone 6S (right), 2016, Creative Commons CC BY 2.0, <https://en.wikipedia.org/wiki/Smartphone#/media/File:Fotos_produzidas_pelo_Senado_(30554309793).jpg> and < https://commons.wikimedia.org/w/index.php?curid=53990377>

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.

16 'Prejudice' literally means to 'pre-judge', to makes up one's mind before all evidence is presented.

Summary

- There are two great systems of trial in the contemporary world. The inquisitorial system in civil law countries with a 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 assumptions 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, prosecutes and adjudicates minor criminal offences. In minor cases it performs the combined roles of police prosecutors and magistrates that exist in, for example, the Australian system. 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. They determine guilt based on an *intime conviction* based on their judgment of the evidence in the dossier. The *juge instructeur* bears the burden of proof. They alone can bring a trial to an end.
  - 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 control over the trial;
  - '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*;
  - a judge's *intime conviction* (inner belief and intimate conviction) is the standard of proof; and
  - 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.

Activities

Short answer

1a) Explain the role of the 'standing judiciary' in a minor criminal case in an inquisitorial legal system.

1b) Distinguish between the role of the '*parquet*' and the '*juge instructeur*' in the inquisitorial trial system.

1c) Discuss **three** key features of an inquisitorial trial system.

2a) Explain what is meant by the term 'codification' in an inquisitorial legal system.

2b) Compare how the truth is discovered in both the adversarial and inquisitorial legal systems.

2c) Discuss the 'rules of evidence' in both the inquisitorial and adversarial trial system.

3a) Explain what is meant by 'the presumption of innocence'.

3b) Distinguish how the adversarial and inquisitorial legal systems use evidence in an indictable case.

3c) Discuss the role of the jury in an inquisitorial legal system.

Source analysis

Use the information in **Table 12.1** on the 'four principles of natural justice' to complete the following.

4a) Explain what is meant by the term 'natural justice'.

4b) Using the source, outline **two** ways the principle of natural justice is upheld within the inquisitorial system.

4c) Discuss how 'transparency and openness' are evident in both the inquisitorial and adversarial legal systems.

4d) Compare **two** strengths of one legal system with **two** weaknesses of another legal system.

Essay response

5) '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.

6) The inquisitorial system is seen as the 'great rival system of criminal procedure'. Discuss why the inquisitorial system is a great rival to the adversarial system.

7) 'The separation of powers is challenged within the inquisitorial legal system'. Evaluate the validity of this statement.

Investigation and discussion

8) Investigate the diffusion of the inquisitorial legal system around the globe and create a mind map to explain its prevalence.

9) 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".[17] Consider this suggestion and:

   – conduct a class discussion on its relevance to countries with legal systems based on common law; and

   – reflect upon how implementing Lord Thomas' comments would change the Australian legal system.

10) 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.

11) 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.

17 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>.

Glossary

abrogate To overrule. Statute law can overrule common law because parliamentary law is superior to judge made law. It is a mechanism available to 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 Being responsible for one's conduct, decisions or (in)actions. Accountability is an essential feature of responsible parliamentary government and applies to both elected and appointed public officials.

Act (of parliament) A piece of legislation following its passage through both houses of parliament and being granted royal assent. A bill becomes an Act. Also known as statute or legislation.

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 The trial system used in common law countries. The belief that justice is best achieved through a 'battle of words' between two adversaries.

adversary system of trial A system of trial based on the assumption that the truth is best discovered by contest between the parties in the dispute. Competition brings out the best evidence and argument before an impartial adjudicator. It developed in England over many centuries and is practised in many countries which were former British colonies, including Australia and the United States.

altruistic groups Cause groups, such as the Australian Conservation Foundation (ACF) and People for the Ethical Treatment of Animals (PETA).

amendment A proposed change to a bill being debated in parliament during the committee stage of the legislative process and/or a change to an existing Act.

appeal A review of a court case by a higher court. A form of judicial accountability exercised by courts over other courts.

appellate jurisdiction The type of cases or areas of law which a court has the power to hear 'on appeal' from another court. Original decisions can be reviewed and reversed if found to be wrong. Judges and courts are held to account through the appeals process.

appropriations Money spent by the executive government. The parliament must pass 'appropriations bills' before the government can access and spend public funds. Also known as 'money bills', this type of bill can only be initiated or amended in the House of Representatives. This is a key way in which the parliament carries out its 'responsibility function'. Also referred to as supply.

arbitration A form of alternative dispute resolution in which a neutral third party (an arbitrator) assists two disputing parties to find common ground and resolve their dispute. The focus is to settle the dispute through a formal contract agreement between the parties. If the parties cannot agree to a resolution the arbitrator can decide for them. The third party arbitrator has more power than a mediator or conciliator, neither of which can impose a resolution. Arbitration is used to resolve industrial disputes between employers and employees. For example, the Fair Work Commission.

assistant minister A junior ministerial (executive) position formerly known as a 'parliamentary secretary'. They assist senior ministers in the larger 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. An autocracy is characterised by the rule by law (not rule of law), concentration of powers, lack of checks and balances, and a politicised judiciary. An autocracy can take on many forms, such as an absolute monarchy, one party rule and dictatorship.

