

POWER, ACCOUNTABILITY & RIGHTS

VERSION _____



Power, Accountability & Rights

Second Edition

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Acknowledgements:

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

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Power, Accountability and Rights Second Edition is their legacy.

*Author's Dedication: For Dianna, who supported me throughout this book's journey.
And to the students who will read it - you are the future.*



Political and Legal Educators Association of Western Australia (Incorporated)

Power, Accountability & Rights

WACE Politics and Law ATAR Units 3 & 4: Second Edition

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Preface

Power, Accountability & Rights: Second Edition has been written as a student textbook to address the syllabus content of the Western Australian Politics and Law ATAR course in senior schools from 2021. This text is designed to facilitate the teaching and learning for Year 12 study of Unit 3 & Unit 4 principles, knowledge and skills.

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

Each chapter is supplemented by a summary and exam practice questions. Exam practice questions have been deliberately designed and scaffolded to reflect, in so far as possible, the assessment types and WACE examination structure. Subsequently, each chapter's exam practice questions reflect the style, expected level of difficulty and number of questions as is found in the WACE examination. Furthermore, these exam practice questions will provide ample opportunity to review the principles and knowledge of the chapter as well as practice for the penultimate examination. The second edition includes a centrefold, between Units 3 & 4, where students can find a variety of case studies on the three arms of government: legislative, executive and judiciary.

The Political and Legal Educators Association of WA recommends this textbook to both students and teachers of the Year 12 Politics and Law ATAR course in WA. Feedback from the membership has been instrumental in providing guidance for the production of the second edition.

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Limits to power – Australia and the United States

Syllabus points:

- **Legislative, executive and judicial powers with reference to the Australian Constitution and with comparisons to one non-Westminster political and legal system**
- **Essential to the understanding of political and legal power is the knowledge of responsible government, representative government, separation of powers, division of powers and Westminster conventions**

Introduction

Democracy requires that power be limited. The operating principles of liberal democracy limit government power. Two of its most important principles are the doctrine of the **separation of powers** and constitutionalism. This chapter examines how Australia and the United States of America (US) achieve these two principles.

The separation of powers principle was first identified in England by the French political thinker, Montesquieu. He was curious about

what made England's monarchy less tyrannical than the French. He noted that the English system of government shared power amongst three different institutions — the legislature, the executive and the judiciary. Moreover, checks and balances between these institutions could restrain their powers. This principle prevented the accumulation of political and legal power by one person — such as an absolute monarch — or an elite body — such as army officers or wealthy oligarchs.

	Legislative power	Executive power	Judicial power
Institutions (Australia)	Parliament	Government	Courts
Institutions (United States)	Congress	Administration	Courts
Outline of powers	- the power to make statute law - elected by the people to represent them - exercises popular sovereignty - the people's representatives make laws reflecting the popular will	- the power to carry out statute law - elected by the people - exercises the coercive powers of the State, which are granted and limited by law	- the power to interpret constitutional, statute and common law - applies the law to specific facts in court cases - courts interpret laws in specific cases where they apply
Note: - all powers relate to laws - laws are coercive, universal and enforceable by the State			

■ Table 1.1 — Overview of the branches of government in Australia and the United States.
Source: Stephen King, 2020



■ Figure 1.1 – Enlightenment thinker, Baron de Montesquieu.
Source: Unknown, after Jacques-Antoine Dasser, Portrait of Charles de Secondat, Baron de Montesquieu, uploaded by Maarten van Vliet, 2004, Public Domain, <https://en.wikipedia.org/wiki/Montesquieu#/media/File:Charles_Montesquieu.jpg>

Table 1.1 provides an overview of the powers of the three branches of government — the legislature, the executive and the judiciary — in Australia and in the US.

The separation of powers is part of another, broader principle — **constitutionalism** — which is the idea that government powers should be limited and not be absolute.

The idea of constitutionalism developed in the 18th century during the Enlightenment. Questioning authority — including government authority — was a feature of the Enlightenment. What is the best form of government? How can people's liberty be protected? What makes government legitimate? These and other questions led to pressure for political change. The result was the French Revolution and other political upheavals across Europe in the late 18th and 19th centuries.

These and other ideas such as the rule of law were influential in the evolution of various forms of colonial self-government in late 19th century Australia. Later debates also had an impact on the form of government Australia would adopt at Federation in 1901. In this sense, Australia's government is the product of both traditions — Enlightenment thinking and evolutionary political change.

In the modern era, there is more than one style of democratic system. Despite their differences, democracies share the principles of constitutionalism and the separation of powers. Australia and the US are two examples of ways that democratic systems of government can differently incorporate these principles.

Understanding democratic constitutions

Before investigating Australia and the US, it is essential to look at democratic constitutions. Constitutions are fundamental or superior laws designed to achieve the following five objectives.

Constitutions:

1. specify a **geographical distribution of power** — power is either vested in one national government (unitary) or divided between two sovereign levels of government (federalism);
2. create **institutions of government** — legislatures, executives and courts — and define their powers;

3. specify the **procedures and processes** of government, including the relationships between legislatures, executives and the courts;
4. outline the relationship between government and citizen, that is, **rights**; and
5. contain a mechanism for their alteration.

Constitutions define and distribute power. Unit 3 examines power and looks at the five points above. Unit 4 examines the accountability of the Australian Government, and individual and group rights. It also addresses some of the points above.

Australia's Constitution and the separation of powers

Australia is a **representative democracy** and **constitutional monarchy** organised as a federation with a Westminster system of responsible parliamentary government.

The *Commonwealth of Australia Constitution Act 1900* — referred to as the Australian Constitution — contains eight chapters and 128 sections. The older Constitution of the United States (US Constitution) greatly influenced the Australian Constitution. The way the Australian Constitution creates a national government and federalism is almost identical to its US counterpart. Separation of powers in Australia, however, is influenced to a lesser degree by the US Constitution.

“There is no mention of the political executive — the Prime Minister and Cabinet — in the constitution.”

In its first three chapters, the Australian Constitution allocates the powers described in Table 1.1.

Chapter 1: Legislative power is vested in the Commonwealth Parliament, which includes the

Queen, as monarch. It is the longest chapter of the Constitution. It contains the first 60 sections of the Constitution, making up almost half of the whole document. It has various Parts:

Part I — General

Part II — The Senate

Part III — The House of Representatives

Part IV — Both Houses of the Parliament

Part V — Powers of the Parliament

Chapter 2: Executive power is vested in the Queen and is exercised by the Governor-General. Chapter 2 is short and only establishes an unelected formal or constitutional executive. It is important to note that there is no mention of the political executive — the Prime Minister and Cabinet. The US Constitution does not provide a model for Chapter 2. Knowledge of the conventions of responsible parliamentary government — described below and later in this book — is essential to understanding how real executive power operates in Australia; the Australian Constitution itself is no guide.

Note that Chapters 1 and 2 create a constitutional fusion of the legislature and executive because the Crown is part of each.

Chapter 3: Judicial power is vested in the High Court of Australia (High Court) and allows the parliament to create other federal courts. It establishes the independence of the judiciary and the original and appellate jurisdictions of the High Court, including its sole jurisdiction to interpret the Constitution. Jurisdictions are court powers.

The powers in brief — Australia

Chapter 1: Legislative power

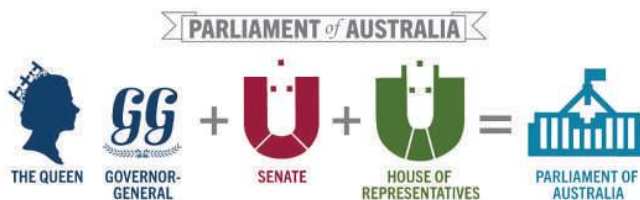
The legislative power is the power to make statutes. A statute is a law made by a legislature. Section 1 of the Australian Constitution creates a **bicameral** Commonwealth Parliament composed of a House of Representatives, a Senate and the Queen (or her heirs and successors). The inclusion of the Queen is a result of Australia having been a British colony and a choice by the Founding Fathers to follow British practice. The monarchy and its representative in Australia — the Governor-General — play a minimal role in the legislative process.

In Australia, the monarch — currently Queen Elizabeth II — is represented by the Governor-General, and is the head of state. The two houses have almost identical powers except that the Senate cannot initiate or amend money bills. Section 53 of the Constitution imposes this limitation.

“There is a division of government powers between one national and six state governments.”

Statutes are universal and powerful laws. They are the primary tool of power because they control social, economic and other aspects of society. In a democracy, statutes must reflect the will of the people. Sections 7 and 24 of the Constitution make Australia a representative democracy by requiring both houses of parliament to be “directly chosen by the people”. These two sections help achieve political representation and popular participation in lawmaking.

The Constitution creates a federal nation — one in which there is a division of government powers between one national and six state governments. Federalism divides sovereignty geographically and results in limited sovereignty for the national parliament. The Commonwealth Parliament can only make statutes in areas of national concern specified and enumerated in the Constitution. Specific powers are written in



■ Figure 1.2 – The Australian legislature.

Source: Parliamentary Education Office <<https://peo.gov.au/understand-our-parliament/introducing-our-parliament/australian-parliament/>>

the Constitution and are called **heads of power**. For example, Section 51(ii) is a financial head of power for taxation, while Section 51(xxix) — external affairs — is a legislative power.

The Commonwealth Parliament makes laws authorised by a head of power. Laws seen to be beyond the power (*ultra vires*) allowed by the Constitution may be challenged in the High Court. In this respect, the Commonwealth Parliament is similar to the US Congress because both operate within a federal system. By contrast, the Parliament of the United Kingdom of Great Britain and Northern Ireland (the British Parliament) operates as a unitary system without a written constitution defining its powers. It has almost unlimited lawmaking powers and thus enjoys wide-ranging parliamentary sovereignty.

The Australian Constitution only specifies the institutions and powers of the legislative branch. It is silent about lawmaking and other processes and procedures. Instead, it grants parliament power to make its own rules, called Standing Orders.

Chapter 2: Executive power

Executive power is the power to carry out or execute laws by developing policies and implementing statutes. Executing statutes is done by a wide range of elected officials (called politicians), agencies and government employees. All the people and institutions involved in executing statutes make up ‘the government’. Therefore, the words ‘executive’ and ‘the government’ are synonymous.

The executive branch includes the Queen as represented by the Governor-General, the Prime Minister, the Cabinet (senior ministers) and the ministry (which includes junior and assistant ministers). It includes the tens of thousands of public servants working in government departments and other agencies tasked with the day-to-day implementation of statutes.

Section 61 vests the executive power of the Commonwealth in the Queen and her appointed representative in Australia, the Governor-General. A **constitutional** or **formal executive** is



■ Figure 1.3 — Queen Elizabeth II is Australia's Head of State. Source: Source: Joel Rouse (Ministry of Defence) and nagualdesign, 2015, OGL 3, <https://en.wikipedia.org/wiki/Elizabeth_II#/media/File:Queen_Elizabeth_II_in_March_2015.jpg>

therefore created by Section 61. However, the Crown's specific constitutional powers are almost completely limited by unwritten Westminster conventions. The most important of these is that the Crown exercises its power on the advice of elected officials. Note that this convention makes the monarchy a constitutional monarchy.

The Governor-General fulfils the Queen's role in executing statutes by using constitutional powers only when advised by members of the Cabinet — the elected officials comprising the **political executive**.

The Queen — as represented by the Governor-General — is the **head of state**. The **head of government** is the Prime Minister. Westminster systems separate these roles.

The Constitution makes almost no mention of the political executive, which wields real power. The political executive — commonly known as the government — is comprised of

- a Cabinet made up of the Prime Minister and senior ministers; and
- an outer ministry made up of junior ministers and assistant ministers.

The political or real executive is formed according to unwritten Westminster conventions. The most important of these is that the government is formed by the party which has the majority of seats in the lower house, the House of Representatives. The Prime Minister is the leader of that party and chooses Cabinet ministers from amongst elected members of parliament.

Australia's Founding Fathers chose this system to entrench the parliamentary executive characteristic of the Westminster system.

Section 64 of the Constitution entrenches a parliamentary form of executive by ensuring that ministers must be members of parliament. Constitutional conventions require that as a collective group they must command the support (or confidence) of the lower house of parliament.

Note that the Westminster conventions of responsible government and Section 64 of the Constitution create a structural fusion of the legislature and executive. This fusion is a point of significant difference between the Australian and the US systems of government. Chapter 2 of the Australian Constitution is therefore fundamentally different from Article 2 of the US Constitution in terms of executive processes and procedures.

The executive branch also includes the public service, comprised of government departments, agencies and statutory authorities. The public service can be thought of as the **administrative executive** because it administers statutes and regulations. Its members are appointed — not elected — officials regulated by the *Public Service Act 1999* and other statutes. The Constitution makes almost no mention of the administrative executive.

Australia's written Constitution is minimalist with reference to creating and defining these executive institutions. Most of the constitutional rules which govern the operation of the executive branch are not written in the Constitution, but found in unwritten **constitutional conventions** inherited from the British Westminster system. The British Westminster system evolved over many centuries and, along with it, a set of conventions or traditional customs and practices developed.

Chapter 3: Judicial power

Judicial power is the power to **adjudicate** and to make legally binding decisions. It is the power to make decisions about rights and obligations by interpreting and applying statutes and common law. Courts decide disputes. Their decisions are legally binding on the parties concerned and may create new law.

Cases are disputes between parties where courts use judicial power to interpret and apply laws to a particular case. There are other forms of dispute resolution, but adjudication by a court is final — its decision is legally binding on the parties involved in the case.



■ Figure 1.4 – The High Court of Australia creates a strict separation of judicial power, following the US model rather than the British.

Source: High Court of Australia, 2015, CC-BY-SA-3.0, <<https://commons.wikimedia.org/w/index.php?curid=458978>>

Jurisdiction means ‘where the law speaks’. The types of cases heard by courts depend on a court’s jurisdiction. Australian jurisdictions are arranged geographically and by areas of law. State and federal **court hierarchies** are made up of inferior, intermediate and superior courts.

Courts interpret various types of law including statutes (Acts of parliament), common law and, in the case of the High Court, the Constitution.

Section 71 of the Constitution vests the **judicial power** of the Commonwealth (federal jurisdictions) in the High Court and “in such other federal courts as the parliament creates”. The High Court is the nation’s highest court. Section 71 also grants the Commonwealth Parliament an exclusive power to create other federal courts. Newer federal courts created under Section 71 include the Family Court of Australia (1976), the Federal Court of Australia

(1986), and the Federal Circuit Court, formerly known as the Federal Magistrates Court (2001).

The Constitution creates a strict separation of judicial power following the US model, rather than the British. Because Australia is a federation, the High Court is modelled closely on the US federal Supreme Court. For example, like the US Supreme Court, the High Court is a constitutional court with jurisdiction over the Constitution and its division of federal powers. Both courts are their country’s final court of appeal.

Constitutions limit power by defining it. In the case of Australian judicial power, this is done by the allocation of original and appellate jurisdictions as set out in Chapter 3 of the Australian Constitution. Jurisdictions specify the areas of law in which federal courts may hear disputes or appeals.

It is important to note that the Constitution deals only with federal, not state, courts. This feature of the Constitution reflects the fact that Australia is a federal nation in which powers — including judicial power— are divided geographically.

What about the states?

Chapters 1, 2 and 3 of the Constitution deal with the Commonwealth. Chapter 5 protects the states’ constitutions in addition to their legislative, executive and judicial powers. The Australian Constitution does not specify states’ powers. Instead, Chapter 5 reserves unspecified powers for the states. This method of creating a federal system is similar to the US.

Taken together, Chapters 1, 2, 3 and 5 create the Australian federation.

An example of a non-Westminster system — The Constitution of the United States and the separation of powers

The US is a **representative democracy** and a **republic** organised as a **federation** with an executive presidential system of government.

The US Constitution contains 10 Articles, the first three of which perform precisely the same function as Chapters 1, 2 and 3 of the Australian Constitution.

Article 1: Legislative power

Article 1 vests legislative power in the Congress of the United States (Congress), consisting of the Senate and the House of Representatives. It contains the following Sections:

Section 1 — vests legislative powers in a Congress consisting of a Senate and House of Representatives;

Section 2 — the House of Representatives;

Section 3 — the Senate;

Section 4 — elections for both houses;

Section 5 — the procedures of each house;

Section 6 — payment and limitations of members of Congress;

Section 7 — the passing of bills;

Section 8 — powers of the Congress; and

Sections 9 and 10 — states and other matters



■ Figure 1.5 – The signing of the Constitution of the United States of America, 1787.
Source: Howard Chandler Christy, 'Scene at the signing of the Constitution of the United States', *The Indian Reporter*, 1940, <<https://commons.wikimedia.org/w/index.php?curid=662340>>

Article 2: Executive power

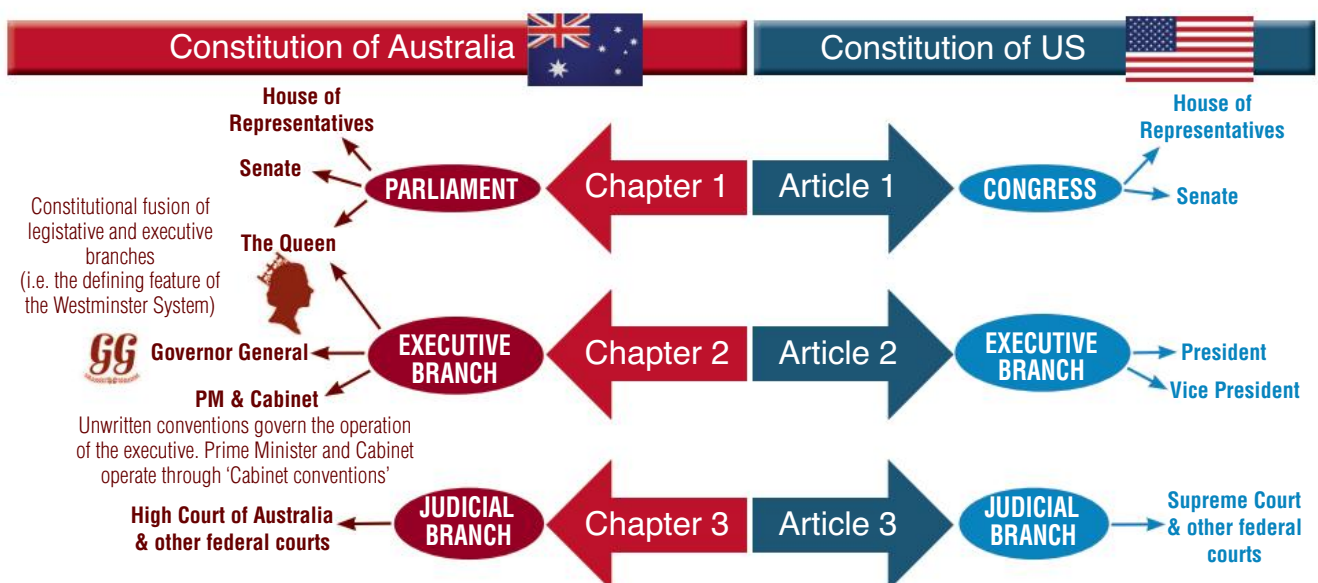
Article 2 vests executive power in a President and a Vice President elected together. Article 2 further establishes the Electoral College. The Electoral College is part of the voting system for presidential elections. Presidential elections are separate from Congressional elections.

Article 3: Judicial power

Article 3 vests judicial power in the US Supreme Court and allows Congress to create other

federal courts. It establishes the independence of the judiciary and the original and appellate jurisdictions of the Supreme Court, including its constitutional jurisdiction.

A historical distinction between Australia and the US is that the US was created through a war for independence from Britain, whereas Australia was granted its sovereignty from Britain peacefully. The US system of government reflects its origins in the furnace of revolution. America's Founding Fathers were adamant their



■ Figure 1.6 – A comparison of the Australian and United States Constitutions.
Source: Stephen King, 2020



■ Figure 1.7– The US features a bicameral legislature referred to as Congress.
Source: Martin Falbisoner, *US Capitol west side*, Own work, 2013, CC BY-SA 3.0,
<<https://commons.wikimedia.org/w/index.php?curid=28359031>>

new system would prevent future tyranny. To achieve this, they took Enlightenment political ideas — including Montesquieu’s — very seriously. As a result, the US more rigorously applies the separation of powers than does the Westminster-inspired Australian system. Other Enlightenment ideas — such as those contained in Thomas Paine’s 1791 book, *Rights of Man* — were also incorporated. Defending individual liberty by limiting government power was the intention. Distributing power widely and imposing vigorous checks and balances upon it was the method.

The powers in brief — United States

Article 1: Legislative power

The US Congress is the name of the American legislature. Article 1 of the US Constitution creates Congress. It is a **bicameral** legislature with a House of Representatives and a Senate, both directly elected by the people. Each house is elected differently and serves a different function, but they are co-equal in power, with the exception that the Senate cannot initiate a money bill.

Just as the Australian Parliament’s lawmaking powers are limited by the Australian Constitution, the lawmaking powers of Congress are limited by the US Constitution. Sharing sovereignty with 50 states in a federation is one limitation. Lawmaking powers are specified and enumerated in the Constitution, especially under Section 8 of Article 1. These define and limit legislative and financial powers.

“In the US system, the President is the head of state and the head of government combined into a single office which is directly elected by the people.”

Chapter 1 of the Australian Constitution is based on Article 1 of the US Constitution. It is not surprising, therefore, that the US and Australian legislatures are very similar in design. A fundamental **similarity** is that both feature strong bicameralism; that is, the legislatures of both houses of each parliament have almost the same lawmaking powers. Another similarity is that the House of Representatives in both countries is a people’s house where people are represented via electoral divisions — 435 in the US and 151 in Australia. Finally, the US and Australian Senates are federal chambers — they are states’ houses — with two Senators per state in the US and 12 Senators per state in Australia.

Article 2: Executive power

The greatest difference between the Australian and US systems is in the executive branch. In the US system, the President is the head of state and the head of government combined into a single office which is directly elected by the people.

The US executive presidency — established by Article 2 of the US Constitution — is entirely separate from the other two arms of government.



■ Figure 1.8 – The US Supreme Court acts as a check and balance on the other arms of government.

Source: UpstateNYer, *US Supreme Court west façade*, Own work, 2008, CC BY-SA 3.0, <<https://commons.wikimedia.org/w/index.php?curid=5839343>>

A complex electoral system allows the people to directly elect the executive government. Presidential elections are held every four years and are separate from congressional elections which occur every two years.

The President and Vice President are elected at the same time. The President then appoints a Cabinet of Secretaries who head departments and agencies in the US Administration (the name used for the executive). The role of Congress in this process is simply to confirm presidential nominations and nothing beyond that. Secretaries are appointed by, and accountable to, the President. They are not members of Congress or elected officials accountable to Congress. The President's powers include the use of executive orders and the power to veto.

In Australia, Section 64 of the Constitution requires all ministers to be members of parliament. There is no equivalent to Section 64 of the Australian Constitution in the US. The US executive is not Westminster-inspired and so does not rely on unwritten constitutional conventions. The strict separation of the executive and legislative branches is the critical point of **difference** between the US and Australian systems.

To find out more about the separation of powers and checks and balances in the US system, see: *Case Study: Attorney General William Barr*.

Article 3: Judicial power

US judicial power is vested in a Supreme Court and other inferior courts that Congress may create. Article 3 of the US Constitution establishes the federal judiciary. Article 3 was the model for Chapter 3 of the Australian Constitution. Like its Australian counterpart, the US judiciary is entirely separate and independent from the other two arms of government.

The US Supreme Court's jurisdictions include the power to interpret the Constitution and to strike down laws it judges to be unconstitutional. It may also adjudicate presidential powers. The Supreme Court is thus a powerful check on Congress and the President. It is also the final court of appeal for all lower courts.

“The separation of Australian executive and legislative powers is much weaker than that of the US, and the checks on Australian executive power are correspondingly less stringent.”

Criteria		Australia	United States	Comments
T Y P E O F G O V E R N M E N T	Constitution	Constitutional Monarchy - written constitution defining the structures of government and division of federal powers - unwritten ‘conventions’ governing the practices of the executive arm, in particular	Democratic Republic written constitution defining the structures and procedures of government and division of federal powers	- both are liberal democracies characterised by constitutionalism, the rule of law and the separation of powers - the US was one of the formative influences on the Australian system - the US was the source of some of Australia’s key governmental features such as federalism, strong bicameralism and a completely separate judiciary - the UK was the other formative influence - the UK was the source of constitutional monarchy and responsible parliamentary government
	Head of State	Monarch - a hereditary office - serves for life - represented by a Governor-General appointed for five years	President - a directly elected office - serves a maximum of two four-year terms	
	Head of Government	Prime Minister an indirectly elected office		
	Geographical distribution of power	Federation sovereignty divided between one central and two or more regional governments — 6 in Australia, 50 in the US		Federalism a US innovation adopted by Australia
S E P A R A T I O N O F P O W E R S	Executive	Responsible parliamentary government - drawn from, and accountable to, the parliament - the executive government is the Cabinet - Cabinet is composed of ministers who must be members of, and responsible to, parliament - the party with a majority of support in the House of Representatives forms the government - the government is indirectly elected	Executive presidential government - directly elected President and Vice President - the executive Administration is the Cabinet - Cabinet is composed of Secretaries appointed by, and accountable to, the President and cannot be members of Congress	- the most significant difference between the Australian and US systems is the form of the executive arm of government - the President is directly elected, the Prime Minister is chosen by the party that controls the most seats in the House of Representatives - there is a distinct separation of legislative and executive branches in the US system - the legislative and executive branches are fused in the Australian system, inherited from the UK
	Legislature	Bicameral legislature - House of Representatives as a ‘people’s house’ and a Senate as a ‘states’ house’ - the people directly elect both houses - each house has co-equal powers, with upper house limitations on money bills (strong bicameralism)		- The structure and function of the two countries’ legislatures is almost identical except that the Australian Parliament contains the executive and the US Congress does not - the Australian Senate is modelled directly on the US Senate
	Judiciary	An independent judiciary - comprised of a constitutional court at the apex of federal/state hierarchies - acts as a check on the powers of both the legislature and the executive		the High Court of Australia is modelled very closely on the US Supreme Court

■ Table 1.2 – Comparison of the Australian and United States political and legal systems demonstrating how their powers are separated.
Source: Stephen King, 2020

Checks and balances in Australia and the United States

The separation of powers, by itself, is insufficient to limit power. A system of checks and balances is also essential. Checks and balances enable the powers of each branch to be limited by those of the others. Checks on power only work if the powers are balanced and distributed relatively evenly between the three branches.

Robust checks and balances are a dominant feature of the US political and legal system. They are also present in the Australian system, but to a lesser degree. One example that serves to illustrate this **difference** is the appointment of judges to the highest court in each country.

The President nominates judges for appointment to the US Supreme Court, but the Senate must confirm each appointment. Judicial appointments involve two branches of government, preventing the President from possessing the sole power to influence the composition of the Supreme Court — the third branch. In Australia, the Attorney General — the chief law officer and a member of Cabinet — appoints judges without requiring parliamentary approval. The Australian model adopts British practice, which has fewer checks on executive power.

Another example is the relationship between the executive and legislative arms of government. In the US these branches are completely separate. The directly elected President is both head of state and head of government. The people elect the Congress in separate elections. In Australia, the unelected monarch is head of state, and the indirectly elected Prime Minister is head of government. Cabinet ministers must be members of parliament, and the Crown is part of both the executive and the legislature. There is a single election for parliament, which then forms the government within its lower house by following conventions.

Note that the **Australian executive and legislature are fused** — the Crown is part of each. In addition, Cabinet ministers are drawn from parliament. The people choose both branches at one election. The separation of Australian executive and legislative powers is much weaker than that of the US, and the checks on Australian executive power are correspondingly less stringent.

Table 1.2 compares the Australian and US political and legal systems, demonstrating how their executive, legislative and judicial powers are separated.

Summary

Operating principles of democracy

- Constitutionalism — the idea that the powers of government should be limited.
- Separation of powers — the distribution of the legislative, executive and judicial powers in separate institutions, with adequate checks and balances between them.

Comparing the separation of the legislative, executive and judicial powers in Australia and the US

The key points of difference between the Australian and US separation of powers and other features are:

- Australia:
 - is a constitutional monarchy in which the Crown is part of both the legislature and the executive, creating a constitutional fusion between the two branches;
 - adopted the Westminster system in which the executive is drawn from, and accountable to, the parliament. Moreover, Section 64 of the Constitution requires that ministers be members of parliament. The result is a structural fusion of the two branches of government;
 - has a lower house modelled on the British House of Commons, in which the Prime Minister and ministers sit in parliament and are responsible to it;
 - has an executive that operates under the unwritten conventions of responsible government rather than written rules;
 - has weaker checks and balances between these two arms of government than the US does; and
 - is a constitutional monarchy, meaning the head of state (Queen via the Governor-General) and head of government (Prime Minister) are two separate offices in which the head of state has formal, not real, powers.
- United States:
 - designed a new system of government after winning the War of Independence with Britain. The aim was to prevent the re-emergence of tyranny by separating powers widely within the system to prevent the concentration of power;
 - has a complete separation of all three arms of government;
 - separately elects the executive (President and Vice President) and legislature;
 - has robust checks and balances between all three arms of government; and
 - is a democratic republic with an executive presidency where the head of state and the head of government are combined in one office that has real power.

Exam practice questions

Short answer

- 1a) Explain what is meant by the term 'constitutionalism'.
- 1b) Outline **three** objectives of democratic constitutions.
- 1c) Discuss the extent to which the Constitution sets out the powers of the legislative arm of government in Australia.
- 2a) Explain what is meant by the term 'head of government'.
- 2b) Distinguish between the roles of the 'executive' and 'judicial' arms of government in a political and legal system.
- 2c) 'To achieve an accurate picture of Australia's system of government, the Constitution must be read with an understanding of responsible parliamentary government.' Discuss.
- 3a) Explain what is meant by the term 'Article' with reference to the US political and legal system.
- 3b) Briefly explain both the difference between, **and** significance of, the executive power of judicial appointment in Australia and the US.
- 3c) Discuss the powers of the judicial arm of government in Australia compared to **one** non-Westminster political and legal system.

Source analysis

Use Table 1.2 to respond to the following:

- 4a) Explain what is meant by the term 'bicameralism'.
- 4b) Using the source, explain **one** way the Australian and US types of government are similar **and one** way they are different.
- 4c) Discuss the extent to which 'separation of powers' exists in Australia.
- 4d) Assess the extent to which the powers of the legislative branches are 'both powerful yet equally limited' in Australia compared to one non-Westminster system.

Essay response

- 5) 'The powers of legislature, executive and judiciary in Australia are greater than those of the arms of government in **one** non-Westminster political and legal system'. Evaluate.
- 6) Assess the extent to which the relationship between the arms of government provides for better 'checks and balances' in Australia than in **one** non-Westminster political and legal system.

Investigation

- 7) Finding evidence of separation of powers
 - 7a) Create two tables to summarise the separation of powers in Australia and the US. List the powers for each arm of government and refer to the constitutional Section/Article number.
 - 7b) Using the Australian Constitution and the US Constitution explore and record the powers of the legislative, executive and judiciary in each column, respectively.
 - 7c) Discuss the powers that:
 - i) are similar to, or different from, those in the Australian and US arms of government; and those that
 - ii) can be used as a check and balance on another arm of government in Australia and the US.
- 8) In small groups, search for one recent example of the US arms of government exercising their powers in the following situations:
 - 8a) the Congress passing a bill, declaring war or approving expenditure for military action;
 - 8b) the President exercising a veto, and the Congress (making an attempt at) overriding a Presidential veto;
 - 8c) the President appointing a Secretary or Justice and the Congress conducting confirmation hearings; and
 - 8d) the Supreme Court interpreting the US Constitution.
Record brief details of each example to show how the separation of powers operates in the US. Remember to use examples as evidence in assessments.



Power and the Commonwealth Parliament

Syllabus point:

- **Functions of the Commonwealth Parliament in theory and in practice, including Sections 7, 24, 51, 53, and the decline of parliament thesis**

Introduction

Chapter 1 of the *Commonwealth of Australia Constitution Act 1900* (the Constitution) creates and defines the powers of the Commonwealth Parliament. Covering the first 60 of 128 sections, it is easily the longest part of the Constitution. Sections of Chapter 1 relevant to power and the Commonwealth Parliament include Sections 7, 24, 51 and 53.

- Section 7 creates and defines the Senate;
- Section 24 creates and defines the House of Representatives;
- Section 51 contains a list of 40 'powers of the Parliament', but this is not a complete list. Other powers are located elsewhere within the Constitution; and
- Section 53 imposes a limit on the Senate's power to legislate money bills.

The Parliament of Australia—the Commonwealth Parliament — has four main functions:

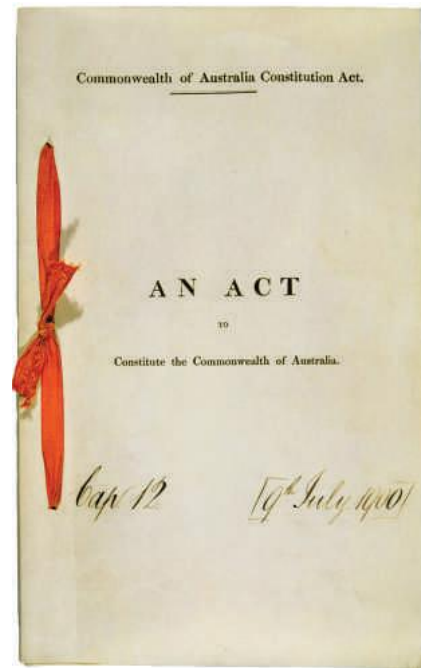
representation — to represent the Australian people;

legislation — to make statute laws; that is, appropriations Acts (money) and ordinary Acts;

responsibility — to make government and then hold it to account; and

debate — to act as the nation's premier discussion forum.

Power flows through these overlapping functions. The Commonwealth Parliament's powers are either specified in the Constitution, which is governed by Parliament itself or by unwritten conventions.



■ Figure 2.1 – The Commonwealth of Australia Constitution Act 1900
Source: PARLIAMENT HOUSE ART COLLECTION, ART SERVICES
PARLIAMENT HOUSE <<https://peo.gov.au/understand-our-parliament/how-parliament-works/the-australian-constitution-/the-australian-constitution-in-focus/>>

Parliament is an ancient British institution dating back to 1707. It has evolved significantly over time. Other Westminster-style parliaments, such as Australia's, have developed in new political and legal contexts, and have evolved different characteristics. For example, Australian federalism impacts the Commonwealth Parliament in ways not relevant to Westminster in Britain. British history and tradition have resulted in theoretical ideas about how parliaments ought to operate. However, the practical reality is often different. While arguments about the differences between theory and practice are inevitable, the issue being discussed here is how to evaluate the Commonwealth Parliament.

Defining parliament and its power

Australia's system is sometimes described as a '**Westminster hybrid**'. It combines features of the United States (US) or 'Washington' model and the British 'Westminster' system.

The Commonwealth Parliament consists of three parts:

1. a lower house, or House of Representatives, modelled on the British House of Commons;
2. an upper house, or Senate, based on the US Senate; and
3. the Crown, with constitutionally limited powers adopted from Britain.

Combining constitutional ideas from Britain and the US has consequences for the functions of the Commonwealth Parliament. For example, the Crown is part of both the parliament and the executive in Australia, creating a fusion of the two which is absent from the US system with its strictly separated executive branch. The fusion of the Australian executive and legislative branches means the parliament must form the executive and hold it to account. Its relationship to executive power is therefore different from that of the US Congress to the US President. Other implications are explained below.

The 'Wash' in Washminster

The names of Australia's houses of parliament come from Washington, but more substantial features were also adopted from the US.

Power is distributed geographically in a US-style federation. Federalism requires a written constitution to divide and allocate powers to two levels of sovereign government — national and regional. Federated Australia has a written constitution heavily influenced by that of the US.

Recall that, like its US counterpart, the Australian Constitution divides power.

- It specifies and enumerates legislative and financial powers which are either:
 - **exclusive** to the Commonwealth Parliament; or
 - **concurrent** to both the Commonwealth and state parliaments. Section 109 provides a way to resolve conflicting Commonwealth/state legislation.
- It does not specify state powers; instead, state powers are:
 - **residual**. Chapter 5 contains several sections essential to state sovereignty. Section 106 preserves the state constitutions (which were developed pre-Federation), Section 107 preserves state legislative powers, and Section 108 preserves state laws.



■ Figure 2.2 – The 'Wash' in Washminster comes from the US federal system of government.

Source: *National flag of the United States of America*, Public Domain, <<https://en.wikipedia.org/w/index.php?curid=33285428>>

Following the pattern established by Article 1, Section 8 of the US Constitution, Section 51 of the Australian Constitution specifies and enumerates (numbers) most of the powers of the Parliament. Section 51 does not include the word 'exclusive'. Therefore, its 40 enumerated powers are deemed 'concurrent' and available to both the Commonwealth and state parliaments. However, many Section 51 powers are external

in character and so are 'exclusive by their nature', making them appropriate for the Commonwealth Parliament alone. Section 51(x) — "fisheries in Australian waters beyond territorial limits" — is an example of a power which is external in character.

Other Section 51 powers are made exclusive elsewhere in the Constitution. For example, Section 51(vi) — the 'defence power' — is made exclusive by Section 114. It prohibits states from having armed forces, but this loss of power is overcome by Section 119 which requires the Commonwealth to protect the states from invasion.

Note that the word 'concurrent' does not appear in the Constitution. If powers are not specified as exclusive, they are deemed concurrent. The few exclusive powers of the Commonwealth are found throughout the Constitution and not listed together. Section 52 is an example. Chapter 10 of this book deals more fully with the balance of powers within the Australian federation.

Section 7 of the Australian Constitution creates the Senate. The US upper house was the model for the Senate. Both the Australian and US upper houses are powerful federal chambers — strong, democratic and elected. They are quite unlike the British House of Lords, which is weak, aristocratic and hereditary.

Section 7:

- establishes the Senate as a states' house, with equal representation for each Original State;
- requires that the Senate be "directly chosen by the people", making it democratic.

Section 53 prohibits the Senate from raising or spending money. **Appropriations** (money) bills cannot originate in the Senate. Nor can the Senate amend them. Governments, which by convention form in the lower house, introduce money bills. The Senate has **co-equal powers** with the House of Representatives, so limiting it in this way is essential to prevent the upper house behaving like a government and spending money. Most upper houses, including the US Senate, have a similar prohibition.

Adopting features of the Washington model has consequences for Australia's political and legal system. One consequence is that equal representation of the states creates **malapportionment** in the Senate because, while states have different sized populations, each state has twelve representatives or senators. Malapportionment is unequal representation and means that the Senate cannot achieve

one vote one value in its electoral system. Malapportionment has been a criticism of the Senate partly because overrepresented small states —such as Tasmania — can have too much power. See: *Case study: Jacqui Lambie*.

Australia's most significant political crisis was caused by the power of the Senate. The Senate's refusal to pass the Whitlam Government's money bills precipitated the 1975 constitutional crisis. After 1975, the Senate evolved a capacity to 'negotiate' money bills with the House of Representatives before they are transferred to the Senate. Negotiation of these bills between the two houses reduces the likelihood of a repeat of the 1975 crisis. Negotiating money bills is now a uniquely Australian constitutional convention made necessary by an unforeseen consequence of blending Washington and Westminster constitutional ideas. However, the new convention means the Senate has developed a power with respect to money bills not intended by the Constitution. It also demonstrates the flexibility of unwritten conventions.



■ Figure 2.3 – The 'minster' in Washminster comes from the British system of responsible government.
Source: Jacky Holland, Direction Design, 2020

The 'minster' in Washminster

By the time the Constitution was written, the Westminster system was well entrenched and widely regarded in Australia as the best form of executive government. Ties to Britain further convinced the Founding Fathers that it was a natural choice for the new national government. Moreover, by 1890 the Westminster system was in use in all six colonies, so its governing principles were well understood.

Section 1 of the Constitution creates a parliament composed of three institutions — the Queen, the House of Representatives and the Senate. The British system of constitutional monarchy is therefore entrenched in Australia by Section 1.

The House of Representatives shares the representative, legislative and debate functions with both the US and British lower



■ Figure 2.4 – Australia's House of Representatives is the 'house of the people' and the 'house of government'.
Source: J J Harrison, Australian House of Representatives, Parliament of Australia, 2012, CC BY-SA 3.0, < <https://commons.wikimedia.org/w/index.php?curid=18231206> >

houses. However, the Australian House of Representatives has a role with respect to the executive inherited from Britain that the US lower house does not. It has the task of creating the government and holding it accountable — the so-called 'responsibility' role.

Section 24 of the Constitution creates an Australian House of Representatives modelled on the UK House of Commons. It is a 'house of the people' and a 'house of government'.

Section 24:

- establishes the House of Representatives as a people's house. States have seats in proportion to their population. Currently, NSW has 47 of the 151 seats, WA has 16 and South Australia has 10, reflecting the sizes of their populations. One vote one value is mostly achieved in the House of Representatives;
- requires that the House of Representatives be "directly chosen by the people", making it democratic;
- guarantees any Original State no less than five members of the House of Representatives (MPs) even if the state's population is too small to qualify for five MPs. This provision affects Tasmania. With a population of 522,327 in 2019, Tasmania would otherwise be entitled to less than five MPs; and
- requires the House of Representatives to be "as nearly as practicable, twice the size" of the Senate. Section 24 is the so-called **nexus clause**. Nexus means 'knot' in Latin. Section 24 binds the two houses in terms of size. Changes in the size of one will affect the size of the other.

Note that the US House of Representatives is a 'house of the people', but not of government.

	Element	Notes
W A S H	A written federal constitution which divides and allocates powers of the legislature	Necessary to create the new national level of government and to allocate powers exclusively and concurrently to the national and state levels, and to reserve powers to the states
	A powerful upper house, a federal chamber or 'house of the states' — the Senate	A house to equally represent the interests of the states at the federal level
	Strong bicameralism	A states' house with powers almost equal to the people's house
M I N S T E R	Constitutional monarchy with the Queen incorporated into 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 seat of the executive government. Government 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 according to traditions and customs called 'conventions'

■ Table 2.1 – A summary of elements of the US (WASH) and UK (MINSTER) contributions to the Washminster design and powers of the Australian Commonwealth Parliament.
Source: Stephen King, 2020

Parliamentary power flows through its functions

Legislatures serve a variety of roles and functions in a democracy. As noted above, there are four main functions carried out by a Westminster-style parliament like the Commonwealth Parliament. There are theoretical and practical aspects of a parliament's functions. Westminster theory stems from the British 'mother of parliaments', which has developed over centuries. In contrast, Australia's Commonwealth Parliament has evolved and adapted to its national context since 1901, a little over one century. It practises its functions in ways that reflect its origin, purpose and context.

Representation

... in theory

The Commonwealth Parliament represents the people — the *demos*. Sections 7 and 24 of the Constitution specify that each house must be "directly chosen by the people". For most of the history of the British Parliament and during the pre-federation history of Australian colonial parliaments, political parties were quite weak associations of like-minded politicians.

Traditionally, elected representatives in the lower house — the people's house — acted in the interests of their constituents according to two theoretical models of popular representation:

a. **delegate representation** — a member of parliament is the mouthpiece of the people who elected them. They simply

're-present' their constituents' values and concerns in parliament. Delegates ensure their constituents' voices are heard in the legislature.

b. **trustee representation** — Edmund Burke — an English political philosopher — argued against the delegate model. Burke proposed that members of parliament should make judgments about their constituents' best interests. In his trustee model, members of parliament do not communicate continuously with their constituents to gauge their views. Instead, they use their judgment to decide the best interests of their electorate.

The Australian Senate has another representative role unrelated to the British Westminster model, which operates as a unitary system. As a federal chamber based on the US model, the Australian Senate represents states and territories. Therefore, a third theoretical model of representation is:

c. **state representation** — the Senate represents the six sovereign states at the national level. Each state — regardless of population — is equally represented in the Senate and has a voice in national government. The Northern Territory and the ACT are also represented in the Senate, but with less seats than the states.

Perceptive students will note that the three forms of representation described above are a result of hybridising a federal upper house with a Westminster-style lower house.

... in practice

Political parties are the leading representative associations in modern Australia. Most Australian electors identify with a party rather than a person such as a candidate or their individual member of parliament. This is called 'party allegiance'. Most electors cast votes for parties whose ideologies and policies most reflect their worldview and seldom think in terms of delegates and trustees. The result is 'partisan' representation (see below).

Contemporary Australian politics has become increasingly leader-centric rather than policy centred. Leader-centrism has made contemporary Australian politics more 'presidential', where the leader's personal traits are a dominant influence on electors' choices. Leader-centrism results in electors voting for or against a party based on its leader. Policies have become less important in many electors' minds. Modern media, a 24/7 news cycle, social media and political advertising are factors leading to an intense focus on the personalities of party leaders. Many electors may not even know who their local representatives are, being only able to identify which party is in power and who is Prime Minister. The critical personalities for most voters are the Prime Minister and Opposition Leader, not their local candidate or representative.

In some cases, an influential local candidate can overcome leader-centrism and electors' party allegiances to get elected as an independent, non-partisan member. Independent members function as traditional delegate/trustee representatives. Grassroots electorate-based political organisations can support Independents. Voices for Indi and Voices of Warringah are two contemporary examples of electorate-based organisations which helped successfully elect Independent candidates in the 2019 federal election.

Contemporary elections — including the 2019 general election — amply demonstrate the influence of party allegiance, leader-centrism and local issues on representation. Students can read about the 2019 election in the example opposite and in the *Case study* section of this book

Example: 2019 general election

In the 2019 general election, Opposition Leader Bill Shorten's personal lack of popularity resulted in many electors voting for the Morrison Government, despite it being unpopular. Dozens of polls in the years before the election showed that the Coalition Government was unpopular and in an election losing position. In the months before the election, the Morrison Government experienced a series of potential disasters, including a Liberal Party leadership spill which removed the incumbent Prime Minister, Malcolm Turnbull, from office. Defections amongst its members and factional divisions within its ranks marked the pre-election period. Finally, the government was the first in 80 years to lose a legislative vote in the House of Representatives (the Medevac Bill. For more information on this bill, see the *Case studies* section of this book, particularly *Case study: Representation and legislation — Wentworth and Medevac*; and *Case Study: Australia's treatment of asylum seekers and refugees*). Despite this record, the polls indicated a widespread preference for Scott Morrison over Bill Shorten as 'preferred leader'. The 2019 election returned the Morrison Government to power and illustrated the power of leader-centrism. It also demonstrated how the popularity of leaders can overcome a weak track record of policy and performance.

Most seats were won by partisan candidates from the Liberal Party, the Nationals and the Australian Labor Party (ALP). However, several candidates won seats against the general trend. Independent candidate, Zali Steggall — a former Olympic athlete — defeated Liberal and former Prime Minister, Tony Abbott, in the Sydney seat of Warringah. Abbott's unpopularity and Steggall's high public profile were factors in the result. The Victorian electorate of Indi made history by electing the first ever Independent to replace a



■ Figure 2.5 – Zali Steggall OAM, MP is an example of a delegate/trustee representative. Source: Zali Steggall, Official images of Zali Steggall for her political campaign 2019, 2019, CC BY-SA 3.0, <<https://commons.wikimedia.org/w/index.php?curid=77412133>>



■ Figure 2.6 – Voices of Warringah — an electorate based political organisation — helped Independent Zali Steggall defeat Tony Abbott in the 2019 election.

Source: Matt Golding, *Sydney Morning Herald*, 2019, author's permission, <<https://www.smh.com.au/politics/federal/tony-abbott-s-paris-backflip-reveals-the-emptiness-of-last-year-s-leadership-madness-20190308-p512sn.html>>

retiring Independent. Dr Helen Haines won the seat vacated by retiring Independent, Cathy McGowan. Voices for Indi, an electorate-based political organisation, achieved this historic result and inspired Voices of Warringah, which helped Steggall defeat Abbott. Steggall and Haines are delegate/trustee representatives.

Background information: Electoral systems and representation

In theory, the Senate is a 'house of the states', but in practice it has always been a 'partisan house'. From Federation to 1918, Senate elections used the **first past the post** electoral system, as did the House of Representatives. As a consequence, both houses tended to have very similar party representation. The Senate was either dominated by the governing party — termed a friendly or 'rubber stamp' Senate — or by the Opposition — termed a hostile or 'obstructionist' Senate. In 1918, both houses adopted the preferential voting system, and the same pattern of partisan

representation continued up to 1949. Both first past the post and preferential voting are 'majoritarian' systems. They tend to result in two dominant parties — one winner and one loser. Majoritarian systems reinforce a two party system by effectively eliminating most minor parties and Independents from parliament. A two party system often results in one dominant party with a secure and reliable majority to form government. It encourages partisanship and competition because the losing party forms the Opposition. There is reduced incentive for cross-party cooperation and consensus.

Since 1949, the Senate has been elected using the **single transferrable vote** (STV) system. STV is a complex system that converts the proportion of votes a party receives into roughly the same proportion of seats in the Senate. Proportional systems elect a multi-party chamber, often with no party winning a majority of seats. They can encourage cross-party cooperation and consensus because majorities must be put together from different parties or Independent Senators for each vote or bill.

As a result of the introduction of the STV system, representation in the Senate has been more diverse and inclusive than in the House of Representatives. Moreover, parties can select less conventional candidates for the Senate because electors voting 'above the line' — which is the vast majority — are voting for a party rather than a candidate.

Under the STV system, the Senate of the 46th Parliament has more women, more Senators from migrant backgrounds, a Senator with a disability and a cohort of minor parties such as the Australian Greens, Centre Alliance and Pauline Hanson's One Nation (PHON). Independents, such as Jacqui Lambie (Tas), were also elected.

A rich mix of representation is offered by the bicameral parliament as a whole.



■ Figure 2.7 – First past the post voting for the Senate often made it an Opposition controlled 'obstructionist' upper house or a government controlled 'rubber stamp'.

Source: Vectors Point, Noun Project, Business Stamp, CC BY 3.0, <<https://thenounproject.com/search/?q=rubber%20stamp&i=3147371https://thenounproject.com/search/?q=rubber%20stamp&i=3147371>>

- the election of minor parties, micro parties and Independents. Approximately 14.3 per cent of a state vote in a general half-Senate election is required to win a seat. In a double dissolution election, the quota falls to 7.7 per cent. With such low thresholds for electoral success, the Senate achieves greater *political diversity* than the House of Representatives where a 50 per cent + 1 vote is the threshold for successfully winning a seat.

Background information: Party rooms

Members of parliament debate issues within their **party room**. A party room is a meeting of MPs and Senators belonging to a political party. Parties make decisions, either by consensus among members or by the leadership team imposing its will. Once made, party members are expected to support the decision. They vote in support of their party on motions and votes in parliament.

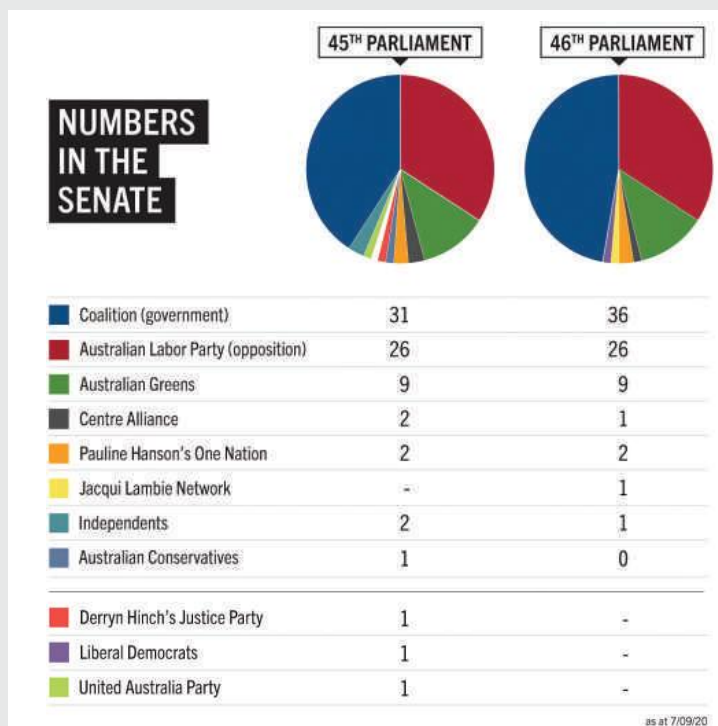
The Morrison Coalition Government campaigned in the 2019 election to reduce personal income tax. All Coalition MPs voted along party lines in parliament to support the tax cuts. The bill passed the House of Representatives, but stalled in the Senate. The government had to negotiate with the Centre Alliance party and Independent Senator Jacqui Lambie (Tas) to pass the bill unamended.

When members find their party's policy conflicts with their constituents' interests they may break ranks and act as a delegate or trustee in defiance of party discipline. Nationals MP, George Christensen (Dawson, QLD) acted in the interests of his constituents by supporting the 2017 *Hayne Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry*. The Coalition parties (Liberal and Nationals) opposed the Royal Commission, which had been promoted by the ALP Opposition. Christensen represented farmers and others in the Queensland electorate of Dawson. Many of his constituents had suffered repossession of their farms and properties allegedly due to corrupt banking practices. Christensen forced the Coalition parties to change their policy and support the Royal Commission by threatening to cross the floor and vote with the Labor Opposition. In this case, Christensen acted as a delegate/trustee rather than a partisan representative.

However, this is quite exceptional in contemporary politics.

Background information: How the Senate better represents Australia's diversity

The reduced threshold for winning a seat in the Senate results in the election of higher numbers of minor party and Independent Senators. Table 2.2 shows the political diversity of the Senate. Note how a double dissolution election can increase diversity further. Australian Greens Senator Jordon Steele-John (WA) was born in 1994, making him 23 years old when he entered the Senate in 2017. He was re-elected in 2019 and is the parliament's youngest sitting member. He lives with a disability and uses a wheelchair. He has represented disabled Australians by calling for a Royal Commission into the abuse of disabled people in prison. Senator Steele-John is young, disabled and a member of a minor party. All three of these demographic and political traits would usually make him less likely to be elected to the House of Representatives — not because of the man himself, but because of the electoral system used to elect that house. As a proportion of the upper house, there are more women and members from differing backgrounds, than there are in the House of Representatives.



■ Table 2.2 — The Senate electoral system better represents Australia's demographic diversity than the system used in the lower house. The Senate results showed unusual diversity — a result of the double dissolution election. Source: Parliament of Australia, *Senate Composition*, CC BY-NC-ND 3.0 AU, <https://www.aph.gov.au/senators_and_members/senators/senate_composition>

With reference to representation, the Commonwealth Parliament has always been partisan. Parliament's Australian context has been an essential influence on representation and how it developed. We should judge the parliament within its context to evaluate how it represents the Australian *demos*. It has existed entirely in an era dominated by political parties. It is also relatively small in size, meaning every seat can be crucial for the survival of a government. Being a Westminster-style legislature, it forms a government and holds it to account. These factors make it more partisan than the bigger British House of Commons, where government majorities tend to be larger, allowing for less strict party discipline than Australia. Historically, it has also been more partisan than the US Congress, where disciplined majorities are not necessary to form a government.

In spite of being constitutionally a federal chamber or states' house, the Senate has never acted this way. Before 1949 it tended to have much the same two party partisan representation as did the House of Representatives. It was only after 1949 that the Senate became more representative, thanks to electoral reform.

Legislating

... in theory

The Commonwealth Parliament is the national legislature. Therefore, elected representatives are also legislators. Their role includes creating statutes authorised by legislative and financial heads of power in the Constitution.

Statutes, in theory:

1. are well scrutinised through speeches, debates and in-depth analysis by parliamentary committees;
2. have diverse input from the people's elected representatives;
3. can be initiated by any member of parliament, including those serving in the executive, as well as private members. Private members are all members of parliament who are not part of the executive. There are government bills and private members' bills;
4. follow the 'statutory process' derived from British practice. There are many stages to this process, but the following, in particular, involve in-depth scrutiny of a bill and an opportunity for the representation of diversity. The key steps include:
 - a. the *second reading*:
 - i. *second reading speech* — informs

parliament of a bill's purpose and necessity. The member introducing the bill makes a speech recorded in Hansard; and

- ii. *second reading debate* — provides members of parliament with the opportunity to represent their electorates when making laws. All members have the opportunity to 'speak to the bill'. Hansard records these debates; and

- b. the *committee stage* — provides opportunities for expert advice and detailed non-partisan work on bills. During this stage — called *consideration in detail* in the House of Representatives and *Committee of the Whole* in the Senate — bills are scrutinised line by line. Committees may consult professional or expert advice and the community. Committee members may travel to assess the impact of a proposed law on specific communities.

The Senate is a house of review. The Senate repeats the entire statutory process, emphasising the impact of a proposed law and how it may affect people's rights.

In theory, the statutory process is **deliberative**. The exhaustive process ensures that statutes are technically well crafted, representative and do not infringe rights.

... in practice

The parliament is a very efficient legislative machine. The 45th Parliament sat for a total of 105 days between 2016 and June 2018. In that time, 265 bills passed the Senate. By these statistics, the 45th Parliament passed an average of 2.5 bills per sitting day.

Example: How fast can parliament legislate?

In July 2015, emergency amendments were proposed by the Abbott Government to close loopholes in the *Migration Act 1958* after a pending case in the High Court of Australia (High Court) threatened to declare the offshore detention of asylum seekers in foreign countries unlawful. This bill passed in two days and closed the loophole before the High Court even discovered it.

Parliamentary — as opposed to presidential — executives can dominate votes in the lower house of a Westminster-style parliament, especially if they are majority governments. Consequently, the executive can dominate the legislative function in the Australian House of

Representatives. Governments often use their power over the House of Representatives to force through government bills. The following tactics can speed up the passage of a bill in order to pass legislation quickly:

- the **gag**;
- the **guillotine**; and
- **floodgating** bills.

Gagging the second reading debate

During a bill's second reading debate, the government may instruct one of its party members—either a minister or a private member—to move a motion putting the bill to a vote. The government then uses its majority to pass the motion, ending further debate. Members who were listed to speak lose the opportunity to do so.

Example: Gagging bills

An example of a gagged bill is the Morrison Government's Fair Work (Registered Organisations) Amendment (Ensuring Integrity) Bill 2019. The Coalition Government policy of cracking down on unions required new laws to be implemented. The Ensuring Integrity Bill 2019 passed the House of Representatives, but was unexpectedly rejected by the Senate in late 2019. Following the Senate's rejection, the government reintroduced the bill into the House, this time including amendments demanded by Senator Jacqui Lambie (Tas). Rather than allow debate on the amended bill, the government used its majority in the House of Representatives to gag debate. It then voted the bill through the House. The Albanese Opposition was furious at being denied the opportunity to scrutinise the amended bill.

Guillotining the debate

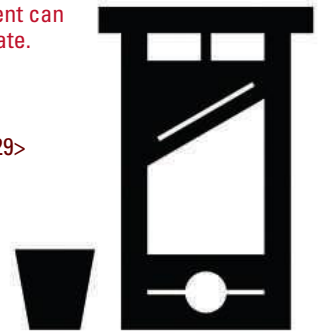
Before a debate commences, the government may move a motion limiting the time allocated for debate. Debate ends when the time limit expires—that is, the 'guillotine' falls. Again, the government can manipulate debate because it has a controlling vote in the House.

Floodgating bills

The government may introduce many bills simultaneously into the House of Representatives. This is called floodgating. Floodgating can overwhelm the deliberative stages of the statutory process, which need time to allow members to consider bills in detail. Floodgating is used with gags and guillotines

■ Figure 2.9 – The government can use the guillotine to limit debate.

Source: Juan Pablo Bravo, *Guillotine*, Noun Project, <<https://thenounproject.com/search/?q=guillotine&i=374429>>



to push legislation through the House of Representatives quickly.

However, the price of speed is reduced scrutiny and representation in lawmaking. A consequence of so-called 'executive dominance' of the lower house is the dominance of one view in lawmaking—the government's view.

The government introduces an overwhelming number of bills. They originate from Cabinet as ministers propose new laws to implement government policy, such as the Ensuring Integrity Bill 2019 discussed in the example above. As the government carries out the law it may discover issues with the operation of particular laws. To address this issue they create new bills which aim to fix existing statutes. Very few private members' bills get past the second reading stage. The government can use its numbers to end debate indefinitely, stalling the bill in the House of Representatives. The *House Selection Committee*—currently chaired by the Speaker, Tony Smith MP—examines all bills introduced to the House. The government can control the *Selection Committee*, as it can all House of Representative Committees. The *Selection Committee* usually rejects bills the government opposes.

Example: Private members' bills blocked by the government

In 2015 Opposition Leader Bill Shorten and Deputy Opposition Leader Tanya Plibersek co-sponsored a private members' bill—the Marriage Amendment (Marriage Equality) Bill 2015—to legislate for marriage equality. However, the government used its numbers in the House of Representatives to adjourn the debate on the bill indefinitely, preventing the progress of this private member's bill.

Dealing with bills

The House of Representatives

The House of Representatives has two pathways for a bill. The *House Selection Committee* will decide which of these two pathways it will follow through the lower house.

1. Controversial or complex bills — usually originating from the government attempting to legislate for its policies — pass through the House in the usual way. They follow the full statutory process, but are subject to gags and guillotines that may both speed them up and reduce effective scrutiny as well as democratic input.

Most votes are decided 'on the voices', but formal votes require a division. In a division, members of parliament vote by moving to the left or right of the Speaker.

2. Uncontested bills pass through the **Federation Chamber**. All MPs are members of the Federation Chamber. Bills progressing through this chamber receive less debate and scrutiny, and pass quickly. The Federation Chamber operates by agreement; there can be no formal divisions. Bills which require debate or a division return to the House.

Having two legislative pathways means the House of Representatives can deal with bills very quickly. Bills that both the government and Opposition support — such as small amendments to administrative law — can pass without slowing down House deliberations on complex or contested legislation.

The Senate

All bills transmitted from the House of Representatives to the Senate pass through the *Senate Standing Committee for the Selection of Bills* which determines whether they should go to *legislative* committees for detailed examination or if they can pass the Senate quickly. Classifying bills in this way ensures both efficiency and scrutiny.

The executive is usually less dominant in the Senate. Only rarely does the government — or anyone else — achieve a majority in the Senate. Gags, guillotines and floodgating are less common here than in the House of Representatives. Opportunities for legislative scrutiny and debate are less often cut short. The government does not dominate and control Senate committees either. They are composed of Senators drawn from the various parties in proportion to their representation in the Senate. Consequently, Senate committees have greater scope to debate and scrutinise bills.

The varied composition of the Senate contributes to the democratic diversity of representation in legislation, which is an essential aspect of legislating in a democracy.

The government can rely on its majority in the House of Representatives to pass its bills with

ease. In the Senate it must negotiate to bring about a majority for every piece of contested legislation. Creating Senate majorities involves consensus and compromise. Agreeing to amendments can accommodate non-government Senators, win their support and often improve government bills.

Example: Government bills in the Senate

The Ensuring Integrity Bill 2019 – discussed in the Example: Gaggling bills above – is an example of Senate legislative power. The bill had passed the House of Representatives with relative ease due to the Morrison Government having control of the lower house. In the Senate, the Leader of the Government, Mathias Cormann (Liberal, WA) negotiated with crossbench Senators to get their support to pass the government bill. The Centre Alliance agreed, which put Jacqui Lambie and PHON in control of the outcome. The government believed it had achieved a consensus with these Senators by agreeing to their amendments. When the vote finally came, PHON Senators unexpectedly voted with the ALP Opposition and defeated the government bill. The defeat caught the government by surprise.

The incident demonstrates the legislative power of the Senate, and the crossbench in particular. It also demonstrates the limits of executive power and how the Senate may hold a government responsible to parliament.



■ Figure 2.10 – The passage of the Home Affairs Bill was the first time the government had lost a vote on the floor of the House of Representatives for 80 years.

Source: Matt Golding, Sydney Morning Herald, 2019, author's permission, <<https://www.smh.com.au/politics/federal/labor-releases-legal-advice-to-counter-government-claims-that-refugee-bill-threatens-national-security-20190206-p50w2z.html>>.

Responsibility

... in theory

Australian governments are drawn from, and responsible to, the parliament. Westminster government is called 'responsible government' because the executive is responsible to the lower house of parliament. Other names for this type of government are:

- a 'parliamentary executive', because the government is formed of ministers who must be members of parliament; and
- 'Cabinet government', because ministers belong to an executive committee called 'Cabinet', led by a 'first' or 'prime' minister.

Responsible government relies on unwritten conventions. Conventions have a long history and have played an important part in the development of responsible government in Britain.

In short, parliament makes and breaks the government according to Westminster conventions.

The major conventions of responsible government are:

- a. a government must maintain the confidence of the lower house. In practice this means a **vote of no confidence** by the House of Representatives will dismiss a government.
 - The relevant convention is **collective ministerial responsibility**, which holds a government responsible to the lower house.
- b. Individual ministers may be dismissed by parliament through a censure motion.
 - The relevant convention is **individual ministerial responsibility**, which holds ministers accountable to the lower house for their conduct and competence, and the performance of their department.
- c. Cabinet operates in secret and speaks as one.
 - The convention of **cabinet secrecy** binds ministers and cabinet staff. The Cabinet Room itself is a highly secure, windowless room with sound insulation. Security services regularly check it for listening devices.
 - The convention of **cabinet solidarity** permits ministers to debate government policy in Cabinet and allows different views to be voiced. However, once Cabinet makes a decision, it binds all

ministers. Ministers must publicly support Cabinet decisions even if they disagree with them. If they cannot, they must resign from Cabinet.

Ministers must answer questions put to them by any member of parliament during **question time**. They must not mislead parliament when answering questions. Question time is a significant accountability procedure. Members of parliament may ask questions without notice, to which a minister will respond verbally there and then. Alternatively, a minister may take a question on notice if the answer is complicated and requires advice from the minister's department. Answers to questions on notice are provided to the house later, usually in writing. According to Westminster conventions, misleading parliament will lead to the **censure** of the minister.

Another way for it to hold a government accountable is for parliament to **scrutinise government spending**. A government can only spend money authorised by parliament. The annual budget and other appropriations (money) bills are the means by which parliament monitors government spending. Money bills follow the same statutory process as all other bills, including debates and scrutiny by parliamentary committees. Money bills allow parliament to examine executive activity through the approval of government spending.

Parliament has many **standing and select committees**. Members of parliament form parliamentary committees. Even though they are parliamentarians, ministers cannot belong to committees—this is an example of the separation of powers between the executive and legislature in the Westminster system. Parliamentary committees have strong investigative powers and may inquire into matters relating to the government.

Note that ministers may belong to executive committees, not parliamentary committees. Cabinet is the main executive committee.

“Majority + party discipline = Executive dominance of the House of Representatives.”

... in practice

The party that wins a majority of House of Representatives seats forms the executive government, and its leader becomes the Prime Minister.

In practice, the supremacy of disciplined political parties means the governing party will seldom lose a vote of no confidence or a censure motion, rendering the ministerial conventions on accountability inoperable.

Majority + party discipline = Executive dominance of the House of Representatives.

Executive dominance of parliament explains why the responsibility function of parliament does not operate according to Westminster theory in the Australian parliamentary system. For more on executive dominance, see the section on the decline of parliament thesis below.

Motions of no confidence and censure motions have negative consequences for a government in the House of Representatives. However, a majority government can always defeat them by a bloc vote of its party. Censure motions have been successful at times in the Senate, where governments tend to be less dominant. However, they lack authority in the Senate and have little consequence.