backbencher A member of parliament who is not in Cabinet or the ministry (the executive). This includes both the government frontbench and the opposition shadow frontbench.

balance of power The situation in which a political party or an individual may use their position in the chamber and vote to decide the fate of a bill or a motion. This is commonly held by minor parties and independents in the Senate. These parties and independents are referred to as the Senate crossbench.

balance of probabilities The standard of proof that is required in a civil dispute. The adjudicator will rule on liability according to the degree of probability as to whose version of the facts is more likely.

beyond reasonable doubt The standard of proof that is required in a criminal dispute. It is the responsibility of the prosecution to prove there is no rational doubt as to the 'guilt' of the defendant, otherwise the charge has not been proven. Beyond reasonable doubt is a higher standard of proof than 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 statute law. Parliament passes bills into law using the statutory process. A bill becomes law after the Governor-General gives it 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 A committee of the executive comprising the Prime Minister and his/her senior ministers. It is governed entirely by convention and has no legal or constitutional authority. Despite this, it is the most powerful institution in the system of government.

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 The party room of the Australian Labor Party (ALP). It consists of all the parliamentary members of the ALP, that is, all ALP Members of the House of Representatives and Senators. Caucus is a critical forum for political strategy and debate. It largely determines the party leadership. Caucus is bound by a pledge to support ALP policy, which is largely set by the party's National Conference held every two years. Caucus and the ALP leadership are very influential over the ALP's policy.

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. Complementary 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 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 subset of parliamentarians formed into a working party or group for a particular purpose. Some committees are established for the life of a parliament (standing committees). Others are formed for a particular purpose and then disbanded after reporting to parliament (select committees). They may be formed in either house of parliament (House committees and Senate committees) or by members of both houses (joint committees). Committees are essential for the parliament to carry out all its functions, especially the legislative responsibility and debate functions. No executive member may serve on a committee, so only backbenchers fulfil the work of committees.

common law Judge made law. Made in courts by judges when deciding cases which give rise to the need for new decisions or precedents. Common law is inferior to statute law.

Commonwealth Sovereign central government within the Australian federation. It is created by Chapters 1, 2 and 3 of the Constitution, which establish the three separate branches of the central government. 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 institution in the Australian political system that represents the people and the states. It makes the laws, makes and may break the government, and debates the important issues of concern to the nation. It is sovereign and the foundation of Australian representative democracy.

compulsory voting A part of the Australian electoral process that requires all eligible Australian citizens to 'vote'. They are required to attend a polling place on election day or before (pre-polling) or return ballot papers by postal voting. A fine is the penalty for not voting.

concurrent power Power 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 type of voting where parliamentary members are given the right to use their judgment on a matter before the parliament. They are also known as 'free votes' as members of parliament are not constrained by political party policy or party discipline.

constituency The alternative name for an electorate or electoral district in which voters are located. For example, Stirling is a federal electorate or constituency in Western Australia. This term for electorates is rarely used in the Australian political system.

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 power should be limited. Democratic constitutions are founded on this idea. The opposite of absolutism.

conventions (constitutional rules) Westminster conventions of responsible parliamentary government. For example, the Prime Minister must be a member of the lower house. See also: 'Westminster conventions'.

court The main institution of the judicial branch of government. An institution that aims to resolve disputes according to law. In common law countries courts can create common law according to the doctrine of precedent and are organised in a court hierarchy.

court hierarchy A ranked order of courts. Courts are arranged in order (from lowest to highest) of inferior, intermediate and superior courts. Each level has original jurisdictions granted by various judiciary Acts or, in the case of the High Court, by the Constitution. Minor civil, criminal and administrative law matters are heard at lower levels. Serious and complex matters are heard at higher levels. Intermediate and superior courts have appellate jurisdiction. Court hierarchies are essential for the distribution of the work load of the courts, for specialisation of courts, for the appeals process to work and for the doctrine of precedent to operate. In Western Australia, the lowest court in the hierarchy is the Magistrates Court, an intermediate court is the District Court, and a superior court is the Supreme Court of Western Australia.

criminal trial A trial in which the State is the prosecuting party and the defendant is accused of a crime. The burden of proof rests with the prosecution. The defendant is presumed innocent and is protected by legal rights.

crossbench The term used to describe members of a house of parliament who are independents or not members of a major or governing party. They sit in the 'U' shaped benches opposite the Speaker of the House of Representatives or President of the Senate. In the Senate, crossbenchers can exercise great political power because they may hold the 'balance of power'. Crossbenchers are less influential in the House of Representatives unless the government is a minority government. In 2019, with the most recent addition of Prof. Kerryn Phelps (Independent) in the seat of Wentworth, there were six crossbenchers in the lower house.

crossing the floor During a division a member of a party may physically cross to the other side of the chamber to vote with other political parties. When members vote they usually vote with their party, but they may choose to vote against it in exceptional circumstances.

Crown, the The term used to describe the British and Australian constitutional monarchy. It is represented in Australia by the Governor-General. The Crown is part of both the parliament and the executive in Australia's Westminster system of government.

defendant In either a civil or criminal case, this is the party that is defending the charge. They have the presumption of innocence unless proven liable/guilty.

delegate (representation) A theoretical form of representation in which the elected representative simply reflects their electors' concerns and values in the parliament. The representative is simply a 'mouthpiece'. Part of parliament's 'representative function'.

delegated legislation Law making power granted by the parliament to the executive. Executive made laws are called regulations, ordinances or instruments. To avoid a breach of the separation of powers the parliament closely monitors the executive's use of delegated legislative power. The Senate Regulations and Ordinances Committee oversees regulations, ordinances and instruments. The Senate may pass 'disallowance motions' which annuls that law or a part of the law.

deliberate To decide by careful and considered processes. Ideally, the way the 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 (the will of the majority). Its key operating principle is majority rule.

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 the basic economic equality and outcomes for all citizens. Socialism is achieved through democratic processes and not violent revolution. The early ALP (prior to the Whitlam years) is an example of a democratic socialist party.

direct action The act of taking action to draw attention to a cause or an issue. Direct action can be protesting and writing letters.

direct democracy A system of government in which citizens govern themselves by personal participation in law making. Referenda and plebiscites are a 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 in favour or against a motion. Members may cross the floor to vote with another party.

division of power In a federation the powers of each level of government are divided. Some are exclusive to the federal level, some are shared by the federal and state levels of government, while the states also retain powers they enjoyed prior to federation.

doctrine of precedent The method by which common law is made by judges in courts. It was developed in England and is based on the principle of stare decisis — 'to stand by the previous decision'. It operates within a court hierarchy in which previous decisions either bind or persuade future judgments where the facts of a case are similar.

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 front bench and opposition backbenchers are more likely to ask genuine questions enquiring into the activities of government. Dorothy Dixers diminish the responsibility role of parliament and support the decline of parliament thesis.

double dissolution The Governor-General may dissolve the parliament using powers under Section 57 of the Constitution if the two houses cannot agree on a bill. A bill which is twice rejected by, or fails to pass, the Senate may become a trigger for a double dissolution election. Section 57 powers are always exercised on the advice of the Prime Minster. The last double dissolution was the 2016 federal election.

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 effort and talent. 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 are examples. John Howard was an economic liberal.

ejusdem generis Latin for 'of the same kind'. Used to interpret legislation. When a list of specific items is followed by a general term, it is implied that the general term will be of the same kind as those listed previously. For example, in a list of beer, wine, spirits and other liquids, the last general term, 'other liquids' would include alcoholic liquids and not soft drinks.

elections A process enabling citizens to choose representatives to sit in a representative legislature and act as their delegates or trustees in law making. This is an essential procedure of representative democracy.

electoral system A system that translates votes into the desired leadership outcome of the people. Most often used to translate votes into seats in parliament. They may be based on single-member electorates or multi-member electorates. Electoral systems are classified as either majoritarian or proportional or a blended compromise of both.

electorate A geographical area in which citizens vote to elect a representative and, subsequently, a parliamentarian who represents them in parliament. An electorate can be small (such as Wentworth in the House of Representatives) or large (such as Western Australia in the Senate) and vary in its representative purpose. An electorate is also known as a 'division' and colloquially as a 'seat' in parliament.

electorate (number of) In the House of Representatives, from the 2019 federal election there will be 151 electorates distributed between the states in accordance with population (following the requirements of Section 24). In the Senate there are eight electorates (one each for the states and the territories).

Enlightenment, the A historical period during the late 17th and early 18th centuries during which old ideas in science, art and government were challenged by new thinking. It led to significant questioning of traditional forms of absolute government and to the emergence of limited government and respect for individual rights and

liberties. Australia's government was strongly influenced by Enlightenment political and legal ideas.

entitlement Possessing a right to something.

equality of political rights A key operating principle of a liberal democracy. All citizens shall be equally entitled to political rights. Political rights include the right to vote, the right to run for political office and the right to participate in government.

exclusive by their nature Concurrent powers which are appropriate only for the Commonwealth to exercise, despite the Constitution not making them exclusive. Section 51(vi) the defence power is an example.

exclusive powers Powers granted by the Constitution to the Commonwealth Parliament alone. They may be legislative or financial powers. For example, Section 52 grants power 'to make laws for the peace, order and good government of the Commonwealth with respect to…'.

executive The branch (or arm) of government responsible for the execution or administration of laws made by the legislature. Often simply referred to as 'the government'. Australian executives are composed of three parts — a 'constitutional' executive (the Queen, Governor-General and the Federal Executive Council); a Cabinet of ministers drawn from parliament and led by the Prime Minister; and the public service. The Cabinet is the 'real' executive and is led by the Prime Minister as Head of Government. Recent Australian executives include the Morrison, Turnbull, Abbott, Rudd and Gillard Governments. The executive may be delegated limited law making powers by parliament, but remains subject to the parliament. 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 the ballot paper — they must 'exhaust' the preferences. Exhaustive preferential voting is used in Commonwealth and Western Australian elections.

ex post facto Latin for 'after the fact'. Judgments made by the courts are done so after the dispute has occurred.

express powers Powers codified in the Constitution. The Governor-General possesses express executive powers. The Commonwealth Parliament possesses express legislative and financial powers.