Example: Senate censure motion

In 2015 the Senate censured Senator George Brandis. ALP Senator Penny Wong moved the censure motion against Brandis for his role in attempting to force the resignation of Human Rights Commissioner, Gillian Triggs. Though the censure was successful, it had little impact on Senator Brandis because the Westminster system has no convention for an upper house censure.

The executive's dominance of the House of Representatives means the conventions of individual and collective ministerial responsibility are ineffective in practice. So long as a government can enforce discipline on its party members, it will never lose a critical vote on the floor of the



■ Figure 2.11 – Attorney-General Senator George Brandis.
Source: Department of Foreign Affairs and Trade, *The Hon. George Brandis QC, High Commissioner of Australia to the United Kingdom, 2017*, CC BY 3.0 AU, <<https://commons.wikimedia.org/w/index.php?curid=71196557>>

House. A minority government may not be able to exert dominance on occasion, but majority government is the norm in Australia and so is dominance by the executive.

“A minority government is inherently less stable than a majority government because it governs only so long as it retains the support of other parties or Independents.”

There are rare occasions where no party wins a clear majority of House of Representatives seats. The preferential voting system tends to amplify a small majority of votes into a more significant majority of seats — a phenomenon called the **winner's bonus**. Historically, a hung parliament has been infrequent in Australia. However, in recent decades the Liberal Party and the ALP have lost votes to minor parties and Independents. If this trend continues, the winner's bonus may not be enough to deliver the major parties a clear House of Representatives majority.

- A **majority government** is one where a single party — or a united coalition of parties — wins a clear majority and can govern in their own right. In practice, this has been by far the most common form of government in Australia.
- A **minority government** may form in a hung parliament where no party wins a majority of House of Representative seats. After an inconclusive election, the larger parties may negotiate with other parties and Independents. They will be hoping to secure their support to form a government. They need confidence and supply (money) to do so. If they are successful in obtaining confidence and supply, then a minority government may be formed. A minority government is inherently less stable than a majority government because it governs only so long as it retains the support of other parties or Independents. A government will fall if the non-government MPs it relies on for confidence and supply withdraw their support.

Example: Minority governments and executive dominance

The Gillard Government (2010–2013) and the Morrison Government (2018) are examples of minority governments that were subject to much greater scrutiny by parliament because they could not command a House of Representatives majority. The *Case study: Representation and legislation — Wentworth and Medevac* shows how losing the seat of Wentworth to an Independent and the resignation of Julia Banks MP from the Liberal Party impacted the Morrison Governments' control of the House. A minority government is uncommon in practice, but declining voter support for the major parties may deliver it more often in the future. If that is the case, the parliament's responsibility function may become reinvigorated.

Debate

... in theory

'Parle' is French for 'speak' and is the origin of the English word 'parliament'. Parliament is a speaking chamber and is the nation's highest forum for the debate of important issues. Debate is the vehicle that carries parliament's other functions.

Each of parliament's other functions depends on debate, as follows:

- *legislating* depends on the discussion and analysis of bills to ensure they are well drafted and reflect community values;
- *representing* constituents depends on members telling parliament about the needs of their electorates; and
- holding government *responsible* requires questioning ministers and discussing government activities in committees.

Parliament has procedures that facilitate debate. The types of debates include grievances, urgency motions, matters of public importance, private members' business, ministerial statements, members' 90-second statements, adjournment debates, second reading debates and question time. All other functions of parliament depend on debate. For example:

- a) second reading debates are part of the legislative process;
- b) grievances, urgency motions, private members' business, matters of public importance and members' 90-second statements allow members to represent electorates; and



■ Figure 2.12 – The Morrison Government was forced into minority in October 2018 with the resignation of Julia Banks MP from the Liberal Party and their loss in the Wentworth by-election. Source: Matt Golding, *The poll bludger*, 2018, author's permission, <<https://www.pollbludger.net/2018/10/21/not-wentworth-election-thread/comment-page-1/>>

- c) ministerial statements and question time enable members to hold ministers to account and keep them responsible to parliament.

Parliamentary privilege creates an ultimate form of freedom of speech. Laws such as the tort of defamation or limitations imposed by statute do not apply when a member is speaking in parliament. They may debate any issue without fear of legal consequence. Both houses of parliament have privileges committees. The role of privileges committees is to ensure that parliamentarians do not misuse their enhanced freedom of speech. Privileges committees may sanction a member if they abuse parliamentary privilege. An example of this is provided below.

Example: Parliamentary privilege

Craig Thomson (ALP, Dobell, 2007–2013) was a MP during the Rudd and Gillard Governments. He was a union official with the Health Services Union before entering parliament in 2007. In 2012 the Fair Work Commission found Thomson had broken workplace laws on 156 occasions, including using his union credit card to spend \$6,000 on escort services. He made a statement to parliament in 2012 denying these allegations. In 2014, after he had left parliament, a court found him guilty of dishonesty offences relating to his union role. The House of Representatives referred his case to its privileges committee. The committee reported in 2016 that his statement to parliament was "at odds with the findings of the court" and that there was "a reasonable

presumption ... of Mr Thomson's intention to mislead the House".¹ Mr Thomson was no longer a parliamentarian, but the privileges committee could have recommended he be jailed for six months or fined \$5,000. It did neither, instead recommending parliament reprimand him for his conduct. Parliament accepted the recommendation and reprimanded Thomson.²

Note that privileges committees are reluctant to jail or fine those who breach privilege. In modern Australia, imposing sanctions is accepted as strictly the role of courts. The Thomson example, therefore, also illustrates how parliament respects the separation of powers by refraining from using its power to sanction. The consequence, however, is that, in practice, privileges committees are relatively ineffective at policing the use of parliamentary privilege.

... in practice

Debate within parliament

In practice, the executive's dominance of parliament undermines its debate function in the same way it undermines the other functions.

Governments can control debate through:

- a. restricting debate opportunities when it decides the schedule for the sitting day. Government business is usually the longest item on any day's agenda. Moreover, a simple vote of the house — which a government usually wins — can extend it;
- b. extending government business, which means grievances, urgency motions, matters of public importance, private members' business, adjournment debates and other debate opportunities lose their allotted time;
- c. using gags and guillotines to limit debate during the legislative process; and

- d. taking advantage of parliament's highly adversarial nature. The government and Opposition compete with each other for political advantage. Parties' attempts to score political points and 'win the day' for reporting in the evening news can undermine the quality of debate. Senate debates are not so affected by the news cycle. However, they are not immune from political point-scoring.

Debate occurs within parliamentary committees as well as on the floor of both houses. Committees are less adversarial than the floor of parliament because they operate away from the media spotlight, reducing the incentive for political point-scoring. Moreover, there is often genuine cooperation between parliamentarians from different parties working on the same committee. Committee debate is consequently more effective than debate within parliament's two chambers.

Debate is also more effective in the Senate than the House of Representatives. The lack of executive dominance in the upper house and the diversity represented within it are the main reasons for this. As a result, debate in the Senate is freer and represents a wider number of views. The Senate frequently engages in lengthy debates, with more non-government Senators able to speak. Quality debate occurs within Senate committees as well. Senate committees are less likely to be controlled by the government. They also reflect greater political and demographic diversity. Minor and micro party Senators and Independent Senators are often active participants in debates and committees. They bring a wide range of perspectives to the issues discussed.

Debate within political parties

Lastly, debate in Australia's modern parliamentary system occurs outside the traditional spaces of the House of Representatives, the Senate and parliamentary committees. Debate occurs within the political parties themselves.

Each party with representation in parliament has its 'party room'. The party room is a meeting of a political party's MPs and Senators. Party room meetings occur within Parliament House, in meeting rooms designed for the purpose. The following are the main party rooms in the contemporary political system:

- the parliamentary Liberal Party meets regularly in meetings of the 'Liberal Party Room';

¹ House of Representatives Standing Committee of Privileges and Members' Interests, *Report into whether the former Member for Dobell, Mr Craig Thomson, in a statement to the House on 21 May 2012 deliberately misled the House*, 2016, Canberra, p 12 and p 15.

² Alysia Blackham and George Williams, 2016, *Craig Thomson and the limits of parliamentary accountability for misconduct*, Australian Public Law, <<https://auspublaw.org/2016/06/craig-thomson/>>.

- the parliamentary Labor Party meets as the 'ALP Caucus';
- the parliamentary Nationals meets as a 'Nationals Party Room';
- when the Liberal Party and Nationals form a Coalition Government, they meet as a 'Joint Party Room' as well as separately; and
- minor parties have similar arrangements.

Party room meetings are private and have no media present. There is no need for political point-scoring, and all members of a party have a chance to speak their minds. Party rooms provide an effective venue for the exercise of the debate function. Party members debate policy, represent community concerns, discuss national issues, devise plans for dealing with crises, develop political strategies and debate other issues of the moment.

A government's backbenchers — that is, its non-executive members — may hold their government to account within their party room. In practice, a modern version of the responsibility function has developed within the party rooms of the major parties when they are in government.

Perceptive students will note how debate within party rooms performs, in practice, much the same role as parliamentary debate performs in theory.

Example: Party rooms in the contemporary Commonwealth Parliament

Over 2017–2018, Prime Minister Malcolm Turnbull and his senior Cabinet ministers devised a policy they hoped would reduce Australia's carbon dioxide emissions, improve the reliability of electricity generation and reduce the price of electricity. The policy was called the National Energy Guarantee or NEG. The Cabinet developed the NEG, but the policy needed Liberal Party Room approval before the government could introduce the NEG bills into parliament. When the party room met, there was disagreement between the progressive centre and the conservative right of the Liberal Party. The conservative wing of the party refused to support any form of legislated emissions reduction.

Many conservative Liberals represent electorates with conservative voters and electorates in which coal mining is an essential economic activity. Queensland electorates were particularly affected. People

in these electorates fear the consequences of emissions reduction on their livelihoods and communities.

Conservative opposition within his party forced Turnbull to abandon the emissions component of the NEG. Later, the NEG and other issues led Home Affairs Minister Peter Dutton, a conservative Queensland Liberal, to launch a leadership challenge against Turnbull. Dutton's challenge failed, but fatally weakened Turnbull's leadership. A second party room challenge soon afterwards saw Scott Morrison voted leader of the Liberal Party and, therefore, the new Prime Minister.

The NEG provides a robust example of how a government's party room can debate issues, represent constituents and, ultimately, hold its government to account. Debating issues, representing constituents and holding the government to account are all the traditional functions of parliament. Indeed, party rooms have become increasingly important since 2007 in holding Prime Ministers to account. Kevin Rudd, Julia Gillard, Tony Abbott and Malcolm Turnbull were all deposed by their parties in party room leadership spills.

Political parties are part of the contemporary parliamentary system. Parties can, in practice, perform many of the roles and functions that theoretically belong to parliament. It can be argued that parties enable, rather than hinder, parliament.



■ Figure 2.13 – In 2018 the National Energy Guarantee and other issues led Home Affairs Minister Peter Dutton — a conservative Queensland Liberal — to launch a leadership challenge against Prime Minister Turnbull.
Source: Matt Golding, 'It's curtains', *Behind the lines*, 2018, author's permission, <<https://behindthelines.moadoph.gov.au/2018/matt-golding/its-curtains>>

The decline of parliament thesis

The decline of parliament thesis is an argument alleging that parliament underperforms. The central cause of parliament's alleged underperformance is the rise of a dominating executive branch — located within the lower house—that can impose its will on the legislature, especially the House of the Representatives.

Many argue the failure of the parliament to perform its functions according to theory indicates its decline. Table 2.3 outlines the

evidence in support of the decline of the parliament thesis.

Table 2.3 shows that the basis for the decline of parliament thesis is the dominance of the executive.

For a detailed explanation of the rise of the executive read the *Background Information*, below, on the transition from absolute monarchy to a parliamentary executive.

Function	Cause of decline
Representative	- Political parties demand loyalty from their parliamentary members, forcing them to be partisan and preventing them from acting as delegates or trustees. - A majoritarian electoral system virtually guarantees a 'two and a half party system', reducing diversity in the House of Representatives, which is supposed to be the 'house of the (increasingly diverse) people'.
Legislative	- A dominating executive proposes and selects bills for introduction to the House of Representatives. Private members' bills, which tend to be sponsored by non-government parties or Independents, usually fail to proceed. - Executive dominance of the House of Representatives and its committees virtually guarantees the passage of government legislation and enables it to floodgate bills as well as gag and guillotine legislative debate.
Responsibility	- A dominant executive reduces to near zero the probability of the House of Representatives censuring a government or a minister. - The executive can manipulate the Standing Orders of the House of Representatives, putting the government in charge of the rules that are supposed to hold the government responsible. - Westminster conventions of responsible government — such as the conventions of individual and collective ministerial responsibility — are undermined. Motions of no confidence or censure motions will not be allowed to pass because it would amount to a government censuring itself.
Debate	- Executives can gag and guillotine debate through their ability to win votes on motions. - A majoritarian electoral system creates a lack of diversity in the House of Representatives. The result is a scarcity of views expressed in the nation's premier forum for debate.

■ Table 2.3 – A summary of the main arguments supporting the decline of parliament thesis.
Source: Stephen King, 2020

Background information: From absolute monarchy to responsible parliamentary government

Magna Carta limits royal power

Parliament is an ancient institution, originating in the 13th century. King John was forced by England's nobles to sign the Magna Carta in 1215. They demanded that the King consult with the nobility by holding a 'Great Council' before raising new taxes. Gradually, the Council evolved into the bicameral British Parliament. The Magna Carta is fundamental for many reasons, one of them being that it demonstrated for the first time that the power of a monarch did not need to be absolute — the law could limit the power of the Crown. Magna Carta introduced the concept of *constitutionalism* into English political history.

Parliament versus Crown — Civil war and the Glorious Revolution

During the 17th century, forces loyal to parliament and Royalists who supported King Charles I fought the English Civil War. Parliament won. Charles was beheaded and for a brief period following 1649 there was republican rule under Oliver Cromwell. However, Cromwell was a tyrant and parliament decided to invite the monarchy back from exile — the 'Restoration' — in 1660. The 'Glorious Revolution' of 1688 overthrew the Catholic King James II. Parliament then invited William of Orange — a Royal Dutch Protestant — to become King William I of England. The Glorious Revolution is one of the most significant events in the history of parliament. King William I, by agreeing to the English Bill of Rights in 1689, made parliament

(legislature) superior to the monarchy (executive). The Bill of Rights 1689 meant *executive power was finally subject to the law and responsible to parliament*.

Before exercising executive power, monarchs now had to consult with a *council of ministers* drawn from the parliament. These ministers provided advice to the monarch. The council of ministers — an executive committee — met in a small room off the main chamber of the House of Lords called the Cabinet Room. Over time, a senior minister from within the council of ministers replaced the monarch as the head of Cabinet meetings, becoming known as the Prime Minister. As an ordinary minister like the others, the Prime Minister was *primus inter pares* — first among equals.

Cabinet government

The Cabinet governed as a collective of ministers drawn from parliament. The Prime Minister chaired Cabinet meetings. The monarchy continued to exist. It retained *formal* executive power, but Cabinet increasingly exercised *real* executive power through ministers' advice to the monarch.

Choosing the Cabinet became a task for parliament. A Westminster convention evolved to govern the process of forming a government. By this convention, a group of parliamentarians could form a Cabinet of ministers if a majority of the House of Commons agreed. The monarch would formally appoint members of Cabinet as ministers of the Crown. At this time, there was a very limited franchise and only wealthy men could vote. Parliament represented their interests. Because its members were similar to one another, parliament was less representative and adversarial than today's parliaments. It was more like a 'gentlemen's club'. The formation of governments was relatively easy with the support of like-minded parliamentarians. The period became known as the 'Golden Age of Parliament'.

The Golden Age of Parliament is the source of most of the theory about how parliament ought to function. It was a time when parliament seemingly controlled the executive. It could remove a government — the **convention of collective ministerial responsibility** — or individual ministers — the **convention of individual ministerial responsibility**. It did so by withdrawing its confidence in the government or rejecting its money bills. Parliament could question ministers about their government. Meanwhile, unwritten conventions bound the

monarch, who could only use the Crown's powers on the advice of a Cabinet minister who, in turn, was answerable to parliament.

The party system in Australia

The expansion of the franchise began with the *Representation of the People Act 1832* (UK) — the *British Reform Act* of 1832. By the 1890s, universal manhood suffrage gave men in colonial Australia — including those of working-class — the right to vote.

Prolonged economic depression in the 1890s caused industrial strife. Trade unions organised mass strikes for better pay and conditions. After the failure of the strikes, the unions sought a new way to influence lawmaking. They wanted to achieve the direct representation of workers' interests in parliament. The result was the creation of the Australian Labor Party (ALP), Australia's first disciplined political party. The ALP hoped to win enough seats to form a Labor government that could govern and legislate to improve the lives of working people and the poor. The ALP was a progressive party. It sought executive and legislative power to reform society and the economy, in its view, for the better.

The ALP was a creature of the union movement. Unions retained control over ALP members, including those who won seats in parliament by forcing them to sign a pledge supporting the ALP's policies. When voting in parliament, ALP members had to follow the dictates of their party. They had to 'toe the party line'. Even today, the ALP votes *en bloc* (as one) in parliament.

The organised and disciplined ALP experienced success in the early part of the 20th century. Consequently, the non-Labor side adopted the ALP's 'disciplined party' model. In 1944 Sir Robert Menzies formed the Liberal Party of Australia. The Liberal Party is more tolerant of dissent within its ranks than the ALP, but it still expects loyalty from its parliamentary members. The Liberal Party is more conservative in outlook than the ALP — it seeks to retain traditions and is suspicious of too much government intervention in society and the economy. It supports traditional social and economic values like family, faith and individual responsibility.

Two highly disciplined political parties with opposing ideological perspectives changed the nature of the parliament from a gentlemen's club into the highly adversarial forum it is today. In such a place, winning

votes in parliament becomes critical and losing government can be the price of ill-discipline.

Expansion of executive power

Disciplined political parties have dominated Australia's political system since Federation and especially since World War 2. The senior leadership team of the majority political party in the House of Representatives forms the Cabinet and the government. A Prime Minister is both the leader of the majority party and the leader of the government. It is their leadership of the former that guarantees their leadership of the latter.

In Year 11, students learned about electoral systems. Australia has always used a majoritarian electoral system to elect the House of Representatives. Until 1918 the first past the post system of voting was used, but was replaced in that year by preferential voting, which is still in place. Both systems are based on single-member electorates. Single-member electorate systems enhance the winning party's representation with a 'winner's bonus' of extra seats in the House. The

winner's bonus results in the high frequency of majority governments in Australia.

Two factors combined are the source of executive power over the parliament today:

- a) an executive controlling the disciplined majority party; and
- b) an electoral system that promotes stable majority governments through a winner's bonus.

When a party or a united coalition of parties form a government AND secures a clear majority of seats AND can control the votes of its parliamentary members, it can control the House of Representatives. 'Executive dominance' is a term used to describe government control of the House of Representatives. Executive dominance over the House is the main argument used to support the decline of parliament thesis.

Re-read Table 2.3 — 'A summary of the main arguments supporting the decline of parliament thesis'. Consider it in light of what you have just read.

Is parliament really in decline?

If the Australian system of government delivers 'good government', can it be argued that parliament is somehow failing?

The first thing to note is that the argument for alleged decline comes from the notion of an ideal Golden Age of the Westminster Parliament. The Golden Age theory provides the 'gold standard' for how a parliament ought to function. While it is true that Westminster inspired the design of the Commonwealth Parliament, it is also true that it differs from that parliament in essential respects.

The Commonwealth Parliament is only partially Westminster in character, so it is unfair to compare the two directly. There are significant differences. The list below outlines some essential differences:

- Australia's parliament is young, only 120 years old;
- it operates within a federal system;
- it has a powerful upper house; and
- disciplined political parties have been a dominant feature of the Commonwealth Parliament since its inception. Parties were weak associations of gentlemen members of parliament during the alleged Golden Age of Parliament.

Moreover, the role of executives is more extensive in the 20th century and currently than it was in a historical Golden Age of Parliament, so a powerful executive is to be expected — maybe even desired and appreciated.

The executive does not usually control the Senate

The Commonwealth Parliament is a Westminster hybrid with a strong US-style Senate. As we learned in Chapter 1, the Senate is co-equal in power with the House of Representatives and has been elected using a proportional representation electoral system since 1949. These facts have two significant consequences for the Commonwealth Parliament.

1. It has a strong Senate acting as a 'house of review' that can check the power of the executive dominated House of Representatives.
2. The Senate is usually an independent 'hung house' in which neither the government nor the Opposition wins a clear majority.

Good government is:	Arguments against the decline of parliament thesis
Accountable	- The Australian executive is accountable to the parliament. Ministers must face questions and answer truthfully. - Relatively non-partisan parliamentary committees hold government accountable. - Party rooms hold their governments and leaders accountable. - The executive does not usually control the Senate. Governments must negotiate with the Opposition or crossbench Senators to achieve majorities in the upper house. Consensus and compromise are common. - The Senate can reject or amend government bills, and it can initiate bills (except money bills). - Senate Estimates committees regularly investigate government spending and activity.
Transparent	- The Opposition and other parties scrutinise Cabinet through questioning, committees, and parliamentary procedures and processes. - Twice-yearly Senate Estimates hearings investigate the executive — both Cabinet ministers and the public service. - Governments must explain their policies to their party rooms.
Follows the rule of law	- The Constitution and Acts of parliament bind the executive and parliament. Executive powers under section 61 of the Constitution are broad, but have been defined in High Court cases such as <i>Williams v the Commonwealth No 1</i> [2012] HCA 23. - The executive initiates most legislation. Government bills must pass an independent Senate. - Laws bind the executive. Until its repeal in 2019, the Medevac law bound the government to evacuate asylum seekers and refugees in need of urgent medical treatment. The government objected to the law, but was still bound to carry it out. - Court interpretations bind the executive. For example, in <i>Plaintiff M70/2011 v Minister for Immigration and Citizenship</i>, the High Court ruled the Gillard Government's 2011 asylum seeker policy — known as the Malaysia Solution — was unlawful because it breached the <i>Migration Act 1958</i>.
Responsive	- Parliament is the only directly elected institution within the Australian system of government. - The short electoral cycle — a maximum of three years — means governments and parliaments face regular elections. This fact alone enhances responsiveness. - Party rooms respond to community concerns. - Constituents can raise issues with ministers and members. - Pressure groups lobby the government and parliament. - The Senate is diverse, powerful and these days rarely controlled by the government. These factors encourage more responsiveness to varied viewpoints, and more compromise and consensus. - Minority governments are rare, but they are particularly responsive. They seem to be increasingly likely. The Gillard Government (2010–2013) accepted a Greens demand for a price on carbon dioxide emissions to secure their support. The conservative Morrison Government fell into a minority in late 2018 and was forced by parliament to accept progressive Medevac laws.
Equitable and inclusive	- The parliament, as a whole, is representative of a broad range of community interests and opinions. - The Senate introduces minority perspectives into debates and legislation. It may amend or reject legislation that is inequitable or exclusionary. - The Joint Human Rights Committee scrutinises all bills for human rights compliance. - The Senate's Scrutiny of Bills Committee refers bills with an impact on rights to one of eight Senate legislation committees for a thorough examination.
Efficient and effective	- Stable government enhances efficiency and effectiveness. Australian executives are usually majority governments. They are generally stable and highly unlikely to fall to votes of no confidence. No government has ever lost a no confidence motion in the Commonwealth Parliament. Eight Australian Governments have either resigned or called for elections because they could not pass significant bills. - Strong and stable governments can legislate their program in the House of Representatives. - Historically, most governments have passed most of their programs, often with amendments proposed by an independent Senate. Senate amendments often improve government bills.

■ Table 2.4 – A summary of the Commonwealth Parliament's ability to deliver good government.
Source: Stephen King, 2020

Does the Commonwealth Parliament deliver 'good government'?

It has been argued that the executive is too dominant for the parliament to function effectively. However, before we make any final judgement on the effectiveness of the parliament, let us ask two questions: "Is the executive as

"No government has ever lost a no confidence motion in the Commonwealth Parliament."

dominant as the decline of parliament thesis suggests?" and "Does the parliament deliver good government?". After all, executive dominance is the main argument supporting the decline thesis. If executive dominance is

less true in fact than in theory, then the thesis is disproved. Likewise, if the parliament delivers good government, then its dominance by the executive is less important. To answer the questions above we must consider if the realities of Australian government breach the principles of good governance and see if the parliament, in practice, aids in establishing these principles.

Table 2.4 lists the principles of good governance published by the 'Good Governance Guide'.³ We are asking, "Is the executive as dominant as the decline of parliament thesis suggests?" and "Does the parliament deliver good government?". If the answer to the first question is 'no' and to the second 'yes', then it is hard to argue in support of the decline of parliament thesis.

Recent parliaments and the decline of parliament thesis

Since 2010 parliaments have been more assertive over governments than at any time in Australia's post World War 2 political history. The following is a short summary of trends and events over the last ten years.

Prime Ministers are weaker

Kevin Rudd (2007–2010 and 2013), Julia Gillard (2010–2013), Tony Abbott (2013–2015) and Malcolm Turnbull (2015–2018) were all deposed by their parties. A government's party members are parliamentarians, and they assert power over the executive in their party room. Logically, then, parliament asserts power over the executive.

Governments are weaker

Only two governments in the last ten years have had significant majorities:

- Rudd/Gillard Government (2007–2010) had an eight seat majority; and
- Abbott/Turnbull Government (2013–2016) had a 14 seat majority.

Note that both the governments above were scarred by leadership revolts that resulted in a change of leader and Prime Minister. Strong majorities do not necessarily equate to a stable government in the contemporary era. Such weakness in majority governments is a recent phenomenon in Australian politics and is evidence of a weakened executive branch.

Other governments over the same period were as follows:

- The Gillard Government (2010–2013). Gillard formed a minority government that was always under threat in the House of Representatives. In return for their support, the Greens were able to force the government to introduce a price on carbon dioxide emissions.
- The Turnbull Government (2016–2018) had a one seat majority. Wafer-thin majorities place a government in a weak position. The loss of any member can tip a government into a minority. Moreover, slim majorities can give tremendous power to government backbenchers prepared to break ranks with their party. George Christensen (National, Dawson) threatened to cross the floor and vote against his party's government if Turnbull did not approve a Royal Commission into banks.
- The Morrison Government (2018-19) fell into minority when it lost both the Wentworth by-election and when one of its party members resigned to become an Independent. The parliament forced the Medevac Bill on the weakened government.
- The Morrison Government (2019–current) won a one seat majority in the 2019 election. Existing divisions within the Liberal Party between 'modern' Liberals and conservatives are a cause of lack of

³ United Nations Economic and Social Commission for Asia and the Pacific, *What is good governance?* <<http://www.unescap.org/sites/default/files/good-governance.pdf>>.

unity over issues such as climate change. The 2020 bushfires crisis created tensions between conservative Liberals, such as Craig Kelly MP and Nationals MP George Christensen, who claim that Australia's fires are the result of drought, not climate change. However, amid growing anger by the Australian people over the government's response to the bushfire crisis and dissent within his own government from moderate Liberals such as MPs Katie Allen and Tim Wilson, Morrison made the announcement that the government would evolve its climate change policy. This includes meeting Australia's emissions commitment and focussing on preparation, resilience and adaptation to deal with climate change.

Parliaments are stronger

There is an inverse relationship between executives and parliaments. A strong executive means a weaker parliament. The evidence outlined above indicates a weakening of executive power in Australia over the ten years up to 2020. A weaker executive means a stronger parliament.

The recent strengthening of Australian parliaments and the ability of the parliament to deliver good government are the main arguments against the decline of parliament thesis.

Making the argument

It is difficult to reach a definitive conclusion as to whether the decline of parliament thesis applies to the Australian Commonwealth Parliament. To help reach a position, students are encouraged to consider the arguments provided in Table 2.5.

Arguments in favour	Arguments against
- Executive dominance is a characteristic of the Australian system of parliamentary government. - Few of the Commonwealth Parliament's functions operate according to theory. - Compared to the Golden Age of Parliament, the Commonwealth Parliament fails to live up to Westminster ideals.	- The Senate is independent and reflects community diversity. - The Commonwealth Parliament maintains the principles of good government in practice. - The Commonwealth Parliament is a uniquely Australian institution and is only partially Westminster in style. It has non-Westminster characteristics and operates in a different context from the British Parliament. To judge it by a hypothetical 'gold standard' of parliament is unfair.
	Parliaments since 2010 have become stronger relative to the executive.

■ Table 2.5 – Arguments for and against the decline of parliament thesis as it applies to the Australian Commonwealth Parliament. Source: Stephen King, 2020

Summary

- The Commonwealth Parliament is a modified Westminster-style legislature incorporating American constitutional concepts, notably federalism.
- It is characterised by strong bicameralism, with both houses directly chosen by the people.
- It is limited by the Australian Constitution, which grants it limited legislative and financial powers. A few powers are exclusive, and many are concurrent with the states. Some concurrent powers are exclusive by their nature or made exclusive elsewhere in the Constitution.
- The Commonwealth Parliament has four principal functions: to represent the people; to pass legislation; to make the government and hold it responsible; and to debate the issues of the day.
- Each function has theoretical and practical aspects.
 - A hypothesised Golden Age of Westminster is the source of most of the theory of parliament.
 - In contrast, the realities of a young parliament with a hybrid Westminster design operating within a federation in a hyper-partisan environment explain the contemporary practice of parliament's functions.
- The decline of parliament thesis proposes that the Commonwealth Parliament has fallen from a hypothetical Golden Age ideal, and that this creates a problem in need of a solution.
 - The principal argument supporting the thesis is the rise of a powerful executive. Any solution must mean a reduction in the power of the executive.
 - The principal argument against the thesis is that the Commonwealth Parliament should not be judged against a fictitious standard. Judging it as a uniquely Australian parliament and by the standards of good government is a better way to evaluate its performance. Naturally, there is always room for improvement, and the thesis may guide reforms.
 - Recent history indicates a weakening of executive power and a strengthening of the parliament, providing evidence against the decline of parliament thesis.

Exam practice questions

Short answer

- 1a) Explain what is meant by the term 'political power'?
- 1b) Outline **three** elements of Section 24 of the Commonwealth Constitution (Australia).
- 1c) Discuss the proposition that, 'while Section 24 of the Commonwealth Constitution (Australia) requires members of parliament to be "directly elected by the people", the parliament is not representative.'
- 2a) Define the term 'partisan' in the Australian political system.
- 2b) Compare the legislative powers of the House of Representatives and the Senate.
- 2c) Discuss the extent to which the Commonwealth Parliament fulfils the debate function in theory and practice.
- 3a) Outline **two** ways the Commonwealth Parliament can provide for 'transparency'.
- 3b) Describe **three** conventions of responsible parliamentary government.
- 3c) Discuss the extent to which 'responsibility of the executive to the Commonwealth Parliament is more the exception than the rule.'

Source analysis

The functions of parliament reflected in the business of parliament.

The reality of some of the main functions of parliament — selection of government, scrutiny of government, lawmaking, representation of the electorate and acting as a public forum — become apparent through an analysis of the business undertaken by parliament, especially the House of Representatives in the 42nd and 43rd Parliaments.

In 2008 the House sat for 654 hours, had 56 main committee meetings, debated 60 items of private members' business, heard 138 90-second statements by private members, and 491 three-minute private member constituency statements were read out. One hundred and fifty petitions were presented containing over 280,000 signatures, and 616 questions on notice were asked, along with 1,187 questions without notice. One hundred and eighty-five government bills were initiated in the House of Representatives, along with six private member's bills. These bills totalled 6,830 pages and none were gagged or guillotined. Matters of public importance were discussed on 45 days, and 79 reports were presented to the parliament. In 2008 government business accounted for 58 per cent of the business conducted by the house.

In 2011 the House of Representatives sat for 640 hours, had 54 main committee meetings, debated 117 items of private members' business, heard 431 90-second statements by private members and 571 three-minute private member constituency statements were read out. One hundred ninety-five petitions were presented containing over 700,000 signatures, and 621 questions on notice were asked, along with 882 questions without notice. Two hundred and two government bills were initiated in the house, along with 21 private members' bills. These bills totalled 7,368 pages, and 19 of these bills were gagged or guillotined. Matters of public importance were discussed on 49 days, and 142 reports were presented to the parliament. In 2011 government business accounted for 50 per cent of the business conducted by the house.

Figures such as these show that while the government still dominates the House of Representatives, claims that there is a 'decline of parliament' may not be entirely correct.

Use the source to respond to the following:

- 4a) What is meant by the phrase 'decline of parliament'?
- 4b) With reference to the source, explain briefly **two** procedures in the business of the House of Representatives.
- 4c) Discuss the influence that the dominance of the executive has on the business of the Commonwealth Parliament.
- 4d) Assess the impact that political parties have had on the Commonwealth Parliament fulfilling its functions.

Essay response

- 5) Assess the claim that the 'decline of parliament' thesis does not apply to the Commonwealth Parliament.
- 6) 'If not for the role and power of the Senate, the Commonwealth Parliament would not fulfil its functions.' Evaluate this claim with reference to at least **three** functions.

Investigation

Investigate the ways political parties ensure their members of parliament act as partisans.

- 7a) The ALP pledge: record the details of the requirements of members of parliament in the Australian Labor Party, the intent of the pledge, at least two examples that show the pledge being complied with or not (crossing the floor), as well as the impact of not following the pledge for a member of parliament.
- 7b) The Liberal Party: record the philosophy/convention of members of parliament in the Liberal Party and how they try to ensure partisanship (and to whom), at least two examples that show party discipline being complied with or not (crossing the floor), as well as the impact of not following party policy for a member of parliament.
- 7c) A party of your choice — for example: the Greens, the Nationals, PHON etc.
- 8) Choose at least **one** example of government legislation and **one** example of a private members' bill to investigate. In table format outline:
 - who introduced this bill and why;
 - if and how it was amended (in the House of Representatives or Senate);
 - the length of the legislative process;
 - whether any tactics were used to expedite its passage or limit debate, and
 - any political party influence.