expressio unius est exclusio alterius Latin for 'the express mention of one excludes all others'. A maxim of statutory interpretation in which a series of specific terms is not followed by a general term. The express mention of objects in a statute precludes the addition of any other objects by the courts. It prevents the courts from declaring meanings of a law that the parliament does not intend. The opposite of ejusdem generis — there is no class of object to which the courts can assign other instances of similar objects.

federalism A system of government in which sovereignty is geographically divided between one central and two or more regional governments, each sovereign within their own sphere. There are different types of federalism which indicate the power distribution between the levels of government. Coercive federalism is where the federal level has greater powers than the states; co-operative federalism is where both levels work together to achieve outcomes; and co-ordinate federalism, which is where each level is independent and autonomous of the other. This was intended by the Founding Fathers at the time of federation.

Federation The act of becoming a federation. In Australia this involved the uniting of six previously separate colonies into one 'indissoluble federal Commonwealth'.

Federation Chamber A special committee of the House of Representatives. Its membership comprises the whole of the house and, therefore, all Members of the House of Representatives. It passes non-controversial bills with minimal debate or scrutiny, by agreement between all parties. Its purpose is to speed up the passage of bills and free up the house to consider more contentious or contested bills.

first past the post electoral system A majoritarian electoral system based on single-member electorates in which electors select the 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. It is still used for many local government elections in contemporary Australia.

floodgating A tactic employed by the government to rush through parliament a substantial amount of legislation, usually toward the end of a parliamentary sitting term. Standing orders can be manipulated by the government of the day to allow for minimal debate using the guillotine.

formal vote A ballot paper that has been completed correctly following the rules of the electoral system.

franchise Described generally as the 'right to vote'. Australia has universal franchise that includes Australian citizens who are over the age of 18 years.

fundamental law Constitutional law. Superior law.

gag A motion passed in a house of parliament to curtail further debate. This is used to end debate by a member (usually a minister) requesting that 'the motion now be put'.

gerrymander The deliberate drawing of electoral boundaries to disadvantage a political opponent. It does not occur in Australia because the Australian Electoral Commission (AEC) draws the boundaries according to the Electoral Act 1902. This is still a prominent feature of the US House of Representatives electoral districts.

golden rule A rule of statutory interpretation in which the courts seek alternative meanings of a word in a statute if the literal meaning results in absurd or unjust outcomes.

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. Established by Section 61 of the Constitution and exercising the executive power of the Commonwealth, which is formally vested in the Queen. Powers are bound by unwritten Westminster constitutional conventions. The Governor-General possesses express, formal and reserve powers.

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 motion is a tactic used to rush legislation through the parliament with little debate.

Hansard The written record of debates in parliament, including committee hearings. The official record of the business of parliament. When interpreting statutes, 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 for all matters from all Australian lower courts. It is at the apex of the Australian court hierarchy.

House of Representatives The lower house of the 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). Currently there are 150 Members of the House of Representatives, but as from the 2019 general election there will be 151.

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 set of social, economic, civil, political, legal and other rights to which human beings are universally entitled.

hung parliament A parliament in which no party attains more than 50 per cent of the seats in the lower house. By convention, the previous government (incumbent) has the first opportunity to attempt to form government. If unsuccessful, other alliances of parties and independents may try to form a minority government. The last hung parliament at the federal level was the 43rd Parliament in which the minority Gillard Government (2010) was formed by the ALP and a number of independents who agreed to support the government on confidence motions and supply.

hybrid pressure groups Pressure groups combining the features of 'cause' and 'sectional' pressure groups, for example, the Returned and Services League (RSL).

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. Political parties are formed by people with shared ideological views.

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 responsible parliamentary government by which a minister may be held to account by the House of Representatives. Part of the parliament's 'responsibility function'. Note, the Senate is not held to the same level of responsibility of individual ministerial responsibility due to its origins from the US system.

informal vote A ballot paper that has not been completed correctly. The vote has been cast in a way that does not follow the rules of the electoral system. For example, 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. Ballot papers that breach 'secret voting' are also informal votes.

in futuro Latin, meaning 'for the future'. Statute laws are made as rules to guide future actions or events. They act to guide the law from their date of proclamation. In contrast to common law which is ex post facto.

inquisitorial system The trial system used in civil law countries such as Indonesia or France.

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, including Indonesia and many South American countries.

interpretation To decide the meaning of a text. Laws and constitutions are text documents. They are capable of alternative readings and meanings. Disputes about the meaning of statute law or constitutional law are resolved by courts with original jurisdiction over the specific law concerned. When deciding the meaning of a law a court is 'declaring the law'. Interpretations of law become part of the common law and change the meaning of the statute until a new interpretation is made or the parliament amends the statute. Constitutional interpretations made by the High Court cannot be reviewed or changed by the parliament or the government without a referendum, and may fundamentally alter the Australian federation or the rights of Australian citizens. This is also referred to as 'statutory interpretation'.

joint committee A parliamentary committee formed of Members of the House of Representatives and Senators, such as the Parliamentary Joint Committee on Human Rights.

joint sitting Where all members from both the Senate and the House of Representatives are called upon to sit and resolve a matter in parliament. These may result from a Section 57 deadlock where legislation has failed to pass through a chamber twice within a period of three months. The first and only joint sitting ever held since federation was in 1974.

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, also of the rule of law. However, it can be limited by parliament tightening the bounds of the law, as in mandatory sentencing laws. Such limits can be seen as controversial intrusions on judicial independence.

judicial independence A key democratic principle. The judiciary must be completely free from interference and influence from the parliament, the government or any other institution or person. It is a vital component of the rule of law.

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 branch (or arm) of government which adjudicates disputes by interpreting the laws and applying them to specific circumstances in cases 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 The adjudicator in a trial. The main office in the judicial arm of government. Judges are protected against undue influence from government or other parties by constitutional law that guarantees their independence.

jury A panel of citizens who judge the facts of a court case. They hear evidence and argument presented by the parties to a case and take direction from a judge. They decide the verdict of guilt or innocence. See: nemo judex in causa sua.

law The highest form of social control. Law may be made in different parts of the political and legal system. In order of superiority, Australian laws may be constitutional, statutory, common and subordinate.

Leader of the Opposition The leader of the party with the second largest number of seats in the House of Representatives. The leader of the alternative government.

legal representative A person, usually with legal training, who represents a party in an adversarial trial. Often referred to as 'legal counsel'.

legislature The branch (or arm) of government which makes law by initiating, debating, amending or abolishing statutes via the statutory process. May be unicameral (one house) or bicameral (two houses). In Australia, the Commonwealth legislature is a bicameral parliament composed of the House of Representatives, the Senate and the Crown. Each state and territory of the Australian federation has its own legislature.

liberal A political philosophy based on the primacy of the individual. It is the basis of rights to which individuals are entitled. Democracy is the only form of government compatible with liberal philosophy because 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 (the will of the majority) and the respect and protection of rights.

literal rule A rule of statutory interpretation in which the courts apply the standard dictionary definition of a word in a statute. The courts are to use the 'ordinary' meaning of the language within the statute.

lobbying The act of making direct contact 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 senior public servants. There is a code of conduct and register of lobbyists to ensure that the influence of lobbyists on government is transparent. Lobbying is a common strategy employed by sectional pressure groups who have access to decision makers.

major party A political party capable of winning a House of Representatives majority in their own right or in coalition with a minor party during an election. A party capable of forming government. The Australian Labor Party (ALP) and the Liberal Party of Australia are two major parties in Australia.

majoritarian electoral system Type of electoral system that amplifies the number of seats the election winner receives relative to the number of votes they won. 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. First past the post and preferential voting are examples of a majoritarian electoral system. These are good systems for use in lower house elections where the formation of a stable majority government is considered desirable. These systems disadvantage most minor parties and independents.

majority government In Australia, this is where a government is formed by the party which controls more than 76 seats in the House of Representatives. Such parties are said to be able to 'govern in their own right'. Prime Minister Tony Abbott won 90 of the possible 150 seats in the lower house at the 2013 federal election, forming a strong majority government.

majority rule A key operating principle of a liberal democracy. It is based on popular sovereignty and expression of the will of the majority in government and law making.

majority verdict In some jurisdictions and for some cases other than murder and manslaughter, a unanimous verdict may not be required. It can be acceptable for a jury to return a 10–2 or 11–1 'majority' verdict.

malapportionment This is where the number of voters in an electoral division are inconsistent with the number of voters in other divisions (outside an acceptable margin of difference). It can be described as being the opposite of 'one vote, one value'. The Australian Senate suffers constitutional malapportionment as a result of Section 7 of the Constitution.

marginal seat In Australia's electoral system, in the lower house, when a political party holds less than 56 per cent of the two party preferred votes for that electorate, it is considered to be 'marginal'. These seats are targeted at election time due to the potential of voters in that seat to be convinced to vote for other parties. Seats where the member has greater than 60 per cent of the two party preferred votes are generally considered to be 'safe', though this proved not to be the case in the 2019 Wentworth by-election where the incumbent held a 19 per cent majority, but the seat was lost by the Liberal party to an Independent.

maxims Rules and legal principles that have developed over a long period of time. The maxims of interpretation assist courts in applying consistent methods to the interpretation of statute law. Ejusdem generis is an example.

mediation A form of alternative dispute resolution in which a neutral third party (a mediator) assists two disputing parties to find common ground and resolve their 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 which may win a limited number of seats in parliament. They may not survive for more than one or a few successive parliaments. They may hold the balance of power in the Senate in concert with other micro/minor party Senators or Independents. The Palmer United Party, Pauline Hanson One Nation, Family First, the Liberal Democrats, the Justice Party, the Motoring Enthusiasts Party and the Nick Xenophon Team are recent examples. Minor and micro parties can more easily achieve representation in the Senate due to the proportional representation electoral system.

minister A member of the executive arm of government. A member of Cabinet. Ministers have responsibility for a particular area of government activity such as health, education or defence, which are referred to as a 'portfolio'.

ministry The entire collective of ministers and assistant ministers, including the Prime Minister. It is divided into an inner ministry of senior Cabinet ministers and outer ministry of less important 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 the proportional representation electoral system.