Consider how the information you have collected will allow you to demonstrate the various functions of the Commonwealth Parliament favourably or otherwise in contrast to an Act passed during the Howard Government while it controlled the Senate.



Roles and powers of the Governor-General

Syllabus point:

- **Roles and powers of the Governor-General, including Sections 61, 62, 63, 64, 68, 72 and 'the 1975 crisis'**

Introduction

The ‘constitutional’ or ‘formal’ executive of Australia consists of the Queen — currently Elizabeth II, monarch since 1953 — as represented by the Governor General. A literal reading of the *Commonwealth of Australia Constitution Act 1900* (the Constitution) could be misleading as it implies that the position of Governor-General brings with it significant power. The reality is that the Governor-General’s executive powers in Australia are strictly regulated through our adoption of many of the Westminster system’s conventions of responsible government, leaving the Governor-General with few discretionary powers.

According to the Constitution, the Governor-General is to exercise most of their powers under the advisement of the Federal Executive Council (EXCO). The EXCO is a body consisting of Senior Ministers of Government who are appointed by the Governor-General under Sections 62 and 63 of the Constitution. In theory, it is at the

discretion of the Governor-General whether or not they choose to follow this counsel. In actuality, ‘real’ executive power in Australia is held by the Cabinet led by the Prime Minister of the day. There is a tension in the Australian system between the formal roles and powers of the Governor-General and those of our elected representatives.

“A literal reading of the *Commonwealth of Australia Constitution Act 1900* (the Constitution) could be misleading as it implies that the position of Governor-General brings with it significant power.”

The Office of the Governor-General

The title Governor-General was first used in mid-19th century Australia. The role was associated with Sir Charles FitzRoy and Sir William Denison whose jurisdiction as Governors of New South

Wales extended to other colonies in Australia.

The framers of the Constitution followed the practice of the British in deciding that Australia should become a constitutional monarchy. In other words, Australia would have the British King or Queen as the head of state and their power would be limited by a constitution. As the monarch lived over 20,000 km away in the United Kingdom and could not possibly fulfil the practical functions of a head of state, it was determined that Australia should have a Governor-General to act as the Queen’s representative.

The Office of the Governor-General was enshrined in Section 2 of the Constitution, which states:

A Governor-General appointed by the Queen shall be Her Majesty’s representative in the Commonwealth, and shall have and may exercise in the Commonwealth during the Queen’s pleasure, but subject to this Constitution, such powers and functions of the Queen as Her Majesty may be pleased to assign to him.



■ Figure 3.1 – Sir Charles FitzRoy was one of the people first associated with the title of Governor-General.

Source: Henry Robinson Smith, Mitchell Library, State Library of New South Wales, ca 1855, Public Domain, <<https://en.wikipedia.org/w/index.php?curid=46204134>>

Appointment of the Governor-General

Appointment to the position of Governor-General is made by the Queen under Section 2 of the Constitution. Early appointments to the position of Governor-General were made by the Queen or King on the recommendation of the Colonial Office in London. Since the 1930s this appointment has been made after consultation with the Australian Prime Minister.

On 16 December 2018 Prime Minister Scott Morrison announced that Queen Elizabeth II had accepted his advice to appoint General David Hurley as Governor-General to succeed Peter Cosgrove. Governor-General appointees usually have a distinguished record of public service and have included retired politicians, judges or military commanders. The appointment of David Hurley — with his 42 years in the military and 4 years as the Governor of New South Wales — followed this pattern. Hurley was sworn in as the 27th Governor-General on the 1 July 2019. Since his appointment the nation has experienced a number of significant crises such as bushfires and the COVID-19 pandemic.

A unique feature of the Constitution is that the Governor-General is also responsible for the appointment of ministers (including the Prime Minister). This circular accountability played an important role in the dismissal of Prime Minister Gough Whitlam in 1975, which is discussed later in this chapter. The tenure of the Governor-General is at the pleasure of the Queen, though the average length of appointment for a Governor-General is around five years. The salary of the Governor-General is set through an amendment to the *Governor-General Act 1974* at the beginning of each term of office and cannot be changed during their appointment. This provision allows the Governor-General to remain a politically neutral figure.



■ Figure 3.2 – David Hurley was sworn in as the 27th Governor-General on 1 July 2019.

Source: Office of the Official Secretary to the Governor-General, on behalf of the Commonwealth of Australia, 2019, CC BY 3.0, <<https://www.gg.gov.au/>> and <<https://commons.wikimedia.org/wiki/index.php?curid=80615391>>

Roles of the Governor-General

The Governor-General — acting as the Queen's representative — performs constitutional, ceremonial and non-ceremonial roles.

Constitutional roles of the Governor-General

The constitutional role of the Governor-General is to exercise those powers vested in the office through the Constitution. These can be classified as either legislative or executive.

Legislative powers of the Governor-General

Chapter 1 of the Constitution confers significant legislative power on the Governor-General. The Governor-General usually exercises their legislative powers on the advice of the EXCO. This is considered appropriate in a democratic system such as Australia where there is a representative democracy and many would balk at the suggestion that a Governor-General should have the power to carry out their legislative role autonomously. Legislative powers include:

- proclamation of a parliamentary session within thirty days after an election (Section 5);
- proroguing or suspending parliament between sessions and dissolving the House of Representatives after an election (Section 5);
- dissolving the House of Representatives (Section 28);
- issuing of writs for a general election (Section 32); and
- dissolving both houses in the event of a double dissolution election and convening a joint sitting of the parliament in particular circumstances. (Section 57).

Governor-General Peter Cosgrove exercised his legislative power under Section 5 of the Constitution to prorogue parliament in March 2016 and then recall it on the advice of Prime Minister Turnbull on 18 April 2016. The recall of parliament enabled the Senate to debate two previously rejected pieces of legislation regarding the re-establishment of the Australian Building and Construction Commission. Despite the recall of parliament, the legislation was not passed. The failure of parliament to pass these critical pieces of government legislation — twice in three months — acted as a 'trigger' for a double dissolution. On 8 May 2016 Prime Minister Turnbull asked the Governor-General to request that he use his power under Section 57 to call a double dissolution election.



■ Figure 3.3 – Malcolm Turnbull visits Peter Cosgrove to request double dissolution.

Source: Office of the Official Secretary to the Governor-General, 2016, CC BY 3.0, <<https://www.gg.gov.au/>> and <<https://commons.wikimedia.org/w/index.php?curid=50359355>>

Section 58 gives the Governor-General the power to grant royal assent to bills. This section is significant because it also implies that the Governor-General may withhold assent which would effectively act to veto a bill that has passed through both houses of the parliament. Early Governors-General used the right to 'reserve' legislation passed by the Australian Parliament in order to seek an opinion from the Colonial Office in London. Today, such an action would be considered undemocratic, which helps demonstrate the 'fictional' nature of some of the constitutional powers of the Governor-General.

Executive powers of the Governor-General

Chapter 2 of the Constitution outlines the executive powers of the Governor-General. Under Section 61 of the Constitution executive power is vested in the Queen and is exercisable by the Governor-General. The executive roles of the Governor-General include:

- selecting and appointing an EXCO (Section 62);
- acting on the advice of the EXCO (Section 63);
- appointing and dismissing 'Ministers of State' (Section 64); and
- appointing senior government officials (Section 67).



■ Figure 3.4 – The Governor-General swears in the 44th Prime Minister, Malcolm Turnbull.

Source: Office of the Official Secretary to the Governor-General (Commonwealth of Australia), 2015, CC BY 3.0, <<https://www.gg.gov.au/>> and <<https://commons.wikimedia.org/w/index.php?curid=43293127>>

Executive roles of the Governor-General that conflict with the idea of responsible government are generally inactive. In theory, the Governor-General has the ability to act independently on matters such as the appointment of ministers (Section 64). By convention, the Governor-General usually acts on the advice of the Prime Minister. For example, under Section 68 of the Constitution the Governor-General is the Commander in Chief of the Australian Defence Forces. In reality, policy regarding the defence of Australia rests with the Minister for Defence. The Governor-General is responsible for the appointment of senior public officials — including the Chief of the Defence Force and the Chiefs of the three Armed Services — on the advice of the EXCO.

Political decision making about the commitment of troops to a conflict, to peacekeeping missions or to other activities are made by the Prime Minister in consultation with the Cabinet. However, they do not have the legal power to make such a commitment and must rely on the Governor-General to act on the advice given. The Howard Government chose to ignore this process in the case of the commitment of troops to the 2001 and 2003 wars in Iraq. In both cases, involvement in Iraq was authorised by the Minister for Defence who used his authority under Section 8 of the *Defence Act 1903* which had been amended in 1975. Section 8(1) states that the "general control and administration of the Defence Force" is vested in the minister, but also notes that under Section 68 of the Constitution, command in chief remains vested in the Governor-General. Section 8(2) of the *Defence Act 1903* also requires the military to act "in accordance with the directions of the Minister".

While governments have used the statutory power of the Defence Minister to commit Australian troops to a conflict, there is an argument that the role of the Governor-General should not be ignored. The involvement of the Governor-General provides an additional level of legitimacy to this process. Essentially, the Governor-General carries out their executive powers on the advice of the Federal Executive Council.

Ceremonial roles

As the head of state the Governor-General has important ceremonial roles to play. In their position as Commander in Chief of the Armed Forces the Governor-General represents the Australian nation on occasions such as ANZAC Day and Remembrance Day, and presents colours (flags) and other insignia. In 2016 Governor-General Cosgrove attended the ANZAC Day service in Villers-Bretonneux (France), representing Australia at a commemorative service in honour of Australians who had fought there in World War 1. Other ceremonial roles performed by the Governor-General include:¹

- receiving and entertaining visiting heads of state, heads of government and other prominent visitors to Australia;
- opening new sessions of the Commonwealth Parliament;
- receiving the credentials of foreign diplomats and High Commissioners appointed to represent their countries in Australia; and
- conducting investitures at which people receive awards under the Australian Honours system.

Non-ceremonial roles

In the minds of many Australians, perhaps the most significant role of the Governor-General is to represent and reflect what it is to be Australian. Sir Ninian Stephen — Governor-General from 1977 to 1983 — stated that the role of the Governor-General was ‘to represent Australia itself’. This requires that the Governor-General should involve themselves in activities such as:

- travelling widely in order to meet with people from all different walks of life;
- accepting patronage of various charitable, cultural and other organisations;
- attending services and functions;
- speaking at, and opening, national and international conferences; and
- presenting awards at major public functions.²

Quentin Bryce made patronage of the Australian Red Cross one of the non-ceremonial powers of the Governor-General upon coming to office in

2008. Prior to this, patronage of the Australian Red Cross had been one of the roles of a Governor-General’s partner.

“In reality, the Governor-General usually exercises power on the advice of the ministers who are responsible to the parliament.”

Types of power

The constitutional powers granted to the Governor-General can also be categorised as being either express or reserve.

Express power

There is no direct reference in the Constitution to either the Prime Minister or the Cabinet, which is where true power actually lies. Under Australia’s system of responsible parliamentary government, executive power is, in fact, exercised by the elected government, while the Queen plays a symbolic role as head of state.

In reality, the Governor-General usually exercises power on the advice of the ministers who are responsible to the parliament. These powers are conveyed through EXCO. Express powers include the dissolution of parliament and the issuing of writs for a new election, as well as the granting of royal assent to new laws. Other accepted express powers include:

- acting on the advice of ministers to issue regulations and proclamations under existing laws;
- appointing federal judges;
- appointing high commissioners to overseas countries and other senior government officials;
- establishing Royal Commissions of Inquiry;
- exercising the prerogative of mercy (similar to the United States President’s pardons); and
- authorising many other executive decisions by ministers, such as raising government loans or approving treaties with foreign governments.

Reserve power

Reserve powers are those powers which the Governor-General may exercise without, or contrary to, ministerial advice. In practice,

1 Governor-General of the Commonwealth of Australia, The role of the Governor-General, 2019, <<https://www.gg.gov.au/about-governor-general/role-governor-general>>.

2 Governor-General of the Commonwealth of Australia, The role of the Governor-General, 2019, <<https://www.gg.gov.au/about-governor-general/role-governor-general>>.

these reserve powers exist to be used only as an instrument of last resort — such as during a political crisis — and are exercised at the discretion of the Governor-General.

This may include the power to:

- appoint a Prime Minister if an election has resulted in a hung parliament (Section 64);
- dismiss a Prime Minister where they have lost the confidence of the parliament (Section 64);
- dismiss a Prime Minister or minister when they are acting unlawfully (Section 64); and
- refuse to dissolve the House of Representatives despite a request from the Prime Minister (Section 5 and Section 28).

In reality, the use of 'reserve' powers by the Governor-General is limited by the conventions of responsible parliamentary government. The use of reserve powers by an unelected representative of the head of state against the wishes of an elected parliament is highly controversial, as was seen during the '1975 crisis' which is addressed below.

The Dismissal

On 11 November 1975 the Governor-General, Sir John Kerr used his reserve powers to dismiss the Whitlam Labor Government. This action sparked a constitutional crisis and is generally regarded as one of the most significant turning points in Australian politics.



■ Figure 3.5 – Prime Minister Gough Whitlam, 1973.
Source: Australian Conservation Foundation, Prime Minister Gough Whitlam launches ACF's new member magazine, 1973, CC BY-SA 4.0, <<https://commons.wikimedia.org/w/index.php?curid=67603810>>

When the Labor government — led by Gough Whitlam — swept to power in 1972 it set about expanding the power of the central government in order to implement a wide agenda of popular health and education reforms, including the abolition of university fees. Such initiatives were initially popular with the Australian public. However, events in the international economy saw the Australian economy afflicted with stagflation, that is, with a simultaneous increase in both inflation and unemployment. This unprecedented situation was made worse by the Whitlam Government's expensive policy agenda, creating the perception that the government was a poor economic manager.

By April of 1974 the Senate felt emboldened to refuse the passage of six of the government's supply bills that had already twice passed through the House of Representatives. Supply is a term that generally applies to all money bills, which are bills concerning government expenditure. Under Section 53 of the Constitution both houses of the parliament have co-equal legislative power with the exemption of money bills, which must originate in the House of Representatives. There is nothing in the Constitution to prevent the Senate from requesting amendments to money bills or from blocking supply. Prior to this time Senates had requested amendments to money bills. However, by convention, none had blocked supply.

Based on advice from Governor-General Sir Paul Hasluck, Whitlam used the blocking of supply as the trigger for a double dissolution election under Section 57 of the Constitution. The May 1974 double dissolution election resulted in the Whitlam Government being returned with a reduced majority in the House of Representatives and an increased number of seats in the Senate. This was a good result for the government as it meant that they held the same number of seats in the Senate as the Opposition, with the balance of power in the hands of an Independent and a member of the Liberal Movement which had splintered off from the Liberal Party several years earlier. The deadlock over the bills was finally resolved by a joint sitting of the two houses of parliament which was authorised by the newly installed Governor-General, Sir John Kerr. This was the only joint sitting of parliament ever held under Section 57 of the Constitution and was the occasion on which six of the Whitlam government's most significant policies were legislated.³

3 Hocking, Jenny, 'Gough Whitlam's 1974 re-election: 'government by double dissolution'', The Whitlam Government's 21st Century Agenda, 2017, Monash University Publishing, Clayton, <<https://research.monash.edu/en/publications/gough-whitlams-1974-re-election-government-by-double-dissolution>>.

After the election the Whitlam Government was plagued with a series of damaging crises. It had been revealed in the media that Dr Jim Cairns — the Deputy Prime Minister and Australian Treasurer — was in the midst of having an affair with his Principal Private Secretary, Junie Morosi. Of more significance, however, was that the government was embroiled in a financial scandal which became known as the ‘Loans Affair’. Rex Connor, the Minister for Resources, became convinced that to deal with the economic crisis facing the country it was essential for the nation to ‘take back’ control of its mineral and energy resources.

With the support of both Prime Minister Whitlam and Deputy Prime Minister Cairns, Connor sought out a loan for \$4 billion. When he was unable to find support within Australia, he looked to Pakistani loan broker, Tirath Khemlani to source the funds. Public concern regarding the unconventional method by which the government planned to obtain the loan saw Whitlam withdraw support for the plan by May of 1975. When it became clear that both Cairns and Connor had disobeyed his wishes by continuing to pursue the loan, Whitlam dismissed both men. The scandal resulted in significant damage to the government in the eyes of the Australian public.

It was in this environment that two casual vacancies opened up in the Senate. The first was due to the February 1975 appointment to the High Court bench of New South Wales Labor Senator, Lionel Murphy. The second casual vacancy came in June the same year as a result of the death of Queensland Labor Senator, Bert Milliner. In both cases the respective state parliaments — who can constitutionally nominate the replacement Senators — decided to break with convention and appoint non-Labor Senators to these positions. The appointment of two Independent

Senators —Cleaver Bunton and Albert Field — changed the balance of power in the Senate back in favour of the Opposition.

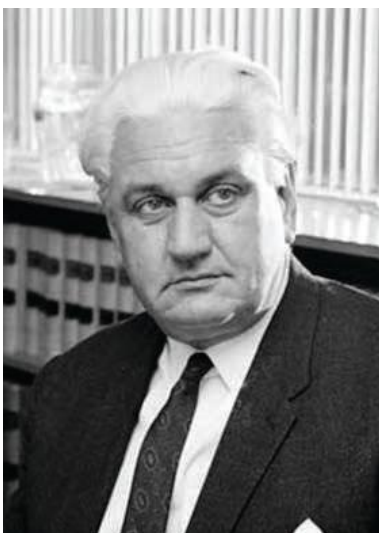
In March of 1975 leadership of the Opposition had transferred to Malcolm Fraser, an Oxford graduate from a wealthy farming family. He was a conservative politician who saw himself as a defender of the ‘old order’ against what he perceived to be the damage being inflicted by the Whitlam Labor Government. With control of the Senate and a government preoccupied by scandal, Fraser seized the opportunity to grasp the reigns of power, stating:

We will use the power vested in us by the Constitution and delay the passage of the Government’s money bills through the Senate, until the Parliament goes to the people. In accordance with long established constitutional practice which the Prime Minister has himself acknowledged in the past, the Government must resign.⁴

In October 1975 the Coalition used its numbers in the Senate to break with convention. The Senate blocked the passage of the budget through the rejection of two appropriations (supply) bills. The Opposition hoped that by blocking supply the government would be forced to call a double dissolution election as they had in May 1974. Sensing that political support for the government had changed by 1975, Whitlam refused to either resign or seek a double dissolution election and instead considered whether to advise the Governor-General to call a half-Senate election.

This left the Governor-General, Sir John Kerr with a problem. He could either leave the government in a situation where it would be unable to meet its financial commitments or break with convention and use the reserve powers established in the Constitution to break the impasse. Kerr believed that the role of the Governor-General was not simply that of figurehead and that the powers of the position as outlined in the Constitution were there to be used. To worsen the situation, the Governor-General had grown preoccupied with the notion that the Prime Minister might ask the Queen to dismiss him as the Governor-General.

For his part, Whitlam was sure that Kerr would not use his power under Section 64 to dismiss him as Prime Minister. In an appearance on television Whitlam stated that “Unquestionably, the Governor-General takes the advice from



■ Figure 3.6 – Sir John Kerr, Governor-General, 1974–1977.
Source: Australian News and Information Bureau, Sir John Kerr in 1965, 1965, Public Domain, <<https://commons.wikimedia.org/w/index.php?curid=67670006>>

4 Malcolm Fraser, cited in *The Australian*, 16 October 1975, p 1, as cited in Stanley Bach, Parliament of Australia, *Platypus and Parliament: The Australian Senate in Theory and Practice*, 2003, <www.aph.gov.au/About_Parliament/Senate/Powers_practice_n_procedures/platpar/c04>.

his Prime Minister and from no one else".⁵ The Prime Minister was so confident about his position that when Kerr asked for permission to meet with Opposition Leader Malcolm Fraser, this was granted. In an unprecedented meeting Sir John Kerr and the Opposition Leader met for an hour during which Fraser made it clear that the Opposition would not retreat and that the Governor-General had a significant role to play in the crisis.

Acting against convention Sir John Kerr also sought advice from other avenues. Prior to and during the crisis, the Governor-General consulted with High Court Justice Anthony Mason who was a close family friend. In 2012 Mason revealed that he had told the Governor-General that he should advise the Prime Minister to call a full election and that if he did not do so he would be dismissed. Further, Mason indicated that to not provide such advice to the Prime Minister would be considered deceptive. Mason also revealed that he had drafted a letter of dismissal for the Governor-General to use should he wish to do so, although this was not the final letter that was presented to the Prime Minister.

Sir John Kerr sought further advice from Chief Justice of the High Court, Garfield Barwick, on 9 November 1975. Barwick advised the Governor-General that it was not only in his constitutional authority to exercise his reserve powers to resolve the deadlock, but it was also his duty. Kerr decided to take action, confident that he was acting according to the powers vested in the Office of the Governor-General as outlined by the Constitution.

Kerr arranged to meet Prime Minister Whitlam at his residence, Yarralumla, on the afternoon of 11 November 1975. After a morning in parliament, Whitlam arrived for the meeting at 1 pm carrying a letter advising the Governor-General to issue the writs for a half-Senate election. However, he was surprised when Sir John handed him a letter and informed him that his commission as Prime Minister had been withdrawn under Section 64 of the Constitution. The letter that Whitlam had been handed outlined a statement of reasons for the dismissal. The meeting concluded with both men shaking hands and Whitlam departing.

Whitlam was unaware that the Leader of the Opposition, Malcolm Fraser, was waiting in a room nearby for a meeting with the Governor-General. After Whitlam's departure Fraser was escorted to Sir John Kerr who formally asked the Opposition Leader to form a caretaker



■ Figure 3.7 – The third Whitlam Ministry was dismissed at the same time as the Prime Minister on 11 November 1975.

Source: National Archives of Australia, *The third Whitlam Ministry at parliament house, 1974*, CC BY 4.0, <<https://commons.wikimedia.org/w/index.php?curid=67603809>>

government upon the condition that he recommend a double dissolution election within six months and pass supply. Fraser assured the Governor-General that he would do so.

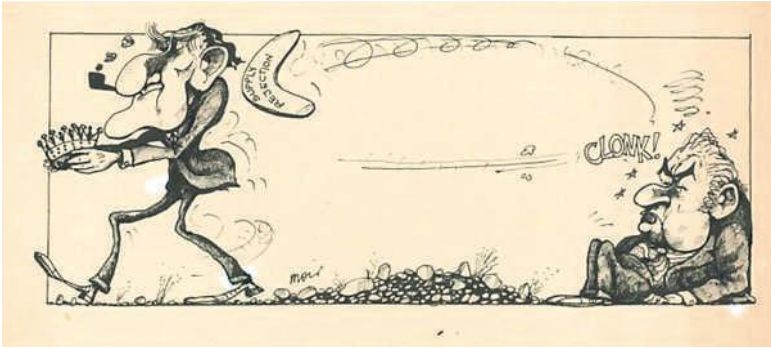
At the conclusion of the meeting with Whitlam on 11 November 1975, the Governor-General appointed the Opposition Leader as caretaker Prime Minister. Despite retaining the confidence of the lower house of parliament, the Labor Government was dismissed and a new caretaker government was installed. In December 1975 a double dissolution election was held and the Fraser Liberal government won a majority in both houses.

Constitutional issues

The dismissal raised significant questions about Australia's political system. The crisis had only occurred due to the breaking of longstanding and fundamental conventions. In 1977 the Fraser Government successfully amended Section 15 of the Constitution by referendum to ensure that casual vacancies in the Senate would only be filled by members of the same political party. No such attempt was made to codify other conventions which underpin responsible government in Australia. These include significant issues such as the role of the Prime Minister and Cabinet, the role of the upper house and the appropriate use of power by the Governor-General.

Questions such as whether the Senate has a legitimate role in blocking supply still exist and demonstrate the inconsistencies between the constitutional powers of the Governor-General and the conventions of responsible government. As most members of the House of Lords are appointed, there is no such debate in the Parliament of the United Kingdom. The blocking of supply by an unelected house would

5 Alex Mann, 'Inside Australia's biggest political scandal', *The Eleventh*, ABC Podcast, 17 March 2020, <<https://www.abc.net.au/radio/programs/the-eleventh/the-eleventh/11972938>>.



■ Figure 3.8 – Many thought that Fraser’s acceptance of the role of caretaker Prime Minister would rebound on him.

Source: Alan Moir, *Whitlam and Fraser*, 1975, author’s permission, National Library of Australia, vn3081062, <www.moir.com.au>

be considered undemocratic in the British system. Since 1975 the Australian Senate has chosen not to block supply, but has used its role as a house of review to recommend to the House of Representatives amendments to subsequent government budgets. The Senate may still refuse to pass supply by blocking other legislation that is essential to the budget bottom line. This was clearly demonstrated by the Senate’s willingness to force the Abbott led Coalition Government to amend the unpopular legislation underpinning the 2014–2015 budget, which included measures such as a \$7 GP Medicare co-payment and the deregulation of university fees.

Another significant issue raised by the 1975 crisis — and which remains unclear today — is the precise scope of the power of the Governor-General. Sir John Kerr — an unelected representative of the head of state — used his reserve powers to dismiss a popularly elected government which still enjoyed the support of the lower house of parliament. Reserve powers are designed to be exercised during times of national emergency when the government cannot or will not act. In this case it is debatable as to whether the country was in the midst of a national crisis. Certainly, the Whitlam Government was plagued by political scandal and struggling to pass supply through the Senate. Despite this, Prime Minister Whitlam believed that the government’s issue with the passage of supply could be resolved through a half-Senate election and was ready to provide Sir John Kerr with advice to this effect. The dismissal of Whitlam and his government might have been avoidable had the Governor-General been willing to listen to the advice of his Prime Minister.

It is clear through historical records that Sir John Kerr felt that the position of Governor-General was more than that of figurehead. To Kerr, the powers vested in the Governor-General

by the Constitution were there to serve a purpose and should be wielded if the situation warranted. Kerr felt further vindicated when he broke with convention to seek the advice of Chief Justice Garfield Barwick and was informed that it was not only within his constitutional authority to exercise his reserve powers to resolve the deadlock, but also his duty. Kerr’s meetings with an ambitious Opposition Leader — who put pressure on the Governor-General to take decisive action — may have also given Kerr a sense of the ‘rightness’ of his course of action.

The role of the Palace in the dismissal of the Governor-General has been unclear until recently. On 29 May 2020, historian Jenny Hocking won her High Court bid to access the letters exchanged between then Governor-General Sir John Kerr and the Queen around the time of the dismissal of the Whitlam government. The National Archives of Australia had previously refused to release the documents known as the ‘Palace letters’, saying they were private papers. Ms Hocking successfully argued that correspondence between the Palace and the Governor-General was the property of the Commonwealth and not private.

“Governors-General have generally been careful to demonstrate their political neutrality.”

The letters reveal the deep insecurity of the Governor-General who believed that Prime Minister Whitlam might at any time write to the Queen and ask for his commission as Governor-General to be revoked. Martin Charteris — personal secretary for the Queen — wrote to Kerr during the crisis empathising with the unenviable situation in which the Governor-General found himself. Charteris also indicated that if Kerr were to do “what the constitution dictates, you [Kerr] cannot possibly [sic] do the Monarchy any avoidable harm”.⁶ Some analysts have interpreted this as being tacit approval on the part of the Queen for the Governor-General to use his reserve powers in order to dismiss the Prime Minister.

⁶ Jenny Hocking, ‘The Palace Letters have blown apart the claim the Queen had no part in the Whitlam dismissal’, *Pearls and irritations*, 15 July 2020, <<https://johnmenadue.com/jenny-hocking-the-palace-letters-have-blown-apart-the-claim-the-queen-had-no-part-in-the-whitlam-dismissal/>>.

After the dismissal, Charteris wrote a letter to the Speaker of the House of Representatives, Gordon Scholes. Charteris downplayed the role of the Palace, stating that “the Queen has no part in the decisions which the Governor-General must take in accordance with the Constitution”.⁷ The implication of this was that the Sir John Kerr had acted on his own initiative and not on instruction from the Palace. Whatever the role of the Palace, there can be no doubt that the actions of Kerr made him an extremely unpopular figure and made his position as Governor-General untenable. Kerr remained a divisive figure in Australian politics after the dismissal and well after his own resignation in 1977. Many Australians questioned the necessity of having a Governor-General and argued that Australia should become a republic.

Subsequent Governors-General have generally been careful to demonstrate their political neutrality. Major General Michael Jeffery — the twenty-fourth Governor-General — was appointed in 2003 by Prime Minister John Howard. Jeffery — a former military officer and Governor of Western Australia — was an uncontroversial political figure. This was in sharp contrast to his predecessor, Dr Peter Hollingworth who left the position under a cloud of scandal.⁸ Sir William Deane — Governor-General from 1995 to 2001 — used his position to encourage the Howard Coalition Government to take greater steps towards reconciliation between Aboriginal and non-Aboriginal Australians. Dame Quentin Bryce — Governor-General from 2008 to 2014 — also used her vice-regal position to speak out in order to progress the position of women in society and in support of marriage equality.

Questions about the role of the Governor-General have led many Australians to consider whether there should be an Australian — rather than the Queen — as our head of state. Many options for a republic were explored during the 1990s while the Keating Labor Government was in power. The Republic Advisory Committee eventually chose a ‘minimalist’ model for the republic in which the Governor-General would be replaced by a ‘president’ selected by the Prime Minister and the Australian Parliament. This ‘minimalist’ solution failed to meet with the approval of the Australian people in a referendum held in 1999.

The greatest stumbling block for the proposal was the distrust that many Australians felt about allowing politicians to choose their head of state.

Conclusion

The Office of the Governor-General is established under Section 2 of the Constitution. The Governor-General fulfils three main roles, which can be summarised as being constitutional, ceremonial and non-ceremonial. The constitutional roles of the Governor-General enable them to exercise powers to influence the appointment and/or operation of all three arms of government. Further, the Governor-General has functions to fulfil in both the legislative and executive arms of government. By convention, the Governor-General fulfils their role at the express wishes of the parliament, and the Office is relatively uncontroversial. However, the Governor-General has the power to ignore the advice of parliament and act at their own discretion. Such was the case in the ‘1975 crisis’ when the Governor-General, Sir John Kerr chose to ignore convention and disregard the advice of Prime Minister Gough Whitlam, dismissing him under Section 64 of the Constitution and calling a double dissolution election under Section 57 of the Constitution. Kerr’s actions revealed the importance to Governors-General of retaining the support of the Australian people in order to make their position tenable. To this date the ‘1975 crisis’ is the closest that Australia has ever come to a constitutional crisis.

7 Jenny Hocking, ‘The Palace Letters have blown apart the claim the Queen had no part in the Whitlam dismissal’, *Pearls and irritations*, 15 July 2020, <<https://johnmenadue.com/jenny-hocking-the-palace-letters-have-blown-apart-the-claim-the-queen-had-no-part-in-the-whitlam-dismissal/>>.

8 Rather than arising from constitutional matters, the controversy surrounding Hollingworth related to his time as Archbishop of Brisbane and his handling of allegations of child abuse by a priest.

Summary

- Australia is a constitutional monarchy with a queen — whose power is limited by the Constitution — as head of state. The Office of the Governor-General was established so that the monarch might have a representative in Australia.
- The Office of the Governor-General is established under Section 2 of the Constitution.
- Appointment to the position of the Governor-General is formally made by the Queen. However, by convention, it is the Prime Minister who is able to select candidates for the position. By extension, the Prime Minister also has the ability to suggest the removal of a Governor-General. As the Governor-General has the ability to appoint senior ministers of government (Section 64), this creates an uneasy tension between the two.
- The Governor-General fulfils three main roles: constitutional, ceremonial and non-ceremonial. The constitutional role of the Governor-General can be examined in terms of the power that they can exercise with respect to their legislative and executive roles.
- The constitutional powers of the Governor-General can also be considered in terms of whether they are express (exercised on behalf of the parliament) or reserve (exercised at the discretion of the Governor-General).
- By convention, reserve powers have rarely been exercised in Australia. A significant exception was the dismissal of Prime Minister Gough Whitlam during the '1975 crisis'.
- The Dismissal led many to question the appropriateness of the role of conventions in the Australian system and of the exercise of power by the Governor-General, and whether the position of the Governor-General should even exist.

Exam practice questions

Short answer

- 1a) Define the term 'constitutional monarchy' as it applies to the Australian political and legal system.
- 1b) Outline **three** of the roles of the Governor-General of Australia.
- 1c) Discuss the extent to which the constitutional powers of the Governor-General are upheld in practice.
- 2a) Outline **one** legislative power of the Governor-General of Australia.
- 2b) Distinguish between the ceremonial and constitutional roles of the Governor-General of Australia.
- 2c) Discuss **one** argument for and **one** argument against the proposition that 'the reserve powers of the Governor-General are inactive'.
- 3a) Explain the purpose of Section 57 of the Commonwealth Constitution Australia.
- 3b) Outline **three** examples within the last three years of the Governor-General using their constitutional powers.
- 3c) Discuss the extent to which the '1975 crisis' was a crisis of conventions.
- 4a) Explain what is meant by 'Governor-General in Council'.
- 4b) Distinguish between the express and reserve powers of the Governor-General.
- 4c) Discuss **one** argument for and **one** argument against the proposition that 'the Governor-General acted improperly by dismissing the Whitlam government'.

Source analysis

Use the section 'The Dismissal' to answer the following questions:

- 5a) Explain what is meant by a 'constitutional crisis'.
- 5b) With reference to the source, explain in your own words **two** reasons why the Prime Minister, Gough Whitlam, was dismissed.
- 5c) Discuss **two** constitutional issues that resulted from the events of 1975.
- 5d) Explain what is meant by the 'reserve powers' of the Governor-General and evaluate the extent to which the Governor-General is able to exercise these powers.