minority government A government formed by a party which controls less than 76 seats in the House of Representatives and which must rely on the support of non-party Members of that house on motions of confidence (collective ministerial responsibility) and supply (appropriations). The Gillard Government and Morrison Government are examples of minority governments.

mirror representation An ideal form of representation in which the composition of the parliament (or at least one house) accurately reflects the diversity of the electorate in age, gender, ethnicity, religion, and other social and economic characteristics. This is the part of the parliament's 'representative function' exhibited most strongly in the Senate.

mischief rule A rule of statutory interpretation in which the court seeks the original purpose of a statute law (that is, the 'mischief' it sought to prevent). This rule is used if the meaning cannot be declared without absurd or unjust outcomes using the literal or golden rules. The courts may refer to the statute's second reading speech in Hansard, or other materials to seek the purpose of the law. This is sometimes referred to as the 'purposive' rule.

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 the

government to resign. This is a key part of the parliament's responsibility role. These motions are almost always defeated on party lines, which means the government will always win. At best they provide the Opposition with an opportunity to speak or debate.

multi-member electorate An electorate represented by more than one representative. The electoral system used for Senate voting uses multi-member electorates.

nation state The largest sovereign political and legal unit of organisation devised by humankind (not including 'super-national' units like the European Union and the United Nations). 'Nations' are large groups of people bound by shared culture, traditions, histories, languages and other demographic characteristics. 'States' are geographical territories containing a population of at least one nation, a political and legal system, and sovereignty. A 'nation state' is a people with the sovereign right to determine their own government within a defined geographical area. Australia is a nation state. Aboriginal Australians form many nations, but no indigenous nation possesses a state. There are between 190 and 200 nation states in the contemporary world. The number can vary as new nation states are created or old ones absorbed within others.

nationalise To take into public ownership. This is where the government takes over private businesses. A key ideology of democratic socialism. The opposite of privatise.

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 Latin for 'by the company it keeps'. A maxim of statutory interpretation in which a term used in a statute is interpreted in the context of the words surrounding it. Allows the courts to apply 'common sense' reasoning to the meaning of a law if a literal interpretation of a word does not result in a just outcome.

obiter dicta Latin for 'sayings by the way'. This includes the non-critical judicial reasoning outlined 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 party with the second largest number of seats 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 be ready to form government itself.

optional preferential voting A preferential voting system in which an elector may number as many candidates on the ballot paper as they wish — they do not have to number all the candidates. Queensland uses optional preferential voting. This system was also applied to the Senate voting practice via reforms in 2016.

ordinances Delegated legislation.

original jurisdiction The type of cases or areas of law which a court has the power to hear 'in the first instance'. The High Court's original jurisdiction is specified in Section 75 of the Constitution. The parliament may add additional original jurisdictions under 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 debate, 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 the misuse of parliamentary privilege by the privileges committee of the house in which they sit.

parliamentary sovereignty In a political and legal system where both common and statute laws are created, if they come into conflict the statute law will prevail. The only exception to this is High Court judgments on the Constitution.

partisan (representation) A practical form of representation in which the elected representative is a member of a political party. They contribute to their party's policy formulation and then support the party's position in the parliament and in public. It is the dominant form of representation in contemporary Australian politics. Part of the parliament's 'representative function'.

party room A general term for the meeting of a parliamentary political party's elected Members of the House of Representatives and Senators. A party's 'party room' is a critical forum for political strategy and debate. It determines the party leadership. The Liberal Party of Australia and the Nationals' party rooms are called the 'Liberal Party Room' and the 'National Party Room', respectively. When in government the Liberals and Nationals form a coalition and meet together in the 'Coalition Party Room' as well as their separate party rooms. The Liberal and National Party Rooms determine policy and drive their respective political parties. The ALP's party room is called Caucus and is bound by a pledge to support ALP policy, which is largely set by the party's National Conference held every two years. The actions of party rooms contribute to the debate about the 'decline of parliament' and 'leadership' in the Australian political system.

peoples' house The lower house of a bicameral legislature. In Australia, the House of Representatives is a peoples' house because it represents citizens in states in proportion to state populations. The Australian electoral system further ensures this by enshrining the principle of 'one vote, one value' in law, ensuring the equality of the political right to vote.

plaintiff In a civil dispute, this is the party that initiates the court case and claims to have been 'wronged' in some way.

plebiscite Parliament may seek direct political participation by citizens when an issue comes before it and for which the parliament desires popular confirmation or rejection of the proposed solution. Plebiscites must be initiated through legislation in the parliament, are held infrequently and are non-binding. Note: The same-sex marriage postal survey in 2017 was NOT a plebiscite.

political freedoms A key operating principle of a liberal democracy. Political freedoms are entitlements enjoyed by all citizens and that enable political participation. Political freedoms include the freedoms of conscience, speech, association and assembly, and media and the press.

political participation A key operating principle of a liberal democracy. Political rights and freedoms enable citizens' political participation, which, in turn, permits citizens a role in their own government.

political party Associations formed by people seeking to influence law making. They have a broad focus. Classified as either major, minor or micro parties. Generally, they are organised and well disciplined, and seek election to parliament. They are formed around shared ideological beliefs.

political spectrum A traditional way of describing political ideology. 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. The more ideological a party or politician is, the more likely they will be further from the centre of the political spectrum. From the extreme left to the extreme right, typical political ideologies are: communism, socialism, democratic socialism, social democracy, social liberalism, economic liberalism, social conservatism and fascism. Australian political parties tend to be pragmatic, with the extremes of the political spectrum not well represented in Australian politics. The political spectrum describes both economic and social ideologies.

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 'gifted' to the government via the electoral process. Democracy is based on the idea of popular sovereignty.

portfolio An area of government activity. For example, the health portfolio belongs to the Minister for Health and includes the Department of Health, all the public servants in the department and other executive agencies related to health. It includes the money allocated from the budget to administer the health portfolio. A minister is responsible under the convention of individual ministerial responsibility for their portfolio. In theory, they accept responsibility for what happens in their portfolio, including any maladministration or spending inefficiencies. This acceptance of responsibility infers a minister will resign if the latter occurs.

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 seeking to influence law making. They have a narrow focus. Classified as either 'cause' groups or 'sectional' groups. They take action in a variety of ways, but usually do not seek election to parliament. The theories of pluralism and corporatism explain their activity. GetUp! is an example of a pressure group.

Prime Minister The Head of the federal executive (the government). The leader of the majority in the House of Representatives. The leader of the party forming a majority government. The leader of the major partner in a coalition or alliance of parties forming government. The position is entirely governed by convention. There is no mention of the Prime Minister in the Constitution.

private law (civil) Law concerning 'wrongs' committed against private parties.

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, but not backbenchers.

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 final stage in the passage of a bill. Bills are published in the Government Gazette and, once proclaimed, become an Act of Parliament, which is law.

progressive The 'left' of the political spectrum. The Australian Labor Party and the Greens are progressive parties. Progressive parties believe in the power of government to improve society. They advocate a larger role for government.

promotional groups Cause groups

proportional voting A proportional electoral system based on multimember electorates in which electors vote for candidates in order of preference. To win, a candidate must achieve a 'quota' of votes determined by a formula. Candidates with votes in excess of one quota have their surplus votes distributed at a reduced transfer value. Votes are distributed at their transfer value to the second preference candidate. This system has been used to elect the Senate since 1949 and versions of it are used in state upper houses. It is a good system for use in upper houses where the domination of a particular political party may be considered undesirable. It enables upper houses to function as effective houses of review and checks on executive power. This system is fair to all political parties as the percentage of votes won is more directly translated into a percentage of seats in the chamber, and may be considered partly responsible for a revival of parliament.

prosecution In the criminal trial process, this is the party that brings the charge to court, acting on behalf of the State.

public law (criminal) Law concerning 'wrongs' committed against the community.

public service Appointed (unelected) officials who provide administrative services to executive government. Arranged into government departments and agencies, and statutory authorities, it administers the laws of parliament and the regulations of the government. It is bureaucratic. It is accountable via the Westminster 'chain of accountability' to ministers in Cabinet and, through them, to the parliament and the people. The public service has considerable power in its own right, such as that held by the Department of Foreign Affairs and Trade.

question time A key procedure associated with the responsibility role of the Commonwealth Parliament which occurs at 2 pm every parliamentary sitting day. Any private member may ask any minister a question concerning their portfolio area, their conduct or other matters relating to how they carry out their role.

quota The requirement to win a seat in a single transferrable voting electoral system. The calculation takes the total number of formal votes divided by the number of seats up for re-election plus one; all added to one. This delivers a quota, which in a half Senate election is approximately 14.3 per cent, while in a double dissolution election where all Senate positions are up for re-election, the quota is approximately 7.7 per cent.

ratio decidendi Latin for 'reason for deciding'. Critical judicial reasoning which is binding on lower courts in a court hierarchy, and persuasive across and up a court hierarchy or for other court hierarchies.

referendum The only formal way to change the Constitution. The procedure is contained in Section 128 and requires a bill to pass the parliament proposing the change. The question must then be put to the people within two months and no later than six months after passing the parliament. To succeed, a proposal must obtain a double majority made up of a democratic majority (a majority of Australian voters) and a federal majority (a majority of voters in a majority of states).

regulations Delegated legislation.

representative A member of parliament elected to re-present the concerns and values of an electoral district (House of Representatives) or of 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 an assembly (parliament) acting as their representatives. Such representatives may be delegates, trustees or partisans.

republic (political science definition) A form of government in which the people are sovereign. By this definition Australia may be referred to as a 'crowned republic'.

republic (popular definition) A form of government in which the head of state is a president. It may be in the form of a 'democratic republic' (US) or an 'autocratic republic' (North Korea).

reserve powers Powers of the Governor-General codified in the Constitution and exercisable without 'advice' in emergencies. Sections 28 and 64 are examples. Sir John Kerr's use of the power under Section 64 to dismiss Prime Minister Gough Whitlam in 1975 provides a good illustration of the use of these powers.

residual powers All government powers not specified or enumerated in the Constitution. They are exercised by the states.

responsible government The convention governing the formation of government in the Westminster system in which the executive is drawn from and responsible to the parliament.