Essay response

- 6) Analyse the extent to which there exists a conflict between the constitutional powers of the Governor-General and the conventions of responsible government.
- 7) 'The powers of the Governor-General are both contentious and controversial'. Evaluate this claim, making reference to particular Governors-General of Australia.

Investigation

The constitutional crisis of 1975 can be described as a crisis of conventions.

8a) Complete the table below, customising the number of rows that you require:

Westminster convention	Description of how the convention was broken in the '1975 crisis'

8b) Discuss the extent to which the events of the '1975 crisis' brought Australia's written constitution into conflict with unwritten political conventions.

Familiarise yourself with the context and content of the 'Palace letters' released to the public in 2020. With reference to the ABC News article, "Palace letters" between Sir John Kerr, Queen released, revealing information about Gough Whitlam and 1975 constitutional crisis⁹, and others that you can find online, answer the following questions:

- 9a) Outline Governor-General Sir John Kerr's reasoning for dismissing Prime Minister Gough Whitlam.
- 9b) Explain the role of the "crisis in the Senate" in the Prime Minister's dismissal.
- 9c) To what extent can the Governor-General's receipt of "advice on constitutional powers" from the Queen's private secretary be seen to have contravened Westminster convention?
- 9d) To what extent can the Governor-General's decision to dismiss the Prime Minister "without warning" and "without giving Mr Whitlam a chance to call an election" be viewed as a violation of conventions?
- 9e) With reference to 'the 1975 crisis', discuss one argument for and one argument against the statement that the use of the reserve powers by the Governor-General is "contentious" and "highly contested".

Investigate one recent Governor-General and complete the following:

- 10a) Collate:
 - information about their appointment and term of office; and
 - examples of the use of their roles and powers during their term of office.
- 10b) With reference to your chosen Governor-General, discuss the extent to which the powers of the Governor-General in theory are reflected in practice.

⁹ Doran, Matthew, Byrne, Elizabeth and Allen, Craig, "Palace letters' between Sir John Kerr, Queen released, revealing information about Gough Whitlam and 1975 constitutional crisis", *ABC News*, 14 July 2020, <<https://www.abc.net.au/news/2020-07-14/sir-john-kerr-queen-whitlam-palace-letters-released/12452616>>.





Power and the ‘real’ executive

Syllabus point:

- **Roles and powers of the Prime Minister, Cabinet and the Ministry**

Introduction

The previous chapter dealt with the Queen and her representative in Australia, the Governor-General. The Queen *inherited* the Crown's roles and powers. The Governor-General — who carries out the Queen's roles and powers — is *appointed*. Australian electors choose neither.

Westminster conventions restrict the use of executive power by monarchs and Governors-General. Conventions ensure real executive power is exercised by *elected* officials accountable through the parliament to the people. Prime ministers, ministers and assistant ministers — collectively called the ministry — exercise executive power in practice.

We can use the following terms to distinguish between the parts of the executive:

- 'formal' or 'constitutional', which describes the monarch as represented by the Governor-General; and
- 'real' or 'political' executive, which describes the ministry. The ministry is commonly referred to as 'the government'.

The Prime Minister, Cabinet and ministry are the subject of this chapter.

The formal executive carries out the roles of the head of state. These roles are described in the last chapter of this text.

The leader of the real executive — the Prime Minister — is the head of government and 'chief executive officer', and leads the Cabinet and ministry. The government carries out the law; this is referred to as *governing*. The Cabinet and ministry run the country between elections,



■ Figure 4.1 – Stability of prime ministerial leadership from 2007 to present.

Source: Matt Golding, *Stab ility*, Behind the lines, 2018, authors' permission, <<https://behindthelines.moadoph.gov.au/2018/matt-golding/stab-ility>>

implement policy, propose statute laws and are responsible for the public service and other agencies.

Identifying the real or political executive is easy. Governments are named after the Prime Minister who leads them. Recent governments have been: the Rudd Government (2007–2010, 2013), the Gillard Government (2010–2013), the Abbott Government (2013–2015), the Turnbull Government (2015–2018) and the Morrison Government (2018–2019). The current government is the Morrison Government (2019–), which commenced after the May 2019 general election.

The Prime Minister, Cabinet and the wider ministry — collectively the 'political executive' — are considered the most powerful institution within the Australian system of government. The term 'engine room of government' is sometimes used to describe Cabinet.

Structure of the real executive

The following table illustrates the structure of the real executive.

Organisation of executive	Ministry members	Cabinet
Ministry	• Prime Minister • Senior ministers (large or important portfolios)	• Permanent members of Cabinet
Outer ministry	• Junior ministers (lesser portfolios)	• Co-opted to Cabinet when their portfolio is discussed
Assistant ministry	• Assistant ministers (officially called 'parliamentary secretaries' under the Ministers of State Act 1952)	• Co-opted to Cabinet when their portfolio is discussed

■ Table 4.1 – Structure of the real executive.

Source: Stephen King, 2020

The Prime Minister

The Prime Minister is the leader of the party — or the senior party in a coalition — commanding a majority of seats in the House of Representatives.

After an election, the leader of the House of Representatives majority is asked by the Governor-General to form a government. They are formally commissioned as Prime Minister by the Governor-General under Section 64 of the *Commonwealth of Australia Constitution Act 1900* (the Constitution).

The authority of the Prime Minister stems from Westminster convention. Prime ministerial power has no legal basis in the Constitution; it does not mention the office.

Ministers

Ministers are nominated by the Prime Minister and commissioned under Section 64 of the Constitution by the Governor-General. They are members of the executive along with the Prime Minister. Together with assistant ministers (discussed below) they form the Cabinet and the ministry:

- the Prime Minister and senior ministers form the Cabinet (ministry); and
- other ministers and assistant ministers form the 'outer ministry'.

Section 64 of the Constitution requires ministers to be members of parliament. They come from the senior ranks of the majority party — or coalition of parties — in the House of



■ Figure 4.3 – The second Morrison Ministry.

Source: Lukas Coch, *Coalition Cabinet swearing in*, 2019, AAP Photos, <<https://photos.aap.com.au/search/morrison%20ministry?q=%7B%22pageSize%22:25,%22pageNumber%22:3%7D>>

Representatives. Approximately 70 per cent or more of ministers are members of the House of Representatives and the balance are in the Senate.

The Prime Minister chooses ministers and allocates their portfolios. A portfolio is an area of government responsibility. There are senior and junior portfolios. Senior ministers compose the ministry, and junior ministers make up the outer ministry. The Cabinet is a meeting of the ministry. If their portfolio is the subject of Cabinet discussion, a junior or assistant minister may be co-opted to Cabinet. This is discussed in *Example: Second Morrison Ministry*, below.



■ Figure 4.2 – The Hon Scott Morrison MP, 45th Prime Minister of Australia.

Source: Kristy Robinson, Commonwealth of Australia, Scott Morrison 2014, 2014, CC BY 4.0, <<https://commons.wikimedia.org/w/index.php?curid=79064273>>

Example: Second Morrison Ministry

Senior portfolios in the current Morrison Government include Treasury, Defence, Education, Health, Homeland Security, Finance and Indigenous Affairs. Ministers with senior portfolios are part of Cabinet and the ministry. Other, less critical portfolios include International Development and the Pacific, Aged Care and Senior Australians, Veterans and Defence Personnel and the Assistant Treasurer.

A complete list of current portfolios and ministers is available on the Australian Parliament website.¹

The *Ministers of State Act 1952* governs the appointment of ministers. The Act limits the number of ministers to 42.

¹ Parliament of Australia, *Current ministry list. The 46th Parliament*, 6 February 2020, <https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/Parliamentary_Handbook/Current_Ministry_List>.

Roles of ministers

Ministers have several roles. They:

- manage a portfolio. Ministers are responsible for a department or departments(s) of the public service;²
- participate in Cabinet meetings. Cabinet ministers:
 - develop government policy;
 - coordinate government activity;
 - plan resource allocations;
 - plan political strategy;
 - manage crises; and
 - support the government narrative, that is, the story of the government's vision and purpose;
- support Cabinet decisions in public, even if they disagree with them. The convention of **Cabinet solidarity** binds ministers. It ensures the government speaks with one voice; and
- answer to parliament for their:
 - personal probity — that is, their character, honesty and integrity;
 - political integrity or propriety — that is, they must not abuse ministerial power for political advantage; and
 - management of their portfolio and department(s) — that is, their competence.

Background information: Cabinet and policy

- The 2019 *Cabinet Handbook* defines the Cabinet as:

The council of senior Ministers who are empowered by the Government to take binding decisions on its behalf.

It further states:

- *The Cabinet is a product of convention and practice. There is no reference to the Cabinet in the Commonwealth Constitution and its establishment and procedures are not the subject of any legislation. Provided the guiding principles of a Cabinet system are met—collective responsibility and solidarity—it is for the Prime Minister of the day*

to determine the shape, structure and operation of the Cabinet.

- *The Cabinet does not have specific terms of reference or powers laid down in statute. Therefore, the outcomes of its deliberations may require action by:*
 - (a) *the Governor-General*
 - (b) *individual ministers whose executive power is derived from Chapter II of the Constitution*
 - (c) *holders of statutory office, or*
 - (d) *the Parliament to be put into effect.*³

Cabinet

The Cabinet is the 'executive committee' of the ministry. Chapter 2, Section 64 of the Constitution mentions ministers, but does not define their powers. Members of Cabinet are selected by the Prime Minister who has wide freedom to organise his or her Cabinet. See: *Background information: Cabinet and policy*.

An election or a Cabinet reshuffle can lead to a change in ministers. At these times, the Prime Minister advises the Governor-General to commission new ministers under Section 64 of the Constitution.

Section 64 of the Constitution requires that ministers must be members of parliament or elected as a member within three months of appointment. This stipulation ensures the Cabinet is drawn from parliament, the maintenance of the Westminster fusion of the executive and legislature, and responsible parliamentary government.

As noted above, parliamentary conventions and practices have resulted in Cabinet as we know



■ Figure 4.4 – Australia's first federal Cabinet. Source: *The first Barton Ministry, 1902*, Public Domain, <<https://commons.wikimedia.org/w/index.php?curid=2814160>>

2 The Commonwealth Public Service is a large organisation of government workers organised into departments and agencies. A minister's portfolio includes one or more departments. The public service can be referred to as the administrative executive because it administers the law. Public servants are appointed and accountable to their minister.

3 Department of the Prime Minister and Cabinet, Australian Government, *Cabinet Handbook*, 13th edition, 2019, Commonwealth of Australia, p 6, <https://www.pmc.gov.au/sites/default/files/publications/cabinet-handbook-13th-edition_1.pdf>

it. No written constitutional or statutory laws govern the operation of Cabinet. Unwritten conventions govern Cabinet, ensuring its paramount place in the Australian system of government.

Cabinet conventions: Theory and practice

Cabinet secrecy

Cabinet meetings are kept secret for 20 years. To breach Cabinet secrecy is a criminal offence.

Cabinet reaches decisions through secret debate and argument. Meetings occur in the Cabinet Room, a secure room on the ground floor of the ministerial wing of parliament house, near the offices of the Prime Minister and ministers. It is soundproof and regularly checked for listening devices.

Cabinet secrecy also binds the clerical staff who record Cabinet meetings.

A perceptive student might ask: 'Why does Cabinet meet in secret in a democracy where transparency is a feature of good government?'. The answer to this paradox is that the Cabinet is a 'collective of ministers', yet must speak as 'one government'. Cabinets are composed of up to 30 ministers who may have many conflicting views. They must be able to argue in a venue free of community and media judgment so that they can arrive at one agreed position — the government position.

Cabinet is a 'collective of ministers', yet must speak as 'one government'.

Robust Cabinet Room debate tests and refines ideas. It allows for problem solving, cost-benefit analysis and risk assessment. Discussion helps formulate ideological positions and political strategies. Thorough, secret debate enables Cabinet to come to its best decisions.

Without secrecy, ministers may lack the confidence to debate their views in Cabinet. The media would report on them, the Opposition could exploit them or their electorate might vote against them if they knew what a minister had said in Cabinet. Secrecy prevents embarrassment for ministers whose views are at odds with the agreed view of Cabinet, while still enabling them to speak their mind.

Public Cabinet meetings would destroy the public perception of government unity and allow the Opposition to drive wedges between ministers who hold different views.



■ Figure 4.5 – The Morrison Government was embroiled in the sports rorts scandal after documents were leaked from the office of former Sports Minister Bridget McKenzie.

Source: Matt Golding, Brisbane Times, 16 February 2020, <<https://www.brisbanetimes.com.au/politics/federal/best-of-cartoons-february-16-2020-20200215-h1lua2.html>>

Cabinet secrecy is not in breach of the principles of good government. It serves to enable a collective of ministers to act as one government. A government can come to its best decision through robust debate protected by Cabinet secrecy. It co-exists with another fundamental Cabinet convention — Cabinet solidarity.

Cabinet solidarity

Cabinet secrecy serves one purpose — to turn a 'collective of ministers' into 'one government'. However, with so many ministers each with their own opinion, how does Cabinet ever reach a decision? There are different methods of decision making within any group. Cabinet can make decisions using any of the following methods:

- consensus — all ministers agree with the decision;
- compromise — ministers give and take until reaching a decision, although not all may agree;
- majority — the decision is the one most ministers support;
- prime ministerial authority — the Prime Minister, as leader of the government and chairperson of Cabinet, imposes their decision; and
- party room pressure — the governing party's parliamentary members pressure their senior members — that is, ministers — or leader — the Prime Minister — to adopt a party room decision.

The convention of Cabinet solidarity requires all ministers to agree publicly with a Cabinet decision, even if they disagreed with it in the secrecy of the Cabinet meeting. Ministers who

were not present when Cabinet made a decision must also support it. Recall, there can be only ONE government decision on any issue, and all ministers are expected to support it.

Sometimes a minister cannot agree with a Cabinet decision. A deeply held moral, ethical or religious conviction may create a conscientious objection to a Cabinet decision. Moreover, as members of parliament, ministers must also represent electorates. What if a Cabinet decision is harmful to their electorate's interests? Should they act as a minister bound by Cabinet convention to agree with the decision, or act as a representative and oppose the decision? A minister who is unable to support a Cabinet decision is obliged by Westminster convention to resign from the executive, leave Cabinet and return to the backbenches of parliament.

Former ministers can remain in parliament and continue to represent their electorate. However, they will play no further role in the executive. They will move from the 'frontbench' — the 'Treasury benches' — where ministers sit in parliament to the backbenches behind their former Cabinet colleagues. More than likely they will remain in their party, take part in party room debate and be bound by party discipline. After a time, they may even re-join the ministry following a Cabinet reshuffle or election.

Example: Cabinet solidarity

It is rare for a minister to resign due to the convention of Cabinet solidarity. Most ministers resign for other reasons. However, there have been notable examples of ministers resigning.

In 1989 Gary Punch MP stood down as Minister for Telecommunications and Aviation Support when Cabinet approved the construction of a third Sydney Airport runway. The proposed runway affected his electorate of Barton in NSW. He remained on the backbench until promoted to the position of parliamentary secretary in 1993 and then to a junior ministry from 1994. He never returned to the inner ministry.

In 1983 Stewart West MP resigned as Minister for Immigration and Ethnic Affairs because he could not support a Cabinet decision on uranium mining. He spent five months on the backbench before returning to the front bench to serve as Minister for Housing and Construction.

Cabinet solidarity is essential. It is what binds the ministry as a government. No member of the ministry should publicly advocate a policy

position different from the rest of Cabinet — if they did so, it would threaten the unity of a government.

Cabinet conventions in practice

Cabinet is the committee of senior members of the ministry and may include invited members of the outer ministry. It is an 'executive committee', not a 'parliamentary committee'.

Cabinet government developed in England over hundreds of years. It was the result of the Westminster Parliament seeking to control the Crown's executive power. Both Cabinet conventions — secrecy and solidarity — were developed during this time. When the English government transitioned from an absolute monarchy to a constitutional monarchy — where the real executive power was exercised by a committee of ministers — there was a need to make government united and coherent. Cabinet conventions emerged as a solution to this problem.

No member of the ministry should publicly advocate a policy position different from the rest of Cabinet — if they did so, it would threaten the unity of a government.

In England in the 18th century parties were weak; they could not discipline their members, so they relied on strong Cabinet conventions to provide that discipline. In Australia today, however, political parties have much of the internal discipline that earlier English governments lacked.

Governments in Australia are always formed by organised political parties. They provide an ideological framework and impose discipline on their members, including those who make up the ministry when the party is in government. Consequently, Cabinet conventions are no longer needed to provide the 'glue' which holds a government together — the party can do that. The consequence of this reality is that conventions are no longer enforced. In practice, breaches of Cabinet secrecy — 'leaks' — are relatively frequent and almost always go unpunished. Ministers rarely resign from Cabinet over differences with their colleagues. Despite this reality, the conventions are still observed and provide expectations for proper ministerial conduct and performance. For example, a



■ Figure 4.6 – Barnaby Joyce, Federal Member for New England.
Source: Bidgee, *Barnaby Joyce portrait 2010*, 2010, CC BY-SA 3.0,
<<https://commons.wikimedia.org/w/index.php?curid=45880248>>

leaky Cabinet is evidence of an ill-disciplined or divided government. It usually results in a fall in a government's popularity. 'Disunity is death in politics', so the saying goes. Failure to observe Cabinet conventions can seriously undermine a government.

Example: Cabinet solidarity in practice

A recent example of a minister in conflict with Cabinet is former Deputy Prime Minister and Minister for Agriculture, Barnaby Joyce MP — leader of the Nationals at the time, representing the NSW rural electorate of New England, home to the Liverpool Plains, some of Australia's prime agricultural land. In July 2015, the Abbott Cabinet — of which Barnaby Joyce was a member — decided to allow the development of the large Shenhua coal mine in the Liverpool Plains. As both Minister of Agriculture and representative for New England, Barnaby Joyce disagreed with the Cabinet decision. When asked if he was critical of the decision 'as the representative of New England' or as 'Minister for Agriculture,' he stated that he was speaking as a minister, not a member. When questioned about the inconsistency between his position in Cabinet, as a minister, and his refusal to resign, he said, "I don't think it [resignation] would achieve anything".⁴ Publicly disputing a Cabinet decision and, therefore, breaching Cabinet solidarity left Barnaby Joyce open to sacking by the Prime Minister. Barnaby Joyce, however, was not sacked or disciplined for his breach of convention. The failure of the

convention of Cabinet solidarity to restrain him illustrates how conventions are flexible and non-binding in the Australian context.

Cabinet committees

Cabinet is sub-divided into smaller groups of ministers who focus on specific areas of government activity. An example of this can be found in the current Morrison Government Cabinet (2019–), namely the National Security Committee (NSC). The NSC focuses on major international security issues of importance to Australia. The committee's permanent members included the Prime Minister, the Deputy Prime Minister, the Treasurer, the Finance Minister, the Foreign Affairs Minister, the Attorney-General, the Home Affairs Minister and the Defence Minister. These ministers have portfolios relevant to the issue of national security. Decisions of the NSC do not require the endorsement of Cabinet.

Example: National Security Committee of Cabinet

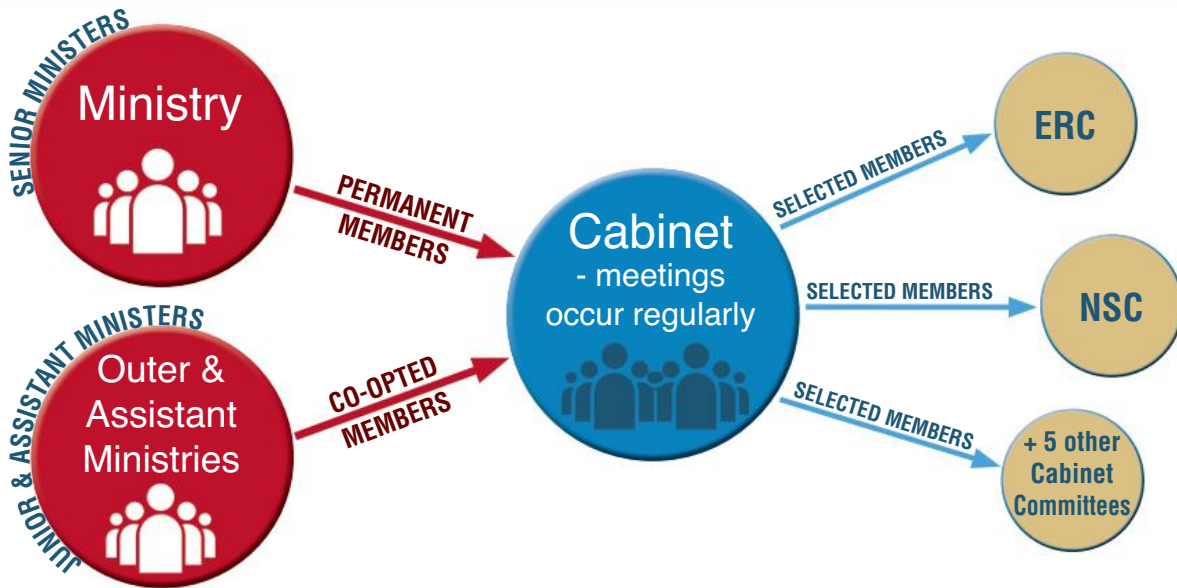
The NSC met in January 2020 at the height of that year's bushfire crisis. It decided to deploy the Australian Defence Force (ADF) to aid fire fighting and to help rescue Australians trapped on beaches and at other locations in the fire grounds. The NSC also met in the same month to discuss Australia's response to Iranian missile attacks against airbases in Iraq where 300 ADF personnel were based.

The Expenditure Review Committee (ERC) examines the budgets of government departments to identify savings and eliminate inefficiencies. The Morrison Government Cabinet's ERC (2019–) comprises the Prime Minister, the Deputy Prime Minister, the Treasurer, the Finance Minister and the Health Minister. The ERC has a critical role in developing the annual budget. It often recommends cuts to government spending and is sometimes referred to as the 'razor gang'.

Example: Expenditure Review Committee of Cabinet

The ERC met in October 2019 to consider a package of government spending aimed at supporting farming areas affected by the drought in New South Wales and Queensland. A \$700 million package was agreed that provided federal funds to local governments in drought-affected areas. The package also included low-interest loans to farmers and funding for water delivered from South Australia's desalination plant.

⁴ Stephanie Anderson, 'Joyce says he won't resign over Shenhua mine dispute', SBS News, 10 July 2015, <<https://www.sbs.com.au/news/joyce-says-he-won-t-resign-over-shenhua-mine-dispute>>.



■ Figure 4.7 –The ministry, Cabinet and Cabinet committees
Source: Stephen King, 2020

Cabinet committees meet separately from Cabinet itself and report their decisions to the whole Cabinet for approval. In most cases, the whole Cabinet remains superior to any of its committees and has the final say on decisions. However, some committees responsible for critical decisions which need to be implemented quickly — such as the NSC — can make decisions without whole of Cabinet approval.

The structure of the ministry, Cabinet and Cabinet committees is shown in Figure 4.7.

Ministry

The *Cabinet Handbook* defines the ministry as being:

*comprised of the Ministers of State including Cabinet ministers, other ministers and assistant ministers. Together they form the Federal Executive Council [EXCO] — the body which formally advises the Governor-General on the administration of the Commonwealth of Australia.*⁵

Note that EXCO is established under Section 63 of the Constitution and is part of the constitutional or formal executive.

The ministry is composed of all ministers, regardless of rank. The ministry encompasses the whole parliamentary executive branch. However, only senior ministers are permanent members of Cabinet.

Junior ministers and assistant ministers

In 1956, the Menzies Government divided the ministry into an 'inner ministry' — which formed Cabinet — and an 'outer ministry' made up of members who could be invited to Cabinet when necessary. Growth in the business and complexity of government after World War 2 necessitated the division of Cabinet which would otherwise have become unwieldy in size.

Members of the outer ministry are not permanent members of Cabinet. They hold less critical portfolios.

Example: Outer and assistant ministries

The 2019 outer ministry of the second Morrison Government contained seven junior ministers.



Two examples of this outer ministry were Michael Sukkar MP (Deakin, Vic), Minister of Housing; and Senator Richard Colbeck (Tas), Minister for Aged Care and Senior Australians and Minister for Youth and Sport.

■ Figure 4.8 – Robert Menzies was the first Prime Minister to divide Cabinet into an 'inner ministry' and an 'outer ministry'.
Source: *Portrait Menzies 1950s*, National Library of Australia, Public Domain, <<https://commons.wikimedia.org/w/index.php?curid=9948712>>

⁵ Department of the Prime Minister and Cabinet, Australian Government, *Cabinet Handbook*, 13th edition, 2019, Commonwealth of Australia, p 7, <https://www.pmc.gov.au/sites/default/files/publications/cabinet-handbook-13th-edition_1.pdf>.

The Morrison Government (2019–) Assistant Ministry had 12 assistant ministers who either held small portfolios or helped 14 ministers with senior portfolios. Western Australian MP, Ben Morton (Tangney, WA) was Assistant Minister to the Prime Minister. Michelle Landry MP (Capricornia, Qld) was Assistant Minister for Children and Families and Assistant Minister for Northern Australia.

Background information: Parliamentary secretaries and assistant ministers

It has proven necessary to support senior ministers because the demands of their portfolios have increased. In the past, parliamentary secretaries provided this extra support. Today, assistant ministers do this job.

In recognition of their role, Prime Minister Malcolm Turnbull raised the status of parliamentary secretary to that of assistant minister.

Before 2000, parliamentary secretaries had been appointed under the *Parliamentary Secretaries Act 1980* and were not technically

ministers. The law was changed to allow them to be commissioned under Section 64 of the Constitution as ministers under the *Ministers of State Act 1952*.

As a result of these legal changes, assistant ministers are now appointed by the Governor-General. These changes have created a new position within the executive and provide new opportunities for talented and ambitious parliamentarians. Former Prime Minister Paul Keating said of parliamentary secretaries — that is, today's assistant ministers: "The institution of Parliamentary Secretary provides a very inexpensive means not only of giving talented individuals executive experience but providing Ministers with needed support".⁶

Junior ministers and assistant ministers may request attendance at Cabinet meetings if Cabinet is going to discuss their portfolio — a process called **co-opting**. A co-opted junior or assistant minister participates in Cabinet discussions and decisions while their portfolio is being discussed. When the discussion is finished, they leave the meeting.

Roles and powers of the Prime Minister:

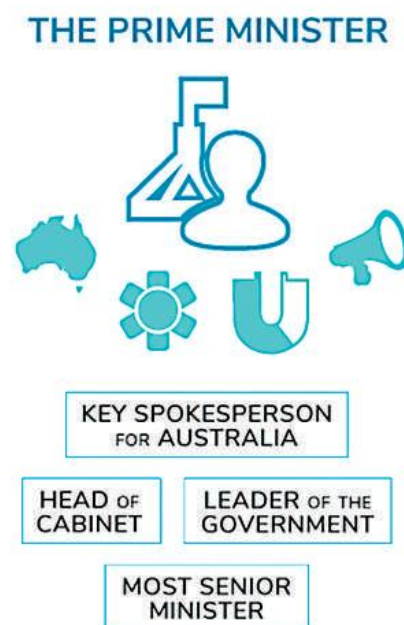
The *Cabinet Handbook* refers to the roles and powers of the Prime Minister as follows:

- *The Prime Minister is responsible for the membership of the Cabinet and Cabinet committees, determines and regulates all Cabinet arrangements for the Government and is the final arbiter of Cabinet procedures.*
- *The Prime Minister advises the Governor-General on the appointment of Ministers (including the title and scope of each minister's portfolio) and determines which ministers will form the Cabinet.*
- *As chair of the Cabinet, the Prime Minister sets the Cabinet's agenda and determines when and where meetings take place. The Prime Minister leads and guides discussion to achieve a collective response and ensures the clarity of decisions. In exceptional circumstances where a collective decision is not possible the Prime Minister's view is authoritative.*⁷

⁶ Statement by the Prime Minister, The Hon P J Keating MP, Media Release, 24 March 1993, <<https://web.archive.org/web/20140225080155/http://pmtranscripts.dpmc.gov.au/browse.php?did=8844>>.

⁷ Department of the Prime Minister and Cabinet, Australian Government, *Cabinet Handbook*, 13th edition, 2019, Commonwealth of Australia, p 7, <https://www.pmc.gov.au/sites/default/files/publications/cabinet-handbook-13th-edition_1.pdf>.

The Prime Minister is theoretically *primus inter pares* — first amongst equals. However, several factors combine to render some Prime Ministers powerful and others weak.



■ Figure 4.9 – The roles of the Prime Minister.

Source: Parliamentary Education Office, *Role of the Prime Minister in Australia*, 2020, CC BY-NC-ND 3.0, <<https://peo.gov.au/understand-our-parliament/parliament-and-its-people/people-in-parliament/prime-minister/>>

Sources of a Prime Minister's power

Leader of the majority party in the House of Representatives

A Prime Minister can determine the outcome of every vote on the floor of the House of Representatives as they are the leader of the House of Representatives majority. Their party will vote *en bloc* and win every vote. A Prime Minister can, therefore, determine the procedures and processes of the House and control legislation and debate.

Chairperson of Cabinet

Prime Ministers lead Cabinet meetings.

As the chairperson of Cabinet, a Prime Minister controls the business list, which is Cabinet's agenda. Discussion is limited to items on the business list. Therefore, a Prime Minister can control what the Cabinet discusses. Agenda-setting power is vital since it determines the priorities of government — in essence, a Prime Minister's priorities are the government's priorities.

Ministers must submit items to Cabinet using a strict format and adhere to the 'Three Day Rule'. They must comply with page limits and deadlines, provide a cost-benefit analysis, human rights impact statement and a summary of impacts on regulations and laws.

Example: A Prime Minister can control a government's agenda

After the severity of the bushfire crisis became known in January 2020, Prime Minister Morrison declared his government would develop new policies to deal with the effects of climate change. Following heavy criticism of his initial response to the crisis, he responded to public pressure and took action. Despite some opposition within his party and government, Prime Minister Morrison used his power to determine the government's priorities and shifted policy focus on climate change. For elaboration of this, see the section in Chapter 2 on recent parliaments and the decline of parliament thesis example.

Access to information

A Prime Minister is the most informed individual in the political system. Ministers have access to expert advice from their departments. In contrast, the Prime Minister receives advice from across government, including highly classified material from Australia's national security agencies.

The Prime Minister has a dedicated department called the Department of Prime Minister and Cabinet (PM&C). No other member of the executive has access to such support and wealth of information. Information is power. See: *Background information: The Department of Prime Minister and Cabinet*.

Background information: The Department of Prime Minister and Cabinet

The Department of Prime Minister and Cabinet:

has unique responsibilities and a privileged role. Our [PM&C's] principal function is to provide high-quality policy advice to the Prime Minister and the Cabinet on matters that are at the forefront of public and government administration, including domestic and international affairs and, in particular, the implications of proposals for Commonwealth-State relations.⁸

The Department briefs the Prime Minister, the Cabinet Secretary, the Parliamentary Secretary to the Prime Minister and the Minister for Social Inclusion, and consults extensively across the Australian Public Service (APS) to ensure that the advice provided draws on the most appropriate sources.

Patronage

As the leader of the majority party and the leader of Cabinet, the Prime Minister has the power to:

- promote backbench members of parliament to the ministry;
- promote members of the outer ministry to a Cabinet portfolio;
- allocate portfolios amongst ministers;
- demote senior ministers to the rank of junior or assistant minister; and
- dismiss any minister from the ministry.

A Prime Minister has the power to reward and punish party members, to demote rivals and promote supporters.

Promotion to the ministry is a significant step up in power, prestige and remuneration (pay) for a backbencher. Many members of parliament desire ministerial positions at some time in their career. Promotion to the assistant ministry is the first step on the executive career ladder, and it is a Prime Minister who awards these coveted positions.

⁸ Australian Network on Disability, *Department of the Prime Minister and Cabinet*, 2020, <<https://www.and.org.au/members.php/39/departments-of-the-prime-minister-and-cabinet>>.

Likewise, ambitious assistant and junior ministers often seek promotion to Cabinet portfolios. They must maintain good relations with their Prime Minister to gain this prize.

Not all portfolios are equally desired. Coveted portfolios are Treasury, Finance, Foreign Affairs and Home Affairs because of their critical roles in government, high public profile and the power they wield. The Defence portfolio is especially challenging, making it harder to succeed as a minister. Health and Education have large

“A Prime Minister has the power to reward and punish party members, to demote rivals and promote supporters.”

budgets, but are less desired than Social Services, which is the most extensive portfolio in terms of budget allocation and spending.

The power to allocate portfolios allows a Prime Minister to match a minister's expertise and experience with a portfolio, which helps make government efficient. A Prime Minister can also reward loyal ministers with desirable portfolios and punish disloyalty through allocating a less desirable one.

Finally, a Prime Minister has the ultimate power to sack a minister. Breaches of Cabinet solidarity are a sackable offence, but so too is disloyalty to a Prime Minister.

Example: Patronage

Scott Morrison's first ministry was formed in August 2018 following the party room coup that ousted Prime Minister Turnbull. Home Affairs Minister Peter Dutton MP instigated the events that split the Liberal Party and brought down Malcolm Turnbull. Morrison needed to heal the wounds of division and prevent the emergence of embittered rivals.

Dutton brought about the fall of Malcolm Turnbull by challenging him for the Liberal Party leadership. Morrison then defeated Dutton in a second Liberal party room ballot for the party leadership and the Prime Ministership. The new Prime Minister used his power to appoint the ministry to keep Dutton in the coveted Home Affairs portfolio. Dutton could potentially become an embittered rival if demoted to the backbench. By appointing him to his previous position, the Prime Minister kept Dutton close and onside, neutralising a

potential threat to his leadership. Interestingly, however, Morrison removed immigration from the prized Home Affairs portfolio, thus reducing Dutton's influence in Cabinet.