royal assent The formal agreement of the monarch or the monarch's representative in Australia, the Governor-General, to a proposed law. The monarch possesses the formal power to make law, but, in practice, the democratic parliament makes law. By Westminster convention, royal assent is always given; it is never refused. Section 58 grants this power to the Governor-General.

rule of law In simple terms, this is the principle by which everyone is subject to the law. All people, governments, corporations and other entities are subject to the law regardless of power, wealth or any other quality. The rule of law is characterised by a number of other principles such as judicial independence, checks and balances, limited power, respect for rights and freedoms, democratic law making, the coherence of laws and public knowledge of laws.

rule by law The opposite to the rule of law. Autocratic systems of government are characterised by the abuse of law by the powerful to subjugate the people.

rules of evidence Rules governing the type of evidence admissible in a trial. The adversarial trial has very strict rules of evidence. For example, hearsay, character, opinion and circumstantial evidence are not admissible because of their lower quality and reliability. The inquisitorial system of trial has more relaxed rules of evidence. Tribunals may also have more relaxed rules of evidence.

secret ballot Voters must be free from intimidation. This is a key principle of a liberal democracy. Only the elector should know how they cast their vote. It is achieved by providing private voting booths for electors and by regarding any identifiable ballot paper as an informal vote. It was pioneered in Australia and is often referred to as the 'Australian ballot' in other democratic countries.

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). Currently there are 76 Senators.

separation of powers A doctrine by which the functions of government to make, carry out, interpret and enforce the laws are dispersed to prevent the concentration of power. First described by French aristocrat, Charles de Montesquieu. A key feature of democracy. Complementary to checks and balances.

shadow ministry The Opposition front bench composed of spokespersons for each of the ministerial portfolios of the government. Each spokesperson scrutinises a government minister. They are the alternative government.

simple majority A majority of votes. A plurality of votes. The required majority to win in a first past the post voting system. If there are three or more candidates, the winner may not be the 'most preferred' candidate because they may win with less than half the votes. See also absolute majority.

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 The type of proportional electoral system used to elect the 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 that 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 and 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. The High Court only grants leave to appeal if it considers a miscarriage of justice has occurred or if the case presents the opportunity for new common law to be made.

standard of proof The level to which a court case must be proven in order for it to be successful. There is a lower standard of proof in a civil dispute — on the balance of probabilities — compared with that for a criminal dispute — beyond a reasonable doubt. This is because of the remedies involved which, in a civil dispute, are less serious than sanctions for a criminal conviction. See also 'balance of probabilities' and 'beyond 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 of Representatives the executive dominates and may easily 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 Electoral Act 1902.

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 This is a simple or minor offence and is adjudicated in an inferior court such as the Magistrates Court of Western Australia. Minor offences include theft and driving offences.

system of government The political and legal system of a nation state. Systems of government have three arms of government and take different forms. They have distinguishing features such as unitary or federal, parliamentary or presidential, republics or constitutional monarchies and democracies or autocracies. Systems of government may combine these distinguishing features in different ways. For example, there are unitary democratic republics and federal parliamentary constitutional monarchies. The absence of a system of government is called 'anarchy'.

trial A procedure for finding the truth. This is the main process of the judicial arm of government. Adversarial trials are used in common law countries. Inquisitorial trials are used in civil law countries. Trial procedure is designed to ensure procedural fairness.

trustee (representation) A theoretical form of representation in which the elected representative acts in their electors' best interests in the parliament. It grants more autonomy to the representative. Part of the Parliament's 'representative function'.

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. May be also termed an 'illiberal democracy'.

unicameral A legislature composed of a single representative legislative chamber. New Zealand has a unicameral parliament. 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 Queen and Governor-General by Section 61, and judicial power is vested in the High Court and other courts by Section 71. Democratic institutions vest power in separate arms of government to create a separation of powers.

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 links between the people and those who execute the laws that govern them. In theory, the people elect representatives to parliament. Parliament forms the executive government (Cabinet) and holds it to account by the Westminster conventions of responsible government (individual and collective ministerial responsibility, question time etc). The ministers hold portfolio responsibilities for government departments staffed by appointed public servants. Therefore, public servants are 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. Its effectiveness is undermined by the size and complexity of modern government and by the decline of parliament. It is also undermined by the existence of political advisors to ministers. These advisors are outside the chain of accountability, but can take the blame that should belong to a minister.

Westminster conventions Unwritten constitutional rules that govern the practice of government in systems derived from the British Westminster system. One convention is that the government is formed by the party which has the confidence (the majority) of the lower house of the parliament. Another is that the Governor-General always acts on the advice of the Federal Executive Council (EXCO). See also 'conventions'.

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 court trial and who gives evidence. Evidence may only be presented in compliance with the rules of evidence in a court. They present a verbal account that may be 'tested' through cross-examination by legal counsel. The adjudicator will determine the 'weight' the evidence should bear in determining the outcome of the trial.

writ A written document issued by a court or another body or person with the legal authority to issue a command. Courts issue writs of mandamus commanding an officer of the government to do or not to do a specific task or action. The Governor-General issues a writ to call an election.

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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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ISBN: 978-0-9953547-7-7

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