Included in the new ministry were ministers who played a central role in the fall of Turnbull. Senator Mathias Cormann retained the Finance portfolio, and Michaelia Cash MP was appointed Minister for Small and Family Business, Skills and Vocational Training. Angus Taylor MP — who had supported Morrison's rival, Dutton, in the party room ballot — was appointed Minister for Energy.

By creating incentives for loyalty and countering bitterness amongst Dutton and his supporters, Morrison hoped to neutralise a future Dutton challenge.

■ Figure 4.10 – The Minister for Home Affairs Peter Dutton. Source: Department of Immigration and Border Protection, Peter Dutton at Parliament House, 2016, CC BY 3.0, <<https://commons.wikimedia.org/w/index.php?curid=49358960>>



Determining the election date

A Prime Minister has the discretion to decide an election date within a parliament's three-year maximum term as imposed by the Constitution. A Prime Minister can, therefore, manipulate the electoral cycle to maximise the chances of re-election.

The timing of an election is a politically strategic decision. A Prime Minister usually seeks an election date to take advantage of factors favouring re-election. For instance, a government may have popular measures to announce, or the Opposition may suffer from leadership instability. Both these factors are favourable to a government seeking re-election. See: *Example: Scott Morrison delays 2019 election.*

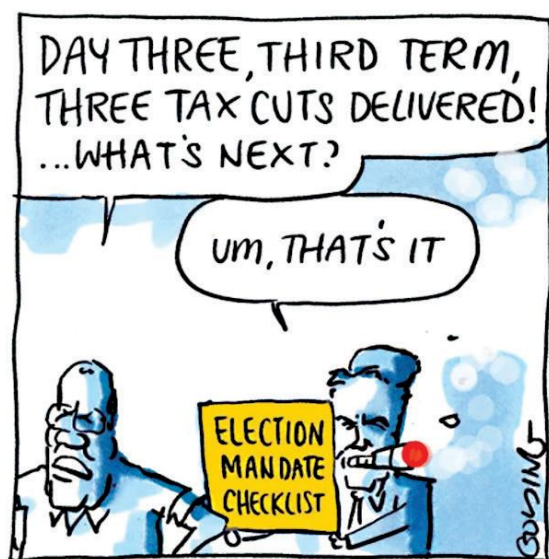
A Prime Minister can use the annual budget to increase his or her government's chances of victory. Pre-election budgets may contain 'sweeteners' designed to appeal to particular groups of voters identified as crucial to success.

An example of a critical group of voters is low to middle income earners living in outer suburbs. Groups which are likely to change their vote between elections — called swinging voters — are especially important to target. Low to middle income earners are acutely aware of the impact government can have on the quality of their lives, and many are swinging voters. They are likely to change their vote to support parties promising help with the cost of living, transport and other pressures. Prime Ministers can target tax relief or spending to benefit these electors in the hope of gaining their support at the election. See: *Example: Government pre-election spending*.

Example: Government pre-election spending

Prime Ministers are central to the design of the budget. In the 2019 Budget — delivered one month before the May general election — the Morrison Government announced a \$550 per year rebate for people earning between \$50,000 and \$90,000 per annum.

Electors in the low income to middle income bracket live mostly in the outer suburbs of Australia's capital cities. These suburbs have poor infrastructure — such as public transport — and residents have to travel long distances on congested roads to get to work. In addition to the \$550 cash rebate, the Morrison Government also promised to spend \$100 billion on roads, rail and car parks aimed at relieving the pressure on commuters in the outer suburbs.



■ Figure 4.11 – In the 2019 Budget the Morrison Government announced tax rebates for low to middle income earners. Source: Matt Gowing, 2019, author's permission, <[https://static.ffx.io/images/\\$width_828/t_resize_width/q_86%2Cf_auto/4b0bc6b50fcd010ed5bc24f48df94352c570e2ff.jpg](https://static.ffx.io/images/$width_828/t_resize_width/q_86%2Cf_auto/4b0bc6b50fcd010ed5bc24f48df94352c570e2ff.jpg)>

Example: Scott Morrison delays the 2019 election

Scott Morrison came to power in August 2018 in a party room coup that deposed Malcolm Turnbull. Many Australians were horrified that a party had deposed yet another Prime Minister. Shortly afterwards, the Morrison Government fell into minority when Turnbull resigned from parliament — bringing about a by-election which was won by an Independent — and then a government backbencher also resigned. The government was weakened, unpopular, disunited and suffered policy indecision. Morrison needed time to re-group and allow the trauma of the Turnbull incident and its aftermath to recede before calling an election.

In March 2019 it seemed the government was in a terminal condition. In that month the government lost a vote on its own bill in the House of Representatives. The passing of the commonly called Medevac Bill was the first time in 80 years a government lost a legislative vote. See: *Case study: Representation and legislation — Wentworth and Medevac*. Losing a critical vote in the lower house can be considered a de-facto vote of no confidence. Some called on the government to resign and call an election. Almost everyone — including many in the ministry and Coalition parties — expected the government to lose the upcoming election.

With on-going crises engulfing the government in early 2019, Morrison used his power to delay the election as long as possible. Unfortunately for the Prime Minister, the 45th Parliament — elected in July 2016 — was already late into its three-year term and was due to expire in July 2019. The election was called for May 2019, close to the expiry of the parliament by 'effluxion of time', as it is called in the Constitution. Despite all its problems, the Morrison Government won the election, surprising almost everyone.

The 2019 general election provides an excellent example of how a Prime Minister's ability to control election timing can be a political advantage.

Some state parliaments have taken away the power of the Premier to call elections to suit their political agenda. Several states of Australia — including Western Australia — have imposed four-year parliamentary terms by law. To do this at the Commonwealth level would require a change to the Constitution. Constitutional change has historically been difficult to



■ Figure 4.12 – Former Prime Minister Malcolm Turnbull leaves parliament after being ousted by political rivals in his party. Source: Matt Golding, *The brown leather jacket*, Behind the Lines, 2018, <<https://behindthelines.moadoph.gov.au/2018/matt-golding/the-brown-leather-jacket>>

achieve in Australia. Prime Ministers will likely continue to enjoy the power to time elections to their advantage.

Face of government

A Prime Minister is the most recognised figure in the government and political system. Prime Ministers who are good media performers can significantly enhance their power through this medium.

Example: Recent Prime Ministers and the media

A Prime Minister may choose the type of media best suited to reach their audience and speak directly to voters. John Howard was a master in the use of talkback radio, connecting directly with millions of voters in marginal seats. Kevin Rudd was the first to embrace social media to engage younger voters through YouTube, Facebook and other platforms. Tony Abbott lacked a polished media performance. He often relied on ministers to address the media. Malcolm Turnbull — a former barrister who was used to complex legal argument — had a solid media presence, but was prone to verbosity. Scott Morrison is a former marketing expert and puts his skills to practical use in communicating with the Australian people.

The public appeal of a Prime Minister is critical in Australian politics. A recent trend in Australian politics is a growing focus on the leader — called leader-centrism. Australian politics is increasingly ‘presidential’ in style because of leader-centrism. Reinforcing leader-centrism is the 24/7 news cycle, which demands a constant

stream of news, short stories and image-based communication. Constant polling on the question of ‘preferred leader’ has helped further entrench leader-centrism. Leader-centrism naturally enhances the role of a Prime Minister as the face of the government.

A story-hungry news media creates a constant demand on Prime Ministers to make announcements and comment on every issue of the day. A Prime Minister with the personality to perform well in the contemporary media environment is, therefore, in a commanding position.

Today there are teams of advisors surrounding a Prime Minister. Some of them are media advisors whose role includes managing the public face of the Prime Minister.

Example: Using and losing face

After he won the 2019 election against all the odds, the Liberal Party and its supporters praised Scott Morrison. The Liberal Party election campaign focussed heavily on promoting Morrison as a leader; there was almost no focus on policies or the record of the government. His victory was his alone. He successfully turned the Australian Labor Party’s (ALP’s) policies against them and focussed on the unpopularity of Bill Shorten, the ALP Opposition Leader. Morrison’s victory is an outstanding demonstration of the power of leader-centrism in contemporary Australian politics.

During the 2020 bushfire crisis, Morrison suffered a severe loss of face. He took a family holiday in Hawaii as the fires continued to burn. Sensing a public relations disaster, he returned early from his holiday. He visited the fire grounds, where angry residents and fire fighters confronted him. Media photos showed the public angrily criticising the Prime Minister. A fire fighter and a resident refused to shake his hand. Morrison acted quickly to repair the damage, making announcements about Commonwealth assistance packages to people and communities affected by the disaster. The government announced the deployment of the ADF to help with rescue and recovery.

Governments often announce policies using taxpayers’ money to pay for advertising. ‘Government advertising’ provides information. In this case, however, the announcement was made by a Liberal Party funded advertisement, which made it ‘political advertising’, not ‘government advertising’.

Consequently, the announcement backfired and led to accusations of political motives.

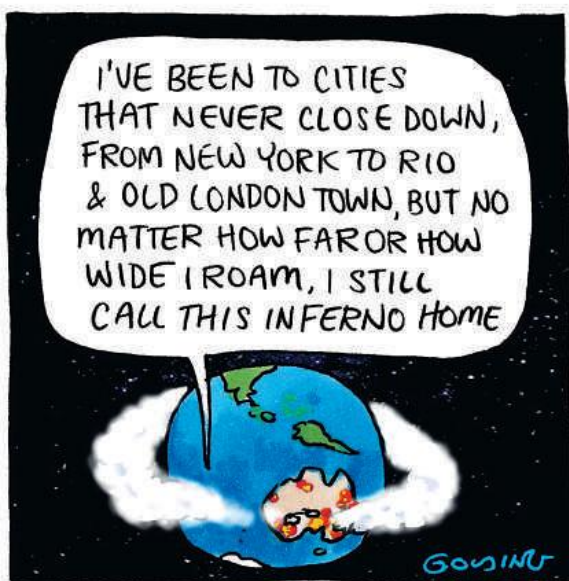
Morrison's experience in winning an election almost single-handedly, and then being heavily criticised for his leadership during a national crisis shows how much focus is now on Prime Ministers.

Limitations on a Prime Minister's power

No personal mandate

Unlike a United States of America (US) President, the Australian electors do not separately or directly elect Prime Ministers. They elect 227 members of parliament, the lower house of which includes those members who make up the executive. The leader of the majority party in the lower house is, by default, the Prime Minister.

A US President holds office because the American people have directly voted for them. As a result, Presidents have a 'personal mandate' to govern. In Australia, no one, except electors in a Prime Minister's electorate — at best no more than approximately 100,000 Australians — can directly vote for the person who becomes Prime Minister. For example, Scott Morrison is the Member for Cook, an electorate in NSW. In 2019, only electors enrolled to vote in the electorate of Cook actually voted for Morrison personally, and then only as their local member. In a Westminster system, becoming Prime Minister is the gift of the majority party, not the people.



■ Figure 4.13 – The Morrison government faced strong criticism of its initial response to the bushfire crisis in January 2020. Source: Matt Golding, *The Age*, 15 January 2020, author's permission, <<https://www.facebook.com/theageAustralia/photos/pcb.10157707691211422/10157707690806422/?type=3&theater>>

What the party gives, the party can take away. John Howard was fond of saying his Prime Ministership was the 'gift of the Liberal Party'. Kevin Rudd lost the gift when the ALP deposed him as its leader in 2010. The same fate befell Julia Gillard in 2013, Tony Abbott in 2015 and Malcolm Turnbull in 2018. Their jobs as Prime Minister were the gift of their parties; they had no personal mandate to protect them.

The recent history of prime ministerial 'churn' is evidence that today's Australian Prime Ministers are weaker than their predecessors. Past Prime Ministers enjoyed longer terms in office with the blessing of their parties. For further information, see: *Case study: Prime Minister John Howard*.

Disunity in Cabinet

Both major parties contain factions. Factions are blocs of party members with different interpretations of the core ideology or beliefs of the party. The ALP has a formal factional structure — the Right and the Left. The Liberal Party has a less formalised structure, but there are 'moderate' and 'conservative' Liberals in the contemporary party. Factions are like parties within a party.

Factions in both major parties demand representation in the ministry. Cabinets, therefore, contain ministers from different factions. Factionalism can promote rivalry and disunity.

Moreover, as the government of a federation, Commonwealth Ministries and Cabinets are expected to balance state representation amongst ministers. Each state has different needs and priorities. Tensions can arise between ministers from different states.

Lastly, Coalition Ministries and Cabinets are composed of ministers from two separate parties. Liberal and Nationals ministers often have different views on the role of government in the economy. The Liberal Party is pro-market, whereas the Nationals can be interventionist, especially in the agricultural sector and rural economy. The Nationals is also a more conservative party than the Liberal Party.

Rivals within Cabinet

Most challenges against a Prime Minister come from within their own Cabinet. Ministers have ambitious personalities, and some have leadership aspirations. The quickest route to the Prime Ministership is by deposing the current leader and taking their place.

Recent history illustrates the consequences of Cabinet rivalry. Between 2010 and 2018,

four Prime Ministers were deposed by a minister within their Cabinet. Deputy Prime Minister Julia Gillard ousted Kevin Rudd. Foreign Minister, Rudd removed Gillard. Communications Minister Malcolm Turnbull displaced Tony Abbott. Home Affairs Minister Peter Dutton challenged Malcolm Turnbull, who was ultimately replaced by his Treasurer, Scott Morrison.

Limits imposed by their party

Prime Ministers are leaders of a political party. As party leader, they must face party room meetings and answer to their backbenchers. Members of a party choose their leaders; hence a party may depose its leader and elect a new one. Party room coups have been the way in which rivals in Cabinet (see above) have deposed four recent Prime Ministers up to, and including, Malcolm Turnbull.

Background information: Both major parties take steps to strengthen the office of the Prime Minister

Kevin Rudd introduced rule changes that would make it harder for the party to depose its leader. The reform occurred after a tumultuous period which saw the ALP replace Rudd with Julia Gillard (in 2010) and then Gillard with Rudd (in 2013).

Since Rudd's reforms, a 'spill motion' — a vote that declares the leadership position vacant — requires a 60 per cent vote of Caucus if the ALP is in Opposition, and 75 per cent if it is in government. Before the rule change, only 50 per cent of the Caucus needed to support a spill motion. Additionally, if there is more than one candidate for the leadership, the Caucus — that is, the parliamentary Labor Party — and the ALP rank and file — that is, the ordinary ALP members across Australia — each have a 50 per cent weighted vote for the leader.

Rudd resigned from the Labor leadership and parliament after he lost the 2013 general election. Bill Shorten and Anthony Albanese then contested the leadership of the Party. Shorten won and was able to hold office as the ALP Opposition Leader for the period 2013 to 2019 — the first time since Kim Beazley resigned in 2001 that a Labor leader had served a full term in government or Opposition.

The Liberal Party has introduced similar rules. It, too, has been plagued by leadership instability since Tony Abbott replaced Malcolm Turnbull as Opposition Leader in

2009. Turnbull replaced Abbott as Prime Minister in 2015, and then Scott Morrison replaced Turnbull in 2018. After becoming Prime Minister, Morrison changed the rules for leadership ballots. From December 2018, the Liberal Party Room must vote with a two thirds majority to unseat a Liberal leader.

The rule changes by both parties are aimed at ensuring stable leadership. The Labor Party's rules have been tested and Shorten's long term in office is evidence the changes have worked. The Liberal Party's changes are similar and are likely to have the same effect.

Even though the party may support a leader, it may limit the policy a leader can propose. In order to consolidate support from the party room and achieve a majority of votes in the 2015 leadership spill, moderate and progressive Liberal Malcolm Turnbull promised not to embark on 'progressive' policies and to leave existing 'conservative' policies in place. For example, he did not change the Liberal Party's policies on same-sex marriage or climate change, both of which were 'conservative' at the time he came to power. See: *Case study: Marriage equality legislation*. He needed to respect the views of his party and, thus, the party was able to limit his power. See: *Example: Disunity and rivalry undermine Turnbull*.

Limits imposed by a coalition party

The Liberal Party governs in partnership with the Nationals. A Liberal Party Prime Minister must accommodate the junior party's priorities. Cabinet positions — such as the Resources and Agriculture portfolios and the Deputy Prime Ministership — are reserved for Nationals ministers based on the ratio of the Liberal/National proportion of seats in the parliament. If the Nationals do better than their Liberal colleagues at an election and increase the proportion of their seats, they will demand and expect more places in the Ministry.

The Coalition Agreement is a secret pact between the leaders of the two Coalition parties. Agreements are signed each time a new leader takes over one of the parties or when a Coalition Government forms following an election. The Coalition Agreement weakens a Liberal Prime Minister because they must share power with a junior party they depend on for their power.

Size of the House of Representatives majority

Australia has had two minority governments and two governments with a one seat majority since 2013.

Small majorities weaken a government and its Prime Minister by reducing their ability to dominate the House of Representatives. They also empower government backbenchers willing to break party discipline. These factors diminish a Prime Minister's grip on the House.

Minority governments are especially vulnerable in the House of Representatives because they depend on non-government backbenchers to remain in power. Prime Ministers leading a minority government need exceptional negotiation skills to govern well.

Example: Disunity and rivalry undermine Turnbull

Malcolm Turnbull was a moderate Liberal leading a party dominated by conservative Liberals.

Turnbull came to power by deposing conservative Prime Minister Tony Abbott, alienating many conservative party members. He went on to lose the 14-seat majority achieved by Abbott at the 2013 election, only retaining government in 2016 by a single seat. A divided party, the manner of his coming to power and a small majority undermined his power, especially after the 2016 election.

Turnbull had to accommodate conservative ministers in the ministry and Cabinet. Tensions between him and his conservative ministers and party members were never far from the surface. There were leaks and criticisms from within the ministry and party room.

Turnbull faced a party room revolt over his Cabinet's National Energy Guarantee (NEG) policy. The NEG was devised as a compromise acceptable to the moderate and conservative factions of the Liberal Party. The Liberal Party Room initially agreed to the

NEG. Shortly afterwards, conservative party members declared they would not tolerate the NEG's carbon dioxide emissions component. The party room revolt over the NEG led to conservative minister, Peter Dutton's first party room challenge. The Dutton challenge failed but fatally weakened Turnbull, and his supporters drifted away in the weeks following the challenge. A second party room leadership ballot saw Scott Morrison defeat both Turnbull and Dutton, and emerge as the new Liberal leader and Prime Minister. Both Dutton and Morrison were members of the Turnbull Government's Cabinet.

Background information: Personalities and contingencies

Leader-centrism has amplified two particular aspects affecting a Prime Minister's power:

1. the personality of the Prime Minister; and
2. the influence of events — called contingencies — outside a Prime Minister's control.

Kevin Rudd and Tony Abbott have personalities that made them intolerant of their Cabinet colleagues, and both isolated themselves within the Prime Minister's Office. They also both surrounded themselves with advisors who acted as 'gatekeepers', making it difficult for ministers to reach them. Each had a 'presidential' style, commanding their governments, with little consultation with Cabinet or the wider ministry. Eventually, their behaviour in office alienated them from their Cabinets and parties, and led to challenges which deposed them.

Two contingencies outside his control dealt Rudd's leadership a blow. One was the global economy collapsed in 2007. The world changed overnight, making many of Rudd's policy promises undeliverable. Another event beyond his control was the world response to climate change. Rudd staked a lot on strong climate policies only to have the rest of the world fail to commit to action at the Copenhagen Climate Conference. Copenhagen isolated Rudd. He abandoned his signature climate change policy, causing a rapid decline in his popularity.

Abbott's 14 seat majority did nothing to help him deal with a Senate that simply refused to pass much of his 2014 budget. Senate non-Coalition parties claimed Abbott had no mandate for many of the measures included in the budget. The lack of a mandate and a Senate willing to block significant legislation



■ Figure 4.14 – Prime Minister Turnbull faced a party revolt over his Cabinet's National Energy Guarantee (NEG) policy. Source: Matt Golding, *Turnbull's NEG*, Behind the Lines, 4 August 2018, author's permission, <<https://behindthelines.moadoph.gov.au/2018/the-antipathies-i-think/turnbulls-neg>>

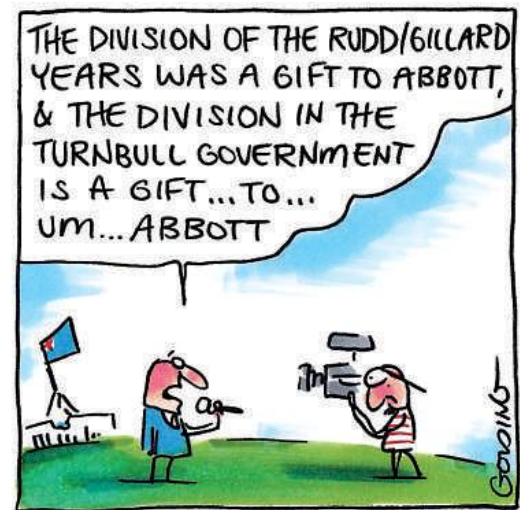
reduced Abbott's power. A difficult Senate is a common contingency with which Prime Ministers must deal.

Julia Gillard had a consultative leadership style and displayed excellent negotiation skills which she had developed when she was a lawyer and union official. She was able to form and hold a minority government together for almost its full term. Mainly because of her talents, her weak government still passed more legislation than any other in recent history. It achieved significant reforms like the National Disability Insurance Scheme. Nevertheless, she was overwhelmed by factors outside her control. The way she came to power — by deposing Rudd — tainted her leadership from the outset. Minority government and a particularly hostile media and Opposition limited her power. A carbon price — forced on her government by the Greens — proved her undoing. Being a woman in a patriarchal political system also created difficulties male Prime Ministers never face. All these factors undermined her power and led to her demise as party leader and Prime Minister shortly before the 2013 election.

Malcolm Turnbull came to power by deposing Abbott and went on to lead a party out of step with his own ideology. Both these circumstances undermined his power. Like Gillard, Turnbull had a consultative style of leadership, but faced internal critics not prepared to compromise on policy.

Scott Morrison had to deal with a natural disaster unparalleled in recent Australian history. He could not control the bushfires of 2020. Yet, when attention focused on his leadership during the crisis, the public found him wanting. Arguably, Prime Ministers have little role in responding to bushfires — the states are responsible for emergency services. However, in contemporary Australia, people look for national leadership. People are quick to judge, regardless of the realities of the federal distribution of power.

There appears to have been a general weakening of prime ministerial power in recent history. Leader-centrism is problematic for Prime Ministers. It focusses attention on them and can amplify personality weaknesses. Leader-centrism also places unrealistic expectations on the capacity of Prime Ministers to solve problems. When faced with the inevitable contingencies outside their control, they can seem weak and unable to lead effectively.



■ Figure 4.15 – Malcolm Turnbull came to power by deposing Tony Abbott and led a party out of step with his ideology. Both these circumstances undermined his power. Source: Matt Golding, *The poll bludger*, 22 August 2018, author's permission, <<https://www.pollbludger.net/2018/08/22/turnbull-48-dutton-35/comment-page-1/>>

Federalism

Federalism imposes a constitutional limit on a Prime Minister's power.

A Prime Minister is the head of the Commonwealth executive. The powers of the Commonwealth are constitutionally defined and, therefore, limited. There are six states and two self-governing territories in Australia. The states are sovereign and govern in their own right.

Nevertheless, in reality, the Commonwealth is the dominant partner within the federation and the Prime Minister is its most powerful figure. A Prime Minister can use the fiscal power of the Commonwealth and other means to influence the states. However, they must still work within Constitutional limits.

The Council of Australian Governments (COAG) — now superseded by a National Cabinet created in response to COVID-19 — was a meeting of the Prime Minister, the state Premiers, the Chief Ministers of the two territories and the Head of the Australian Local Government Association. COAG was one of the central bodies of Australian federalism. Prime Ministers must work within the federal system to achieve their national goals. The need to cooperate with state governments — which share power in the federation — can limit a Prime Minister's power.

Chapter 9 will address the 'federal balance of power' and COAG. See: *Example: National Cabinet* in Chapter 9 and *Case study: Response to COVID-19* for an examination of National Cabinet.

The Opposition

The second-largest party in the House of Representatives becomes the official Opposition. Oppositions have two key roles in a Westminster system:

1. to hold the government to account; and,
2. to present itself as a viable alternative government.

Oppositions utilise parliamentary procedures and other non-parliamentary tactics to check the power of the government and its leader, the Prime Minister.

Example: Oppositions limit prime ministerial power

The Abbott Opposition is an excellent example of an Opposition limiting the power of a Prime Minister. Tony Abbott is frequently referred to as the most effective Opposition Leader in recent history, not least because he claimed the scalps of three Prime Ministers:

1. the fall of Kevin Rudd in 2010. Abbott used parliamentary and media strategies to highlight the problems of the first Rudd Government;
2. the fall of Julia Gillard in 2013. Abbott successfully campaigned against the Gillard Government's 'Carbon Tax', undermining the integrity of the Prime Minister; and,
3. the defeat of Kevin Rudd. Abbott won the 2013 general election, defeating Rudd a second time.



■ Figure 4.16 – Tony Abbott is frequently referred to as the most effective Opposition Leader in Australian history.
Source: Department of Foreign Affairs and Trade, (Former) *Prime Minister Tony Abbott*, 2013, (CC BY 3.0 AU), <<https://commons.wikimedia.org/w/index.php?curid=32770160>>

All Prime Ministers face Opposition Leaders. The personal qualities of the Opposition Leader and the quality of the shadow ministry are factors influencing the power of a Prime Minister. They are both factors beyond a Prime Minister's control.

Negative media attention and polling

The 24/7 news cycle discussed above is also a source of weakness if a Prime Minister is unable to master its demands.

Constant polling of the electorate is another feature of the modern political landscape. Newspoll, Galaxy Poll and Essential Poll are three businesses that poll the electorate using sophisticated statistical methods. They produce snapshots of the electorate's opinion on a range of issues, including the popularity of the major party leaders.

A Prime Minister whose popularity declines is likely to see their power decline as well.

Example: Unpopular Prime Ministers are usually weaker Prime Ministers

1. In 2015, Malcolm Turnbull held a media conference to announce that he would challenge the leadership of the Liberal Party. He declared that the last 30 news polls under Prime Minister Tony Abbott had been negative and that there was a need for a change of leadership.
2. When Kevin Rudd abandoned his Carbon Pollution Reduction Scheme after the Copenhagen Climate Conference, his popularity plummeted. A Newspoll taken on 4 May 2009 showed he had lost 1 million supporters in two weeks. The Nielson poll recorded a fall from 59 points to 45 points, the largest decline in the popularity of a Prime Minister for 40 years.
3. Powerful pressure groups — such as the Minerals Council of Australia (MCA) and the Australian Council of Trade Unions (ACTU) — can be pivotal in influencing these polls and thus can strengthen or weaken a Prime Minister. The MCA's \$20 million campaign against the mining tax severely damaged Prime Minister Rudd.
4. John Howard lost government — and his own electorate of Bennelong — in part due to a strong ACTU campaign against his government's industrial relations laws.

Prime Ministerial power — Some final words

Perceptive students will note that many sources of a Prime Minister's power are also sources of weakness, and much depends on circumstances. Two things stand out as critical: the personal qualities of the Prime Minister, and the contingencies they face when in power.

There is no formula to be a successful Prime Minister. Some have been popular. Others have been unpopular, but respected for their ability to make tough decisions. Some have been highly intelligent — Bob Hawke, Tony Abbott and Malcolm Turnbull were Rhodes Scholars. Others had excellent negotiation skills — Julia Gillard implemented significant reforms such as the National Disability Insurance Scheme and the Gonski education reforms. Some Prime Ministers were charismatic communicators — Bob Menzies, Gough Whitlam, Bob Hawke and Paul Keating are examples. Others — such as John Howard who stuck to his principles and implemented the unpopular Goods and

“Many sources of a Prime Minister's power are also sources of weakness, and much depends on circumstances.”

Services Tax — lacked charisma yet were judged 'conviction politicians'.

Today, global forces largely determine economic performance, weakening the power of a national government to manage the economy. Nevertheless, the performance of the economy is a key measure of a Prime Minister's success. The Global Financial Crisis (GFC) of 2007–2008 and the trading policies of other countries — such as the US trade war with China under President Trump — are examples of contingencies over which Australian Prime Ministers and governments have almost no control, yet they can determine political success or failure.

Roles and powers of Cabinet

Cabinet and the public service

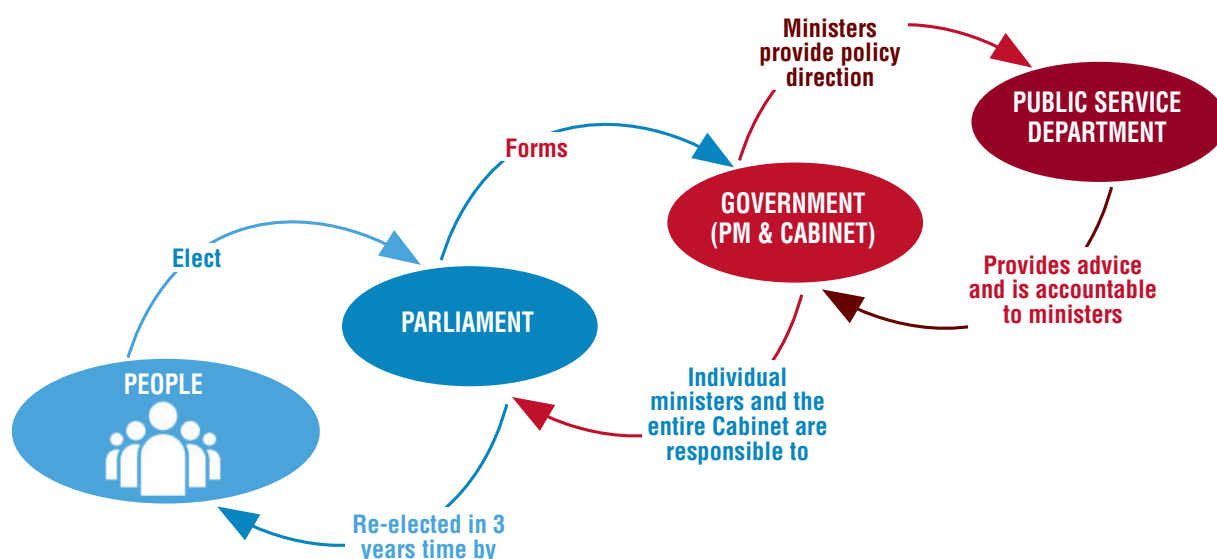
Understanding the Cabinet's relationship to the public service helps explain its roles and powers.

Cabinet provides policy and direction to the public service. That is, the *elected* political executive provides policy and direction to the *appointed* administrative executive.

Recall that ministers belong to the ministry. Senior ministers are permanent members of Cabinet. Ministers are responsible for a portfolio, which includes government departments and

agencies — that is, parts of the Australian Public Service — which administers the law.

Public servants are *appointed* officials. They are accountable to their minister — an *elected* official. Ministers are *responsible* to the lower house of parliament — the people's house. Through this chain, the public service is accountable to the people. Cabinet is a key link in the chain of accountability.



■ Figure 4.17 – The Westminster chain of accountability
Source: Stephen King, 2020

Background information: The Westminster chain of accountability

The Westminster chain of accountability helps us understand Cabinet's role within the larger executive branch, which includes the Australian Public Service. Note the relationship between Cabinet and parliament, and Cabinet and the public service.

Cabinet is a critical link in the Westminster chain of accountability. Unit 4 discusses the chain of accountability in depth.

Cabinet as the 'engine room' of government

As the 'committee of the executive', Cabinet has many roles.⁹ Cabinet must:

- develop and communicate the narrative of the government;
- develop and implement policies;
- allocate resources;
- coordinate the machinery of government;
- act as an information exchange; and
- respond to crises — see: *Case study: Response to COVID-19* and *Example: National Cabinet* in Chapter 9.

Developing and communicating the narrative of the government

A government needs to tell a story about its vision and priorities. Political ideology influences policies. Guided by their ideologies, ALP governments tend to focus on fairness and equality; Coalition governments emphasise self-reliance and reward for effort.

Cabinets use their party ideology to develop a coherent story about their vision. A government narrative helps citizens understand what their government is about and what it is doing.

Developing and implementing policies

Policies are a government's action plans. Policy coordination across government is necessary. Policies derive from ideology, election promises, responses to emerging issues and political strategies.

Background information: Cabinet and policy

Policies drive a Cabinet's agenda. Cabinet can implement policy in two ways, through:

1. **legislation:** Government bills passed through parliament may be necessary to implement some policies. The Morrison Government's repeal of the Medevac laws in 2019 and its changes to the tax system are examples; and
2. **regulation:** The executive — using power delegated by statute — may implement policies. For example, the Morrison Government's \$1.2 billion School Choice and Affordability Fund is distributed to schools by regulation, not legislation.

Most legislation introduced into the Commonwealth Parliament comes from Cabinet. Government bills are often necessary to enact Cabinet policies. See: *Background information: Cabinet and policy*.

Cabinet does more than make policies; it tracks their implementation, too, as demonstrated by the following excerpt from the *Cabinet Handbook*.

*The Cabinet's role does not end with a decision. Ministerial oversight and regular tracking of progress for complex programs is essential to ensure policies are implemented properly and any problems can be addressed as soon as possible.*¹⁰

The Cabinet Implementation Unit (CIU) assists Cabinet with:

*the implementation and delivery of the Government's strategic priorities. This includes providing the Prime Minister and the Cabinet with regular progress reports and working across Government to ensure that key Government decisions are implemented on time, on budget and to expectations.*¹¹

Allocate resources

Governments produce an annual budget, which is a statement of the Commonwealth's revenue and expenses.

Ministers estimate the cost of running their departments and implementing policies. These estimates are reviewed by the Cabinet's ERC

⁹ Keating M, Wanna J, and Weller P, eds, *Institutions on the Edge*, 2000, Allen & Unwin.

¹⁰ Department of the Prime Minister and Cabinet, Australian Government, *Cabinet Handbook*, 13th edition, 2019, Commonwealth of Australia, p 11, <https://www.pmc.gov.au/sites/default/files/publications/cabinet-handbook-13th-edition_1.pdf>.

¹¹ Australian Government, 'Cabinet Implementation Unit', *PM&C Annual Report 2011–12*, 2012, <https://www.pmc.gov.au/sites/default/files/publications/annual_reports/2011-12/part-2/strategic-policy/ciu.htm>.

and adjusted by the Prime Minister, Treasurer and Finance Minister if necessary. The Treasurer introduces the budget in the House of Representatives as a series of money bills. The budget bills must be passed by the House of Representatives, reviewed by Senate estimates committees and passed by the Senate. If passed by parliament, the budget bills authorise the spending of public money on the policies and priorities of the government.

Cabinet may allocate resources to deal with emergencies. Natural disasters such as bushfires and floods, or national security emergencies such as terror attacks are dealt with by Cabinet. Cabinet can authorise spending money or mobilising the ADF or other government assets to help manage crises. See: *Example: Emergency allocation of resources by Cabinet*.

Example: Emergency allocation of resources by Cabinet

In response to the bushfire crisis of 2020, Cabinet authorised the use of the ADF to assist state fire fighting services and volunteers. It also decided to grant money and make low-interest loans to businesses affected by the fires.

The bushfire example illustrates how Cabinet can allocate Commonwealth physical and financial resources to manage a natural disaster. See also: *Case study: Response to COVID-19*.

Coordinating the machinery of government

The public service — the administrative executive — is responsible for about 24 per cent of Australia's economic activity. It is a vast government machine, organised as a bureaucracy. Bureaucracies are structured and hierarchical. Large departments and smaller statutory agencies make up the public service. The size and complexity of the public service make coordination essential to avoid conflicts, duplication and waste.

Ministers are responsible for government departments and are responsible for how their departments run. See: *Background information: The Westminster chain of accountability*. It is a two-way relationship; ministers provide policy guidance to their departments, and departments provide expertise and advice to their ministers.

Departments are like silos containing expertise and resources, but they are isolated from each other. They know what is going on in their area of administration — they have a 'part of

government' view. Cabinet has a 'whole of government' view.

Good policy ought to be a set of coherent and rationally organised ideas flowing from Cabinet to departments via ministers. Departments then administer the policies.

Information also flows from departments to ministers. Public service information provides feedback to ministers about the administration of policy. Ministers bring this information to Cabinet which then resolves inconsistencies, conflicts, duplication and other issues across government.

In short, political power flows from Cabinet. Cabinet directs, corrects and controls bureaucratic power, holding it accountable via the Westminster chain of accountability to the people.

Acting as an information exchange

Information comes to Cabinet from many sources, including public service advice, parliamentary committee reports, government inquiries, court decisions and other sources. All this information needs to be sorted and prioritised.

The Department of Prime Minister and Cabinet (PM&C) and the Cabinet Secretariat — which is part of PM&C — provide administrative support to Cabinet and help it manage the flow of information. The Cabinet Secretariat is a branch of the public service whose administrative support ensures Cabinet power is exercised consistently and in response to the correct information.

Responding to crises

Events such as natural disasters, threats to national security or international emergencies may impact Australia. For example, the 2004 Boxing Day tsunami in Thailand, Sri Lanka and Indonesia, the 2008 Global Financial Crisis and the 2020 Australian bushfires crisis had to be dealt with by Cabinet.

Cabinet can exercise power rapidly and decisively in these cases. The National Security Committee of Cabinet can make decisions without the approval of the whole Cabinet. It can allocate resources quickly to handle unfolding emergencies.

When a national crisis occurs, the 'nationhood power' — implied by Section 61 of the Constitution — can boost executive power. The nationhood power grants Cabinet, "a capacity to engage in enterprises and activities ... for the

benefit of the nation”.¹² It means Cabinet can spend money, use the ADF and carry out other activities to address a crisis which threatens the nation. Under normal circumstances, Cabinet would lack these powers. See: *Case study: Response to COVID-19* and *Example: National Cabinet* in Chapter 9.

Factors affecting Cabinet’s roles and powers

The Prime Minister

The Prime Minister is critical to the character of Cabinet decision making. Their personal qualities and experiences as a leader may weaken or strengthen them in the minds of their colleagues. Cabinet relationships and respect for the Prime Minister’s abilities and authority affect Cabinet performance.

Refer to the *Examples* and *Background information* in the section on the Prime Minister above for specific recent and contemporary examples.

Relationships between ministers (and parties in a Coalition)

A Cabinet may be collegial or divided by rivalry. Collegial Cabinets may reach decisions by consensus. In contrast, Cabinets in which ministers are rivals or where there are professional, political or personal differences may reach decisions by majority or even by prime ministerial authority. The relationships within Cabinet determine the exercise of its power.

Example: The nature of recent cabinets

Increasing dysfunction characterised Kevin Rudd’s Cabinet (2007–2010). Prime ministerial authority was his dominant form of decision making. Rudd appointed very young advisors to staff his Office and consulted mostly with them. A lack of consultation with ministers alienated Prime Minister Rudd from his Cabinet.

Julia Gillard’s Cabinet (2010–2013) contained her disaffected rival, Rudd, as Foreign Minister. Despite this, her Cabinet was collegial and achieved decisions through consensus and majority.

Tony Abbott’s Cabinet (2013–2015) was similar to Rudd’s. His personality and ‘captain’s call’ style dominated decision making. Abbott isolated himself in the Prime Minister’s Office

and appointed advisors who kept Cabinet ministers at arm’s length. His ‘presidential’ style alienated most of his Cabinet.

Malcolm Turnbull promised his Cabinet (2015–2018) would be a traditional Cabinet, characterised by consultation and collective decision making. Nevertheless, ideological differences between the moderate Turnbull and conservative ministers such as Peter Dutton led to division and policy difficulties.

Coalition Cabinets contain two parties — the Liberal Party (the senior partner) and the Nationals — which can lead to issues with decision making. Compromise is often necessary. In 2013 the Nationals were able to prevent the purchase of *GrainCorp* — a major Australian agricultural company — by US company Archer Daniels Midland, despite Liberal Party support for foreign investment in all sectors of the Australian economy.

“Cabinets in which ministers are rivals or where there are professional, political or personal differences may reach decisions by majority or even by prime ministerial authority.”

Timing

A new government may struggle with decision making because of inexperience. A mature government may make decisions smoothly because its processes are well developed. A long-term government may lack vigour or new ideas, and coast along.

Example: Exceptional Cabinets

In 1972 the Australian Labor Party won office after 23 years in opposition. Prime Minister Gough Whitlam’s first Cabinet consisted of two members — himself and Deputy Prime Minister, Lance Barnard. Between them, they held all 27 portfolios for two weeks before the full Cabinet was sworn in by the Governor-General. The Whitlam Government is famous for many reasons, two of them being its haste in making change while in government, and its lack of experience. These two characteristics contributed to its dismissal in 1975 (see Chapter 3).

John Howard was Australia’s second-longest-serving Prime Minister. A strong and stable government characterised the later Howard

12 *Victoria v Commonwealth and Hayden* [1975] 134 CLR 338 — the AAP Case.

Cabinets. Many years in office had refined Cabinet processes, and the relationship between ministers was mostly settled and constructive. One criticism of the final Howard Cabinet is that it lacked the vigour to challenge the Prime Minister when all indications were that he would lead them to defeat at the hands of ‘Kevin 07’ Rudd — which is what happened.

The type of decision

Most decisions of government are deliberative, with appropriate time and discussion devoted to them. Other situations require a quicker response. The Morrison Government’s response to the 2020 bushfire crisis is an example and more recently, the creation of a National Cabinet to respond to the COVID-19 pandemic.

The exercise of Cabinet power is clearly dependent on the circumstances of the day.

From the 2019 *Cabinet Handbook*—An indication of the kind of issues that would normally require consideration by the Cabinet:

72. The following is an indication of the kind of issues that would normally require consideration by the Cabinet:

- (a) proposals relating to the delivery of the Government’s priorities
- (b) significant or controversial policy issues
- (c) proposals affecting the Government’s financial position, or important financial commitments
- (d) proposals that are challenging to implement due to their complexity or timeline for delivery
- (e) significant matters affecting state and territory government relations
- (f) the most significant international business, including international treaties and agreements
- (g) national emergencies, including any decision to take military action
- (h) proposals that affect Australia’s constitutional arrangements
- (i) proposals requiring significant new or amendments to legislation or regulations
- (j) any significant or controversial exercise of a minister’s statutory power
- (k) significant Government appointments.

■ Table 4.2 – The types of issues considered by Cabinet.
Source: Department of the Prime Minister and Cabinet, Australian Government, *Cabinet Handbook*, 13th edition, 2019, Commonwealth of Australia, p 16, <https://www.pmc.gov.au/sites/default/files/publications/cabinet-handbook-13th-edition_1.pdf>.

Background information: The expanding roles and powers of the ministry

The expanding role of government

The role and, therefore, the size of government has expanded immensely since World War 2. Modern governments regulate and manage more aspects of our increasingly complex society — especially in economic matters — than they did prior to the 1930s.

Why has this occurred? Since the beginning of the 20th century, many significant changes have taken place in society and the economy.

First, the welfare state was expanded. Increases in the redistribution of income through government tax collection and welfare distribution have occurred.

Second, economic management has become a government priority. The Great Depression of the 1930s devastated national economies. Economist, John Maynard Keynes developed a theory to smooth out the business cycle to avoid the booms and busts that had characterised capitalist market based economies. The theory proposed that the government manage an economy by actively adjusting its spending to create or reduce aggregate demand. Keynesian economics demanded intervention by the government. An example of this was the Rudd Government’s spending during the Global Financial Crisis and, more recently, the Morrison Government’s spending to combat the economic crisis created by the COVID-19 pandemic.

Third, Australia’s population is too small for private companies to consider building critical infrastructure such as railways and telecommunications commercially viable. Consequently, the only organisation with sufficient resources to construct essential infrastructure is the government. Government railways, telecommunication companies and the contemporary National Broadband Network are examples of the role of government in the Australian context. Each piece of government provided infrastructure requires government departments and ministers to implement and administer their operations.

Fourth, society now expects basic entitlements. There is an expectation that the government provide free state-based education for 14 years of childhood, along with public hospitals and



■ Figure 4.18 – In Australia, government is the only organisation large enough to provide infrastructure such as the National Broadband Network.

Source: Alan Moir, author's permission <www.moir.com.au>

subsidised health costs through the Medicare system. Education and health have become some of the largest bureaucracies of modern government.

Modernisation of the ministry — 1956 to the present

The growth of government has accompanied the modernisation of society and the economy over the last century or so. Recall that the Westminster system of government is a very old and continuously evolving system. Before the growth of government, the ministry was quite small and had relatively few departments, and ministers were genuinely able to know most of the essential details of their small departments.

The massive growth of government has seen the Westminster system in Australia evolve and adapt.

First, the number of departments has grown. In 1956, Prime Minister Robert Menzies split the ministry in two, creating the outer ministry. Since then, all governments except that of Gough Whitlam (1972–1975) have adopted this practice.

Second, new executive positions have been created. Parliamentary secretaries are now assistant ministers and legally part of the ministry under the *Ministers of State Act 1952*.

The increased size and complexity of the ministry is a result of the growth in government in the 20th century.

Summary

- The executive branch carries out the law.
- The executive is complex because it has three separate components:
 - the Queen, as represented by the Governor-General (formal);
 - the ministry and Cabinet (real); and
 - the public service (administrative).
- The Prime Minister is the leader of the 'real' executive. Prime Ministers have no direct mandate or legal basis, and relies on several factors for their power.
- Sources of strength for a Prime Minister include the support of the party they lead, a united Cabinet, access to information, the power of patronage and control of election timing. The ability to set the government's agenda and represent the government to the community are also sources of power.
- Sources of weakness for a Prime Minister include the lack of a personal mandate, rivals within Cabinet, division within their party, federalism, a strong Opposition and the size of their parliamentary majority.
- The personal qualities of the Prime Minister and the external conditions they face are essential factors in how effectively they use their power.
- The ministry is composed of the senior ministry, the outer ministry and assistant ministry. Only members of the senior ministry are permanent members of Cabinet.
- The Cabinet is a permanent body of the most senior members of the executive, and is chaired by the Prime Minister. The outer ministry is a group of junior ministers who may be co-opted to Cabinet.
- Cabinet has several Cabinet committees. Different ministers are members of different Cabinet committees. Cabinet committees allow for specialisation and distribution of the workload of government.
- The Cabinet is the so-called 'engine room of government'. Hence, it is regarded as the 'real' executive — because it exercises genuine power. Despite its central role in the system of government, it has no legal or constitutional basis. Instead, Cabinet derives its power and position from Westminster conventions. Cabinet secrecy and Cabinet solidarity are two conventions. Cabinet is a committee of the executive, not of the parliament.
- Cabinet has a range of functions. It develops the narrative and vision of government. It develops and implements policy. It allocates resources. It coordinates the activities of the government. It handles the exchange of information across government. It deals with crises.
- Cabinet together with the wider ministry is a collective of ministers and yet must be a single government. Cabinet solidarity helps maintain the unity of government. Cabinet secrecy helps Cabinet reach decisions.
- The Prime Minister, Cabinet and the ministry have become increasingly important with the increase in the size and scope of government since World War 2.

Exam practice questions

Short answer

- 1a) Explain what is meant by the 'real executive'.
- 1b) Outline **three** roles and/or powers of Cabinet.
- 1c) Discuss **one** argument for and **one** argument against the proposition that 'Cabinet secrecy undermines the idea of good government'.
- 2a) Explain the purpose of Cabinet solidarity.
- 2b) Distinguish between the inner and outer ministry.
- 2c) Discuss the extent to which a Prime Minister's personal qualities can be a limitation to their powers.
- 3a) Outline the role of an assistant minister.
- 3b) Explain what is meant by Cabinet being the 'engine room' of government.
- 3c) Discuss the extent to which Cabinet solidarity is upheld in practice.

Source analysis

Read the source below and answer the questions that follow.

The source is adapted from: Joshua McDonald, 'Political Redemption in Sight for Australian Prime Minister Scott Morrison'.¹

Less than three months ago it was not difficult to imagine Australian Prime Minister Scott Morrison joining the list of the country's most unpopular leaders.

A Newspan poll published in January, as the fires continued to rage, found that 59 percent of voters were dissatisfied with Morrison's performance. He was also overtaken as preferred Prime Minister by the Leader of the Opposition for the first time since May 2019. Analyst Kevin Bonham wrote at the time that it is "the equal second highest such loss in Newspan history".

For the most part, however, the Australian government's handling of the crisis has been better than even they expected. Partially responsible, at least, is the rare moment of unity within government. Morrison himself recently said: "There are no blue teams or red teams. There are no more union bosses. There are just Australians now, that's all that matters".

Although parliament has been suspended, the Opposition is still given the opportunity to lobby and criticize the government when necessary. Just last week Morrison agreed to a Labor proposal for a special Senate select committee to be created to examine the government's actions in parliament's absence. The committee is chaired by a Labor MP.

And unlike during the bushfire crises, when the Opposition was not given a seat at the table, Morrison has brought together state and territory, Labor and Coalition leaders to form a National Cabinet to coordinate their efforts against COVID-19.

Attorney General Christian Porter recently quipped that "this is parliament's Dunkirk moment ... We get the life boats out and we save jobs and we do it with the simplest, clearest, guaranteed formula that parliament can devise".

Also unlike Morrison's handling of the bushfires is his assurance this time that the government's response is directed by experts. Since the current crisis began, Morrison has made clear that his government is simply following the advice of the Chief Medical Officer. This is in stark contrast to his refusal to even meet with emergency service chiefs and bushfire experts about the looming bushfire crisis last year.

¹ McDonald, Joshua, 'Political redemption in sight for Australia Prime Minister Scott Morrison', The Diplomat, 17 April 2020, <<https://thediplomat.com/2020/04/political-redemption-in-sight-for-australian-prime-minister-scott-morrison/>>.

- 4a) Explain the term 'preferred Prime Minister'.
- 4b) With reference to the source, explain in your own words **two** reasons why Prime Minister Morrison's popularity has increased in recent months.
- 4c) With reference to **two** Prime Ministers, discuss how the Cabinet limited their powers.
- 4d) Outline **one** contemporary issue involving political power and discuss its impact on Australia's political and legal system.

Essay

- 5) 'Internal party politics have been the most significant factor in limiting the powers of recent Prime Ministers'. Evaluate this claim.
- 6) Critically analyse the extent to which a Prime Minister's powers are dependent on the circumstances of the time.

Investigation

The powers and limitations of different Prime Ministers are dependent upon various circumstances.

- 7a) In the table below, rank from the most significant to the least significant the powers and limitations of each Prime Minister.

Prime Minister	Powers	Limitations
Morrison (2018–)		
Turnbull (2015–2018)		
Abbott (2013–2015)		
Gillard (2010–2013)		
Rudd (2007–2010, 2013)		

- 7b) For two Prime Ministers, compare and contrast the ranking of their powers and limitations. What accounts for the similarities and differences?
- 8a) In the table below, for each Prime Minister provide a specific example of one of their powers being exercised and of one of their powers being limited.

Prime Minister	Specific example of one power being exercised	Specific example of one power being limited
Morrison (2018–)		
Turnbull (2015–2018)		
Abbott (2013–2015)		
Gillard (2010–2013)		
Rudd (2007–2010, 2013)		

OR

8b) In the table below:

Identify one Prime Minister.

Outline a specific example of one of their powers being exercised.

Outline a specific example of one of their powers being limited.

i. Prime Minister	
ii. Specific example of one power being exercised	
iii. Specific example of one power being limited	



Scrutinising power – The Opposition and shadow ministry

Syllabus point:

- **Roles and powers of the Opposition and the shadow ministry at the Commonwealth level**

Westminster government relies on the contest of parties to produce both the accountability of government and a democratic choice for voters. The Opposition performs both these roles.

Democracy depends on the operation of democratic principles. Without oversight and enforcement, the best principles have little effect. Two important principles are that power must be:

1. limited; and
2. subject to law.

The principles above — **constitutionalism** and the **rule of law** — need a ‘watchdog’ capable of overseeing and challenging executive power.

Despite their critical democratic role, Australian Oppositions are at a disadvantage compared with the governments they seek to hold accountable. Governments:

- have more resources; and
- control the House of Representatives.

Oppositions strive to overcome these limitations by:

- using parliamentary procedures and tactics;
- using extra-parliamentary strategies — for example, the media; and
- working with pressure groups and other organisations to challenge governments.

Background information: Opposing power in political and legal systems

Opposition to power is healthy in political systems because people have different values and perspectives. A plurality of values and views means some will agree and others disagree with how power is used.

In democracies, opposition to power is institutional and accepted as part of a healthy democracy. In autocracies, political opposition is suppressed and sometimes ruthlessly eliminated.

In a democracy based on the Westminster system, parliament creates both the executive and the opposition to the executive. Parliament hosts a political organisation — called ‘the Opposition’ — which uses the processes and procedures of parliament to hold the executive responsible to the lower house. Chapter 2 described the roles of the Commonwealth Parliament — that is, legislation, representation, debate and responsibility. The Opposition plays an integral part in each of these roles. Therefore, an Opposition is necessary for the proper functioning of a Westminster parliament. Additionally, a good Opposition is necessary for good government because it provides the checks and balances that limit executive power and make it accountable.

Background information: What’s in a name?

The name ‘Opposition’ can be misleading.

Revolutionary Oppositions *oppose the system* of government. Lenin’s Bolsheviks were a revolutionary opposition party that seized an opportunity to overthrow the failing Tsarist system. In the October 1917 Russian Revolution, the Bolsheviks overthrew Tsarism and replaced it with Marxist-Leninist Communism — an entirely different *system* of government.

‘Her Majesty’s Most Loyal Opposition’ is the term used to describe the Opposition in Britain. The word ‘loyal’ is instructive. A Westminster Opposition is *loyal to the system* of government, but opposes the current executive. For example, the Albanese Opposition is loyal to Australia and its system of constitutional parliamentary government. Nevertheless, it opposes the Morrison Government. Westminster Oppositions work *within the system* to check and balance the government of the day.

The Opposition

The party with the second-largest number of seats in the House of Representatives forms the Opposition. The Opposition has a structure that mirrors the executive. It has:

- an Opposition Leader; and
- a shadow ministry.

All Opposition members are private members of parliament, whether they are in the House of Representatives or the Senate.

Opposition Leader

The Opposition Leader leads the party with the second-largest number of seats in the House of Representatives. They sit to the Speaker’s left and directly opposite the Prime Minister in the House of Representatives.

Shadow ministry

The shadow ministry is composed of Opposition members who scrutinise and oppose ministers in the ministry. The shadow ministry often mirrors the ministry in that shadow ministers scrutinise a particular minister and his or her portfolio area. They check their opposite minister's performance, the performance of their government department and the government policies relevant to their shadow portfolio, and ask questions of the minister opposite.

Shadow **ministers sit on the front bench** seats of the House of Representatives to the Speaker's left and behind the Opposition Leader. Directly opposite the Opposition frontbench is the government frontbench, where ministers sit behind their Prime Minister to the Speaker's right.

Private members

All members of parliament who are not in the ministry are **private members** of parliament. Private members include:

- the shadow ministry and the Opposition Leader;
- Opposition backbenchers;
- government backbenchers; and
- Independent and minor party members of parliament.

Bills proposed or initiated by the Opposition are private members' bills.

Only private members — not ministers — may be members of parliamentary committees.

■ Figure 5.1 – The current Opposition leader in Australia is Anthony Albanese MP.

Source: Bidgee, Robert Myers, *Leader of the Opposition Anthony Albanese chairs meetings of the Australian Shadow Cabinet*, 2013, CC BY-SA 3.0 au, <<https://commons.wikimedia.org/w/index.php?curid=71336737>>



■ Figure 5.2 – In the House of Representatives, the Opposition Leader sits to the left of the Speaker's Chair.

Source: Parliamentary Education Office, *House of Representatives numbers* <<https://peo.gov.au/understand-our-parliament/parliament-and-its-people/house-of-representatives/house-of-representatives/>>

Roles of the Opposition

Westminster Oppositions have two roles:

1. holding the government to account; and
2. being a viable alternative government.

Holding the government to account

The Opposition empowers the parliament's responsibility role. Recall that parliament makes and breaks the government in a Westminster system.

Two fundamental Westminster conventions — collective and individual ministerial responsibility — operate through parliament's procedures. Both conventions of ministerial

responsibility make an executive responsible to the lower house. The Opposition uses these conventions and their associated procedures to hold the ministry to account. The government is, therefore, answerable to the lower house for its performance, spending and policies. The Opposition's role is to scrutinise and question the government and demand its accountability to parliament and, through it, to the people.

Parliamentary procedures — all related to parliament's responsibility role — are important powers that the Opposition has at their disposal when attempting to hold the government to account. These include:

- question time;
- motions of no confidence and censure;
- debate;
- calling for a quorum;
- pairs; and
- divisions.

Also, the Opposition may use extra-parliamentary avenues of accountability. The media, pressure groups and think tanks are examples. These can be used to highlight issues with the government's performance or policies.

The discussion that follows focuses on the parliamentary procedures as they apply in the House of Representatives as this is the house in which government is formed. Students should note, though, that these procedures also take place in the upper house and according to the Senate's Standing Orders.

Question time

Question time is the key parliamentary procedure to scrutinise the government. Private members ask questions of ministers. Any private member can ask a question.

Private members direct their questions to ministers or the Prime Minister. Question time occurs on each sitting day — usually between 2 pm and 3 pm — during which private members may ask two types of questions:

1. questions on notice; and
2. questions without notice.

Questions on notice are complex and require research or advice before a minister can provide an answer. The minister will seek information — usually from their government department — before answering the question. Questions on notice are answered at a later date and in writing. Generally, they are answered promptly. While there is no set time limit within which a minister must respond, if the question has been on the House Notice Paper for more than 60 days in the House of Representatives or 30 days in the Senate, a member can ask the Speaker or President to write to the minister involved to seek reasons for the delay in answering the question. Answers are published in Hansard.

Questions without notice can be simpler than questions in writing. If a minister cannot respond verbally and immediately it can be embarrassing for the government.

The convention of individual ministerial responsibility requires ministers to answer truthfully. They must not mislead parliament when answering questions. In theory, the conventions of ministerial responsibility require a minister who misleads parliament to resign.

In practice, ministers can avoid answering questions without notice. There are only limited requirements for answers: they must be directly relevant to the question and of limited duration. Additionally, the government's private members — government backbenchers — may ask helpful questions. Such friendly questions are rarely probing because the backbencher asking — and the minister answering — are from the same governing party.



■ Figure 5.3 – Question time in the Senate.

Source: (PEO.GOV.AU), DPS AUPIC Senate Question Time 2020 <<https://peo.gov.au/understand-our-parliament/how-parliament-works/parliament-at-work/question-time-in-the-australian-parliament/>>

Background information: Dorothy Dixers

Friendly questions from government backbenchers to ministers are known as **Dorothy Dixers**. The name comes from an American newspaper columnist Dorothy Dix, who answered questions she had written herself. Dorothy Dixers are used by ministers to speak about the positive things their government is doing rather than give a proper account of government.

Dorothy Dixers take up time during question time and diminish the proper functioning of parliament's responsibility role.

Some Westminster parliaments, such as Canada, have abolished Dorothy Dixers. Abolishing Dorothy Dixers can enhance parliament's responsibility role, but at the expense of its representative role. For instance, government backbenchers prevented from taking part in question time are unable to scrutinise ministers about government policy affecting their electorates.

Evaluating question time in the House of Representatives

Questions without notice in the House of Representatives have become little more than a contest for political advantage. Attempted reforms have had little practical effect.



■ Figure 5.4 – American gossip column from which the term 'Dorothy Dixer' is derived. Source: Dorothy Dix & Staff, *Daily Picayune*, 1898, Public Domain, <<https://commons.wikimedia.org/w/index.php?curid=16833336>>

Proposed reforms to question time include time limits for replies and increased use of supplementary questions. More effective enforcement by the Speaker of relevancy rules is another idea for improvement.

Answers to questions in writing are not provided immediately and are given in writing, providing less opportunity for political theatre. From an accountability perspective, they are more effective than questions without notice.

Question time in the Senate is more effective than in the House of Representatives because more questions come from private Senators and there are fewer Dorothy Dixers. The Senate has long used supplementary questions to allow private Senators to interrogate a minister with follow-up questions.

Censure motions and no confidence motions are parliamentary procedures linked to its responsibility role.

Moving censure motions and motions of no confidence

A 'motion' is a procedure that triggers a parliamentary vote. Members move motions to enable parliament to act on matters. Motions are often debated before a vote. Debates on motions provide opportunities for the Opposition to criticise the government.

There are different types of motions — for example, a motion that a 'bill be read a second time' is part of the legislative process and is the action that causes a bill to progress from its first reading to its second reading.

Censure motions and no confidence motions are parliamentary procedures linked to its responsibility role. They are procedures by which parliament expresses either disapproval of a specific action by a member of the executive or parliament's loss of confidence in the whole executive — that is, the ministry.

Motions of censure and no confidence hold the government answerable and responsible to the parliament. When moved by a member of the House of Representatives (an MP), they take precedence over any other business.

Background information: Censure motions and motions of no confidence

Individual and collective ministerial responsibility are the two conventions associated with these motions. The conventions and procedures are inherited from Britain, but have been adapted to the Australian context.

A government is drawn from, and responsible to, the House of Representatives. The Opposition uses the procedures of parliament to carry out its task of holding a government accountable. Motions of censure and no confidence are two such procedures.

Censure motions

Censure motions highlight a specific government action. The Opposition Leader usually moves the motion against a minister or a government action. This means that censure motions are usually moved in the House of Representatives. If the motion is allowed, the Opposition Leader is permitted to speak for 30 minutes after which the Prime Minister — or a minister assigned by the Prime Minister — may speak for 30 minutes. Private members may speak for 20 minutes. It is highly unlikely the executive would allow debate on any such motion in the House of Representatives. Recall the impact of executive dominance of the House on these procedures.

Censure motions uphold the convention of **individual ministerial responsibility**.

No confidence motions

The government as a whole — that is, the ministry — is the target of a no confidence motion.

No confidence motions uphold the convention of **collective ministerial responsibility**. They may take several forms:

- a direct vote against the government;
- the defeat of a critical government bill in the house;
- the defeat of a government money bill in the house; and
- a loss of government control of the House of Representatives.

Any private member — but most likely the Opposition Leader — may move a motion of no confidence in the government. If passed, such a motion triggers debate with the same time allocations as for censure motions described above. A vote follows the debate.

If the government loses this vote — that is, 76 or more MPs vote no confidence in the government — it has lost the confidence of the House of Representatives and is obliged by Westminster convention to resign. The House will attempt to form a new government. If no party can command a majority, the Governor-General will dissolve the parliament and issue writs for a general election.

If the government suffers a legislative defeat on the floor of the House of Representatives it may be considered an 'effective vote' of no confidence requiring the resignation of the government. Australian Governments seldom lose legislative votes in the House, so the convention is untested and weak. The Senate blocks government bills regularly, but this is not the same as defeat on the floor of the House of Representatives, where the government is formed and held accountable. The Turnbull Government did not resign when the Senate blocked its tax cuts legislation. Neither did the Morrison Government when it lost a legislative vote in the House — a more serious matter than a Senate refusal to pass a government bill. See: *Example: Morrison Government loses a legislative vote*.

One of the tasks of government is raising and spending money. Section 83 of the *Commonwealth of Australia Constitution Act 1900* (the Constitution) states, "No money shall be drawn from the Treasury of the Commonwealth except under appropriation made by law". Governments must pass **appropriation bills** — that is, money bills — through parliament in order to govern.



■ Figure 5.5 – Arthur Fadden's government was deposed after a successful motion of no confidence.
Source: National Library of Australia, *Portrait of Arthur William Fadden*, Darling Downs, 1940, <<https://trove.nla.gov.au/work/33059134?q=arthur+fadden&c=picture&versionId=40456389>>

The defeat of a money bill in the House of Representatives — but not the Senate — is considered an ‘effective vote’ of no confidence in the government. See: *Example: Parliament dismisses a government by a vote of no confidence*.

The government, of course, has a majority on the floor of the House of Representatives — it would not be the government otherwise. It controls the order of business in the House. Should a government be unable to control the order of business then, by implication, it has lost control of the House and, therefore, its confidence.

If passed, censure motions and no confidence motions result in ministers resigning or governments falling. Motions need a majority of support on the floor of the House of Representatives to succeed. Because the government commands the majority, it will not let these motions pass. These motions are moved by the Opposition to highlight and draw attention to ministerial incompetence, political corruption or to embarrass the government. Rarely — in the House of Representatives at least — do they proceed to the point at which debate occurs.

The situation is different in the Senate. The Australian Senate is a powerful upper house and is home to approximately one-third of the ministry. Due to the composition of the Senate, it is almost always a hung house. Censure motions and no confidence motions are, therefore, more likely to succeed and result in debates about the government. In early 2015, the Senate censured Cabinet minister and Attorney-General, Senator George Brandis after his criticism of Human Rights Commissioner Gillian Triggs. A censure is a serious matter and this one led to Prime Minister Abbott stepping in to defend his Attorney-General. Senator Brandis did not resign, but the censure drew the attention of the media. Censure by the Senate lacks power because it is not part of traditional Westminster convention. Why is there no tradition of ministerial accountability to the upper house? Because Britain’s House of Lords is weak, undemocratic and does not contain any ministers — it has no role in ministerial responsibility.

If they are ineffective, what purpose do motions of censure and no confidence serve? When it moves these motions, the Opposition aims to embarrass and draw negative attention to the government or its ministers. Negative

attention helps pressure the government to improve its performance or modify its policies. It may contribute to a loss of public confidence in the government and assist the Opposition at election time.

Example: Morrison Government loses a legislative vote

In 2019 the minority Morrison Government became the first in 80 years to lose a legislative vote in the House of Representatives. The Opposition amended the government’s Home Affairs Legislation Amendment (Miscellaneous Measures) Bill 2018 in the Senate and returned it to the House of Representatives where the government was in minority. In the House, the Opposition and Independents voted together in early 2019 to pass the amended bill against the government’s wishes. Despite this outcome, the government did not resign, and the parliament did not pursue a formal motion of no confidence. See also: *Background information: Hung parliaments, minority governments and Opposition power*.

Example: Parliament dismisses a government by an effective vote of no confidence

The only other time a government was forced from office by parliament was during wartime in 1941. The parliament amended the budget of the minority Fadden Government (29 August–7 October 1941) by £1. The government resigned because it was unable to pass its major money bills without amendment. A minority government being forced out of office is a rare event in Australia.

Debate

Many opportunities exist for debate in parliament — see Chapter 2. The Opposition, shadow ministry and backbenchers use these opportunities to speak against, or to embarrass, the government.

The government may use its majority to amend Standing Orders of the House of Representatives to limit the Opposition’s use of parliamentary debates. It may also gag or guillotine debate on legislation. Debates do not penalise the government, but may embarrass it, so the government may have reasons to restrict members’ ability to speak.

The debate within parliamentary committees is of higher quality because partisanship is less intense. Opposition members can effectively debate the activities of government within

committees. The government dominates House of Representatives committees. Senate committees tend to be less controlled by the government.

The Opposition in the Senate can more effectively use a debate to highlight government failings. The Senate is a more independent and deliberative chamber than the House of Representatives. Consequently, a debate in the Senate is more productive than in the lower house.

Calling for a quorum in the House of Representatives

A quorum is the minimum number of members required in the House of Representatives for a vote to be valid. The Standing Orders specify that a quorum is one-fifth of the total number of MPs. There are currently 151 MPs; therefore, the quorum is 31 including the Speaker.

The Opposition can frustrate a government by calling attention to the 'state of the House', which is a request to check if a quorum is present. The House of Representatives is suspended if there is no quorum. The result is a procedural delay, which slows down the functioning of the House and interrupts government business.

Members are frequently away from Canberra on electorate or other business, including committee work. By convention — and agreement between the parties — quorum may be overlooked for the sake of efficiency. Nevertheless, any member may call the Speaker's attention to the state of the House. If there are less than 30 MPs present, the bells are rung for four minutes throughout Parliament House to summon MPs to the chamber. Until the assembly of a quorum, the House of Representatives remains suspended.

Refusing pairs

An absence of government MPs may temporarily deprive a government of its majority, calling its control of the House of Representatives into question. Ministers often travel on parliamentary business and cannot be present in the House. Members also may be absent due to illness, family commitments or other reasons.

An absence of members can upset the balance of power in the House of Representatives. 'Pairs' is a convention which allows the House — and, therefore, the government — to operate even if government party members are absent.

To grant pairs, an Opposition MP is 'paired' with each absent government backbencher or minister. Paired Opposition MPs abstain from voting in the House of Representatives. Using

pairs respects the government's majority and conserves the balance of power in the House.

An Opposition may refuse pairs. Refusing pairs may force a government to summon its MPs back to parliament so it can win votes in the House of Representatives.

Refusing pairs is useful to an Opposition only if a government has a small majority or is a minority government. Pairs are unnecessary if a government has a secure majority because it can usually muster a majority even if some members are absent.

Example: Refusing pairs in the House of Representatives

In August 2016 the Opposition refused the Turnbull Government's request for pairs. Malcolm Turnbull had narrowly won the election, winning a one seat majority. The government was vulnerable in the new House of Representatives because any event which cost it a seat could threaten its survival. The Opposition declared it would test the government's one seat majority whenever it could.

An earlier refusal to pair occurred in 2010 when Opposition Leader, Tony Abbott, withdrew his agreement with Prime Minister Julia Gillard to pair the Speaker's vote in the hung 43rd Parliament. In 2011, the Abbott Opposition threatened to refuse a pair for Labor backbencher Craig Thomson MP when his wife was due to have a child. At the time, the House of Representatives was debating controversial carbon pricing legislation. A pair was ultimately granted. In 2013 the Abbott Opposition refused to grant Michelle Rowland's request for a pair so she could be with her sick child. A pair was later granted.



■ Figure 5.6 – Julia Gillard is sworn in as the Prime Minister of the 43rd Parliament by Governor-General Quentin Bryce. Source: The Office of the Official Secretary to the Governor-General, on behalf of the Commonwealth of Australia, *Quentin Bryce swearing in Julia Gillard as PM*, 2010, CC BY 3.0, <<https://commons.wikimedia.org/w/index.php?curid=43697358>>

Calling for divisions

There are two methods used to vote on motions. Votes may be on the voices or by division. Voting on the voices occurs when the Speaker puts a motion to the vote and asks members to vote by saying, “those in favour say ‘aye’, those against ‘no’”. Voting on the voices is informal, quick and used when there is little doubt about the outcome. There is no record of how individual members vote when they vote on the voices.

Divisions are formal votes. During a division, members leave their seats and move to the Speaker’s right to vote ‘yes’ or left to vote ‘no’. The party **Whips** then count the votes and report the result to the Speaker who announces the outcome. The Clerk enters the result into

the record. A similar process is in place in the Senate.

Divisions are time consuming. Oppositions may call for a division to slow down the business of either house. Divisions also identify who voted ‘yes’ and who voted ‘no’. Knowing how MPs vote helps keep them accountable because electors can see how they voted in parliament.

As with calling for a quorum or refusing pairs, a division in the House of Representatives will only delay the business of government, not alter the outcome of votes. An Opposition may be able to use the voting history of a government member, recorded during divisions, to campaign against them at an election.

Being a viable alternative government

The Opposition must be ready to assume government at any time. Following are three scenarios in which an Opposition may become the government.

1. A government may fall during a parliamentary term after losing the confidence of the House of Representatives. An Opposition able to command the confidence of the House may then form a government. See: *Example: Fall of the Fadden Government, 1941*.
2. A weak government loses the confidence of the House of Representatives, and no other party can form a government. The Governor-General uses the reserve powers to dissolve the parliament and initiate an election which may be won by the Opposition. See: *Example: The Dismissal*, in Chapter 3.
3. The Opposition party contests ordinary general elections against the government party.

The first two are theoretical and rare in contemporary Westminster systems. The third scenario is the most common way Oppositions become governments. Therefore, before and during an election an Opposition must be a viable alternative government if electors are to have a democratic choice.

Governments are made and unmade by the House of Representatives

Losing a vote on a money bill in the House of Representatives brought down the Fadden Government in 1941. The Curtin Opposition was later able to form a government. See: *Example: Fall of the Fadden Government, 1941*.

The first Morrison Government (2018–2019) lost a vote in the House of Representatives on a government bill in 2019, leading to calls for Scott Morrison to resign or call an election. His government survived. See: *Background information: Hung parliaments, minority governments and Opposition power*.

Background information: Hung parliaments, minority governments and Opposition power

A ‘hung Parliament’ — where a government is in minority — may increase the probability of a government falling. Two minority governments in recent history illustrate the power of the Opposition in a Westminster parliament.

The Abbott Opposition always threatened the vulnerable Gillard Government (2010–2013). Ultimately, Tony Abbott’s Opposition weakened Julia Gillard to the extent she was replaced by her party. Kevin Rudd took over as Prime Minister and led the minority government to a resounding defeat at the 2013 election. Abbott then formed a majority government.

The Morrison Government (2018–2019) lost a critical legislative vote in early 2019. The government was weakened, but survived until the election in May that year. Scott Morrison won the election, but with a weak one seat majority. The Shorten Opposition exploited the Morrison Government’s weaknesses. However, it was unable to convert its success in holding the government to account into an election win. Interestingly, the Shorten Opposition went to the 2019 election with a



■ Figure 5.7 – Instability within the ALP was a significant theme of Tony Abbott's tactics.
Source: Alan Moir, author's permission, <www.moir.com.au>

highly developed and specific policy platform, aiming to present itself as a viable alternative government. Morrison was able to turn the Opposition's policies against it and win the election. The lesson from the 2019 election may be that convincing the public it is a 'viable alternative government' may not mean an Opposition should lay out a detailed policy plan. While this appears counter-intuitive, a government can use an Opposition's policies to make it a target.

Hung parliaments have been rare in Australia, although they are becoming more likely with the decline of electoral support for the major parties.

“Shadow ministry leads its party room and plays a significant role in its own party's policy platform.”

Example: Fall of the Fadden Government, 1941

The last time a federal government lost the confidence of the House of Representatives was 1941 when the House amended the Fadden Government's budget by £1 — an effective vote of no confidence. With World War 2 raging in Europe and the threat of war with Japan, Australia was faced with a crisis. Moreover, the non-Labor parties — the United Australia Party and the Country Party — were in disarray and could scarcely organise a House majority. The minority Fadden Government lasted only 40 days. It was initially supported by two Independents who later 'crossed the floor' and voted with John Curtin's Australian Labor Party (ALP) Opposition. Now with a majority, Curtin was able to form a government.

The Fadden case is an old example, but it perfectly illustrates several key points:

- parliament's responsibility role — that is, how governments are 'made' and 'unmade' by the lower house of parliament;
- Oppositions may be able to form a government without an election; and
- the impact of a successful no confidence motion.

Preparation for government

Being a viable alternative government requires the Opposition to be a genuine contender at an election. It must be united, inspire public confidence and appear at least as competent as the existing government.

To present itself as a viable alternative government, the Opposition must:

- have policies that set out a plan and vision; and
- appear competent and ready to govern.

Policies

The shadow ministry leads its party room and plays a significant role in its own party's policy platform.

Policies are a government's action plans. An 'alternative government' should have alternative policies to present to electors.

Background information: Liberal v Labor Opposition

Liberal Oppositions

The extra-parliamentary Liberal Party — that is, its members and organisation outside Parliament — is mostly concerned with logistical support such as fundraising and is less involved in policy development.

The organisation of the Liberal Party places a heavy emphasis on the role of Liberal Opposition Leaders, shadow ministers and the Liberal party room in the development of policy. The collective political philosophy of this relatively small number of party members is critical in determining the policies of a Liberal Opposition. There is a diversity of Liberal philosophy, with Malcolm Turnbull perhaps the best recent example of a 'moderate Liberal', and Peter Dutton and Scott Morrison being examples of 'conservative Liberals'.

A Liberal Opposition's policy development depends very heavily on the personal qualities, and political and social philosophy of its leader and leadership team.

Labor Oppositions

The ALP has an active and organised extra-parliamentary party organisation, which includes significant support from the trade

union movement. In the past, the ALP National Conference determined policy. Caucus — the parliamentary wing of the party — was bound by party policy and pledged to support it in parliament. Since Gough Whitlam's time, Caucus and the parliamentary leader of the ALP have assumed a more significant role in the process of developing policy.

The ALP has internal factions — the Left and the Right — each with different ideological philosophies. The Left and Right compete and collaborate in policy development during ALP conferences.

Policies endorsed by the National Conference form the ALP policy platform. The Opposition Caucus develops the platform further before taking it to the next general election and presenting it as their plan for government. A Labor Party leader has a significant role in policy development, but less than that of a Liberal Party leader.

Factors affecting Opposition success

Impartiality of the Speaker

Following an election, choosing the Speaker of the House of Representatives is one of the first items of business for a new parliament. The Speaker is an MP — a member of the lower house — and is elected by MPs under Standing Order 11.

The House of Representatives cannot function without a Speaker. The Speaker is the presiding officer — a sort of 'referee' — of the House of Representatives. The Speaker's role is to uphold the Standing Orders and ensure the proper conduct of the MPs.

A Speaker should be impartial and neutral. The President of the Senate is the equivalent role in the upper house, and is elected by the Senators.



■ Figure 5.8 – Speaker Bronwyn Bishop was often accused of political bias.

Source: Alan Moir, *Sydney Morning Herald*, 28 November 2014, author's permission, <www.moir.com.au>; and <https://www.smh.com.au/national/phillip-hughes-memorial-advocated-by-cricket-fans-20141127-11vma0.html>>

Background information: The impartiality of the Speaker

In Britain, Speakers resign from their party. Further securing the neutrality of the presiding officer, the Opposition does not run a candidate against the Speaker at election time — virtually guaranteeing their re-election. The office of the Speaker is a highly prized position. In Britain, this system helps ensure the impartiality of the Speaker.

In the Commonwealth Parliament, the government party chooses the Speaker, and they are almost always a member of that party. In contrast to the British Speaker, Australian Speakers seldom resign from their party, although they may cease attending party room meetings. The Australian Opposition runs candidates against the Speaker in a general election. Generally speaking, most MPs place less value on being Speaker than on being a minister.

The impartiality of Australian Speakers depends significantly upon the character of the person occupying the office. Some Speakers uphold the Standing Orders with an even hand. However, as a member of the governing party they hold office at the discretion of the Prime Minister. 'Refereeing' the contest between the parties is difficult when you are in one of the teams and one of the team bosses is also your boss.

The impartiality of Australian Speakers tends to be less than that of their British counterparts. The lack of complete impartiality means that they may behave in a partisan way, which disadvantages the Opposition. Some have been more partisan than others. Factors such as their personality and their relationship with the Prime Minister affect their impartiality. For information about the present Speaker of the House and past Speakers, see: *Case study: Speaker of the House of Representatives*.

Access to resources

A lack of resources limits the effectiveness of Oppositions.

The governing party commands all the resources of a government. These include access to expert advice, knowledge of the workings of government and the administrative power of the Australian Public Service. The Opposition lacks all these.

The Prime Minister decides the resources allocated to the Opposition. For example, Oppositions get approximately 21 per cent of the

government's staffing levels.¹ Without access to adequate information and other resources it can be difficult for an Opposition to hold a government to account. Additionally, a lack of resources increases the likelihood an Opposition will make errors or appear incompetent and unfit to govern.

Labor Oppositions benefit from the extra-parliamentary organisation of the ALP. The ALP's close relations with the trade union movement also provide it with staffing and financial resources. For example, the Australian Council of Trade Unions (ACTU) ran its 'Change the Rules' campaign in parallel with the ALP's election campaign during the 2019 general election. See: *Background information: Liberal v Labor Opposition*.

Liberal Oppositions often lack financial resources and the benefits that come from a well-organised and funded extra-parliamentary party. They rely heavily on their parliamentary members to carry the weight of scrutinising the government and the development of policies. See: *Background information: Liberal v Labor Opposition*.

Government control of the House of Representatives

Opposition limitations can be blamed on government dominance of the House of Representatives and sources of information.

Majority governments easily win votes on motions in the House of Representatives. They can elect the Speaker of their choice and control the resources of the government. Nevertheless, an Opposition can be effective against a majority government. The Abbott Opposition to the first Rudd Government (2007–2010) was effective, bringing about Kevin Rudd's fall and replacement by his deputy, Julia Gillard. The Shorten Opposition — during the first Turnbull Government (2015–2016) — was also effective and came close to winning the 2016 election. Following the election, the second Turnbull Government (2016–2018) was reduced to a one seat majority, making the task of the Shorten Opposition easier. Turnbull fell from office in a party room coup two years later.

Minority governments have less control over the parliament than majority governments, which creates opportunities for effective Opposition. The most effective Oppositions in recent history have been the Abbott Opposition to the minority Gillard/Rudd Government (2010–2013) and the Shorten Opposition to the first

¹ Anne Tiernan, 'Forgetting how to govern', Inside Story, 3 February 2016, <<http://insidestory.org.au/forgetting-how-to-govern>>.

Morrison Government (2018–2019) which fell into minority after losing the Wentworth by-election. The situation was made worse when a Liberal backbencher resigned from the Party. See: *Case study: Representation and Legislation – Wentworth & Medevac* for more information.

■ Figure 5.9 – Tony Abbott successfully employed the politics of fear to undermine the government. Source: Alan Moir, 2011, author's permission, <www.moir.com.au>



Overcoming the limitations of Opposition

Third-party research

Oppositions can overcome some of the limitations brought about by the lack of sources of information through using third parties — such as accounting firms, think tanks and academic research centres — to provide analysis of government policy. See: *Example: Think tanks and third-party research*.

Example: Think tanks and third-party research

The Chifley Research Centre (CRC) is the ALP's official 'think tank'. A think tank is an organisation that provides research, reports and advice on particular issues. The CRC collaborates with universities and pressure groups to develop public policy. The CRC commissions research into public issues and provides advice to the Labor Caucus. The resources provided by the CRC help compensate for the lack of resources an ALP Opposition might otherwise suffer.

The Institute of Public Affairs (IPA) provides a similar function for the conservative side of politics. It is not as closely linked to the Liberal Party as the CRC is to the ALP. Nevertheless, it provides research supporting Liberal Party policy objectives and critiques progressive ALP policies.

Other influential Australian think tanks, their ideological perspectives and the parties they generally support include:

- The Centre of Independent Studies (libertarian) — Liberal/Coalition
- The Grattan Institute (non-aligned) — non-partisan
- The Australia Institute (progressive) — ALP

Reforms

Reforms to improve government accountability — and therefore support the work of the Opposition — have been proposed. They include the provision of additional staffing and other resources to Oppositions. Most reform proposals stall. Only the government can implement reforms that would benefit an Opposition, but it is not in any government's interest to do so.

Example: A reform to empower the Opposition

The Charter of Budget Honesty was a successful reform of the Howard Government. The *Charter of Budget Honesty Act 1998* requires government finances to abide by financial management principles. It also provides for public scrutiny of government finances and performance. The Treasurer must report to parliament three times a year:

1. when introducing the budget in the House of Representatives;
2. with a Mid-Year Economic and Fiscal Outlook (MYEFO); and
3. within three months of the end of the June 30 financial year.

Each report by the Treasurer is an opportunity for the Opposition to scrutinise government spending and hold it accountable.



■ Figure 5.10 – Bill Shorten's Opposition might be considered superior to that of Tony Abbott's in the sense that the ALP presented a cohesive outline of their policies. Source: Ross Caldwell, (Former) *Leader of the Australian Labor Party Bill Shorten*, 2016, Own work, CC BY-SA 4.0, <<https://commons.wikimedia.org/w/index.php?curid=49744153>>

Summary

- The party with the second-largest number of seats in the House of Representatives forms the Opposition. This party's leader becomes the Opposition Leader.
- The Opposition has two roles:
 - holding the government to account — fulfilling parliament's responsibility function; and
 - being a viable alternative government.
- The Opposition forms a 'shadow ministry' and a 'shadow Cabinet' — called the Opposition frontbench.
- Shadow ministers — or spokespersons — scrutinise their opposite members, that is, the ministers who form the ministry. They seek to highlight failings and embarrass the government, and so keep it accountable.
- All members of the Opposition are private members of parliament, including the Opposition frontbench.
- The Opposition uses a variety of parliamentary opportunities and tactics (powers) to hold the government to account. While parliamentary tactics do not result in the fall of a government they can be useful for embarrassing it.
- Parliamentary opportunities for accountability include:
 - question time;
 - censure motions and motions of no confidence;
 - debates;
 - calling for a quorum;
 - refusing pairs; and
 - calling for divisions.
- The Opposition can be more effective in the Senate if it can persuade Senate crossbenchers to vote with it against the government.
- The Opposition makes use of the media where possible to draw attention to government problems.
- As an alternative government, the Opposition must stand ready to govern at any time, especially if it faces a vulnerable minority government. Its shadow ministry may become the real Cabinet if the government falls to a no confidence motion.
- To be a viable alternative government, an Opposition needs to have policies. They may not reveal policies in detail, but the Opposition needs to create public confidence in its competence to govern.
- Oppositions are relatively weak, and there are several factors which undermine their effectiveness:
 - Australian Speakers may not be impartial;
 - a lack of resources for research, scrutiny and policy development; and
 - the dominance of the government in the House of Representatives.
- The Opposition may overcome these limitations:
 - by using third parties — such as accounting firms — to assist in policy development;
 - by benefiting from reforms such as the Charter for Budget Honesty; and
 - if it faces a disunited or weak government.

Exam practice questions

Short answer

- 1a) Explain what is meant by a 'viable alternative government'.
- 1b) Explain the relationship between the 'shadow ministry' and the 'shadow cabinet'.
- 1c) Discuss **two** parliamentary procedures of the Commonwealth Parliament the Opposition can use to hold the government to account.
- 2a) Define the term 'Opposition' as it applies to the Australian political system.
- 2b) Outline **three** factors which can affect the success of an Opposition in parliament.
- 2c) Discuss **one** argument for and **one** argument against the proposition that 'the Leader of the Opposition can hold the Prime Minister to account'.
- 3a) Explain the purpose of a censure motion in the Commonwealth Parliament.
- 3b) Outline **three** roles of the Opposition in the Commonwealth Parliament.
- 3c) Discuss the claim that 'governments are made and unmade by the House of Representatives'.
- 4a) Define the term 'leader of the Opposition'.
- 4b) Explain **one** way that the Opposition can effectively use its powers in the Senate.
- 4c) Discuss **one** argument for and **one** argument against the proposition that 'the Opposition provides a check and balance on the executive'.

Source Analysis

Read the source and answer all the questions that follow.

The source is adapted from: Katherine Murphy, 'Anthony Albanese kicks off Labor leadership race with call for policy shift'.¹

Anthony Albanese is making a concerted play for the Labor leadership, declaring the party's policy direction needs to change but signalling he would promote progressive values, as the count continues after Saturday night's election.

Shorten on Sunday confirmed he would remain in parliament and stay on as interim leader while the ALP sorted out who would succeed him in the top job. The party's national executive is due to meet on Monday to begin making arrangements for the ballot and the post-election postmortem.

While telling reporters on Sunday he had no criticism of Shorten as Labor leader, Albanese was candid about the weekend rout, noting Saturday night was a "devastating result for the Australian Labor party".

His pitch for the party leadership was that he was a known quantity with Australian voters and would take the political fight up to Morrison in a "vigorous fashion". But he said also he was prepared to look for common ground with his opponents in an effort to "bring the nation together".

Albanese said Labor needed to pursue "a fairer agenda, a more inclusive agenda, an agenda that brings the nation together on economic, social and environmental policies so that we can meet the challenges of the future".

continued overleaf

¹ Murphy, Katherine, 'Anthony Albanese kicks off Labor leadership race with call for policy shift', The Guardian, 19 May 2019, <<https://www.theguardian.com/australia-news/2019/may/19/anthony-albanese-kicks-off-labor-leadership-race-with-call-for-policy-shift>>.

He signalled it would be back to the drawing board in a policy sense if he secured the party leadership, putting an obvious question mark over the most contentious revenue measures of the campaign — like dividend imputation and negative gearing.

There was also a hat tip to voters in outer metropolitan areas and the regions, places where Labor significantly underperformed on Saturday.

Albanese said Labor needed to articulate an agenda for economic growth, not just talk about how it was prepared to redistribute wealth — an implicit criticism of Shorten and Bowen's campaign agenda.

Albanese said Labor needed to acknowledge it had now lost three elections in a row, and its supporters needed to be reassured that Saturday's result would not be repeated at the next federal election.

- 5a) Outline **one** role of the Opposition leader.
- 5b) With reference to the source, explain in your own words **two** ways that the Australian Labor Party needs to change if it is to win future elections.
- 5c) Discuss **two** powers that an Opposition can use to hold the government to account.
- 5d) Evaluate the extent to which recent Oppositions have been more successful in holding the government to account than in forming a viable alternative government.

Essay response

- 6) Evaluate the extent to which recent Oppositions have used their powers in the Commonwealth Parliament to achieve their roles.
- 7) 'The Opposition has been unable to perform its role in recent Parliaments'. Evaluate the validity of this claim.

Investigation

8) Activity 1

8a) Select one of the following Oppositions:

- Abbott Opposition
- Shorten Opposition

8b) Using this chapter and drawing upon additional research, compile information about your chosen Opposition. Use online news articles to help you.

Chosen Opposition	
Party	
Leader	
Years in Opposition	
Number of seats in the House of Representatives	
Examples of how this Opposition fulfilled its roles	
Holding the government to account	
Being a viable alternative government	
Examples (where applicable) of how this Opposition used parliamentary procedures	
Question time	
Motions of no confidence	
Censure motions	
Debate	
Quorums	
Pairs	
Divisions	
The effectiveness of this Opposition in the House of Representatives	
Factors affecting the success of this Opposition in the House	
Evaluation of the effectiveness of this Opposition in the House	
The effectiveness of this Opposition in the Senate	
Factors affecting the success of this Opposition in the Senate	
Evaluation of the effectiveness of this Opposition in the Senate	

continued overleaf

9) Activity 2

9a) Complete the tables below, using the “Party representation — seats won” data on the pages accessible via the following links:

2013 federal election:

<<https://results.aec.gov.au/17496/Website/HousePartyRepresentationLeading-17496.htm>>;

2016 federal election:

<<https://results.aec.gov.au/20499/Website/HouseDefault-20499.htm>>; and

2019 federal election:

<<https://results.aec.gov.au/24310/Website/HouseDefault-24310.htm>>

9b) With reference to the tables above, answer the following questions:

- i Which of Australia’s two major parties has formed the Opposition since the 2013 federal election?
- ii Describe the strength of the Opposition’s ability to hold the government to account after the 2013 federal election.
- iii Comment upon the extent to which the Opposition formed a viable alternative government after the federal elections of 2016 and 2019.

Composition of the House of Representatives after the 2013 federal election	
Party	Seats
Liberal/National Coalition	
Australian Labor Party	
Australian Greens	
Katter’s Australian Party	
Palmer United Party	
Independents	
Total	150

Composition of the House of Representatives after the 2016 federal election	
Party	Seats
Liberal/National Coalition	
Australian Labor Party	
Australian Greens	
Katter’s Australian Party	
Nick Xenophon Team	
Independents	
Total	150

Composition of the House of Representatives after the 2019 federal election	
Party	Seats
Liberal/National Coalition	
Australian Labor Party	
Australian Greens	
Katter’s Australian Party	
Centre Alliance	
Independents	
Total	151

Solutions at the back of this book



Claims to power

– Political mandates

Syllabus point:

- **Political mandates in theory and in practice, including competing mandates**

Introduction

Political mandates stem from the need of those with power to justify its use.

Political power is the capacity of those within a political system to influence the behaviour of others, including others within the same political system.

If forced to comply with its demands, people will often resist power. People tend to oppose illegitimate power and respect legitimate power.

What makes political power legitimate? In democracies, political mandates are an authority to use legislative and executive power. Sovereignty is vested in the people — the *demos* — so they are the source of power. It is the people who authorise the use of power. The people grant a mandate to those they elect so that they may govern for the people.

Mandates are based on political theory. However, they operate in the world of political reality.

How much authority does a mandate confer?

Political mandates are not legally enforceable. Mandates are persuasive.

Mandates are not legally enforceable

Constitutional law, convention and statute are the legal authorities for power. Those with the legal capacity to use power will use their power. They use mandates to convince others to accept their power. However, a mandate is not the true source of their power.

Australian political power has the features described below:

1. Parliament has legislative and financial power authorised and limited by the *Commonwealth of Australia Constitution Act 1900* (the Constitution).
2. Executive power is defined and limited by constitutional law, statute and conventions.
3. The Constitution creates a powerful Senate with veto power over the House of Representatives. If a Senate wishes to block a government bill, it will — regardless of the government's claim to a mandate.
4. If a government possesses majorities in both houses and can force a bill through parliament, it will — with little or no regard for the mandate claims of others.
5. New Oppositions — chastised by electoral loss — may respect a government mandate and give way to its will early in its term. Mature Oppositions often challenge and criticise a government, with little respect for its mandate.
6. Governments with a fragile majority, minority governments and divided governments may be feeble and lack authority. Others with parliamentary power — that is, the Opposition and balance of power senators — will exploit a weak government's feebleness and ignore its mandate claims.

Note how political power is authorised by constitutional law, convention and statute (features 1, 2 and 3), but may be influenced by other factors such as the size of a government majority or the time since the last election (features 4, 5 and 6). Mandates are useful when trying to influence the use of power.

“What matters are the power relationships between stakeholders with different types of political power. Where power favours one side, that side will prevail. A balanced distribution of power requires negotiation, compromise and consensus. Mandates provide support to those engaged in negotiating power.”

Power to persuade

Mandates are tools of persuasion.

In using political power in a democracy — where power is separated, checked and balanced between different political stakeholders — what matters is the ability to negotiate political outcomes.

First, one must possess power. Second, one must convince other power holding participants (that is, those able to check power) to agree to its use. Persuasion can alter the *balance* of power between participants in a democratic political system.

The possession of power comes from constitutional law, convention and statute. Persuading other political stakeholders — who also possess power — requires skill and validation. Mandates assist in validating power.

In practice, mandates are nothing more than a political tool for the persuasion of powerful stakeholders in the political system.

What matters are the power relationships between stakeholders with different types of

political power. Where power favours one side, that side will prevail. A balanced distribution of power requires negotiation, compromise and consensus. Mandates provide support to those engaged in negotiating power.

Political mandates in theory

Social contract theory supports democratic mandates. A contract is an agreement between two parties. The two parties to a democratic mandate are the legislators and governors, and the people — that is, the parliament and government on one side and the *demos* on the other.

In democracies, sovereignty is vested in the people — called ‘popular sovereignty’. In a representative democracy, sovereignty is delegated by the people to their elected representatives — who legislate and govern — for a limited time.

Elections delegate popular sovereignty and establish a ‘contract’ between governors and governed. Because the people have chosen those who govern, they are the people’s delegates and exercise popular sovereignty on their behalf until the next election. The people have a right to expect their chosen representatives to govern according to the promises, policies and ideologies they outlined before the people chose them.

If elected governors govern well, the people may renew their contract and vote them back into office for another term. If the governors ‘break the contract’ by failing to govern as expected or by governing badly, the people can withdraw their sovereignty and re-delegate it to new representatives and governors.



■ Figure 6.1 – The people are sovereign. They choose governors and legislators at elections giving them a ‘temporary’ mandate to govern until the next election.

Source: Stephen King, 2020

Representatives and governors are elected officials. They have authority because the people choose them as temporary custodians of popular sovereignty. Being ‘chosen by the people’ is the source of legitimacy for their political power. Moreover, elected officials can argue that their power should be respected because it is endorsed and authorised by the people.

Free, fair and regular elections are a fundamental requirement for trustworthy mandates in representative democracies.

Mandate theory in the Australian context

Mandates are claimed by:

- members of parliament — either in groups (as parties) or as individuals (Independents);
- governments; and
- others with political power — for example, the Opposition.

Mandates claimed by members of parliament and political parties

Sections 7 and 24 of the Australian Constitution create the Senate and the House of Representatives. Both Sections 7 and 24 use the words “directly chosen by the people” to prescribe how each house of parliament is to be formed. These words make Australia a representative democracy and legitimise legislative power.

Section 28 of the Constitution ensures federal elections occur at least every three years.

Sections 7 and 24 establish the ‘contract’, and Section 28 creates the ‘delegating mechanism’ for entrusting the people’s sovereignty to members of parliament. Most members of parliament are partisan, so through elections people also delegate power to political parties.

The Commonwealth Parliament contains a powerful Senate chosen by a proportional electoral system. Most Australian electors vote above the line on Senate ballot papers, meaning most senators are elected on group tickets decided by parties and so are not ‘directly

chosen' as individual candidates. Minor parties and Independent senators — who are more likely to be directly chosen by the people through below the line voting — can find themselves in powerful positions in such a chamber. They must find ways to justify the great power that comes from holding the balance of power in the Senate.

Mandates claimed by Australian governments

Section 64 of the Constitution requires ministers to be members of parliament.

The House of Representatives 'makes and breaks the government'. Through unwritten constitutional conventions, elected members of parliament may become members of the ministry — the executive branch. The principle of 'majority rule' is expressed through these conventions because the government must retain the confidence — the majority — of the elected lower house. Governments' claims to represent the 'will of the majority' are justified by these conventions.

Perceptive students will note that Australian governments are not directly chosen by the people. As Westminster 'parliamentary governments', they are indirectly elected.

In theory, parliamentary governments have a mandate because they are formed by, and within, an elected body — the lower house of parliament — in which they control the majority of seats. Because the government has been indirectly chosen by the people, it, too, has a contract with the *demos*.

In practice, the majority party in the House of Representatives won an election and formed the government. The size of a government's majority and the strength of its mandate are proportional.

An indirect election produces a weaker government mandate than that enjoyed by a directly elected government. For example, the President of the United States of America (US) President has a direct connection to US electors. Australian electors choose a parliament which then forms a government in which the lower house — the people's house — has confidence. Australian governments have a 'contract' with the parliament and, through it, the people. This means that the Australian government's responsibility to the people is exercised through the parliament. The form of Australia's parliamentary government has real consequences for the strength of government mandates.

Mandates for others with power

In Westminster systems, there is a legitimate role for an Opposition. The Opposition is part of the parliamentary system and uses parliamentary power to hold the government responsible to the House of Representatives, the house in which government is formed. It must justify the use of this power.

Oppositions do not have the mandate to govern, but they do have a claim to use power for accountability. Opposition power is linked directly to the size of the government majority. In rare cases, Oppositions may win more of the popular vote but fewer seats in the House of Representatives than the party forming the government. The 2001 general election delivered this type of result, with the ALP polling 37.8 per cent of the national vote, but winning only 65 seats in comparison to the Liberal Party, which polled 37.1 per cent of the national vote and won 68 seats. Results like this can complicate mandates.

All parties, members and senators claim they have the right to be heard in parliament.

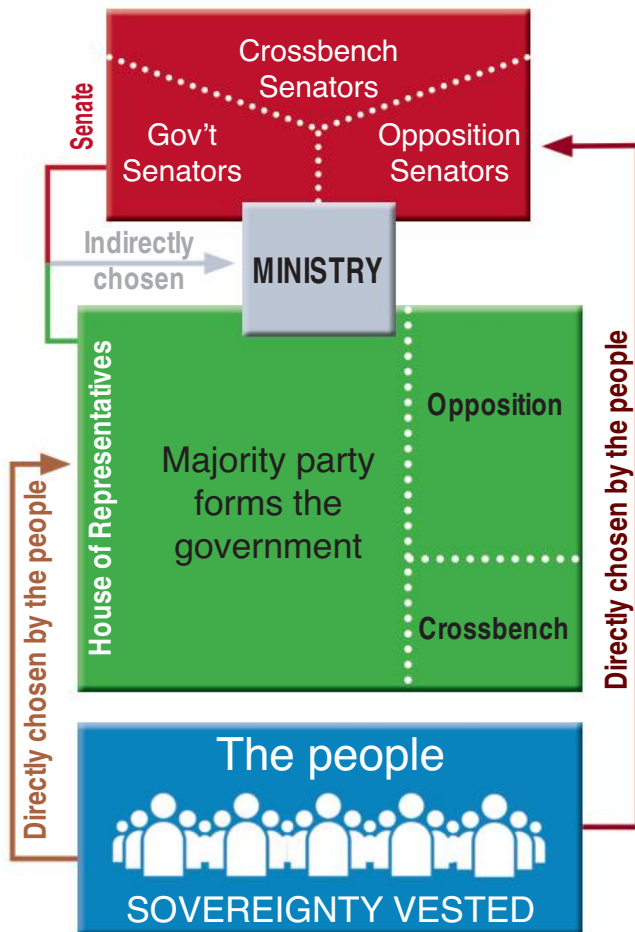
In recent times, Independent crossbenchers in the House of Representatives supported the Gillard (2010–2013) and Morrison Governments (2018–2019). These crossbenchers provided guarantees of confidence and supply — that is, passage of money bills — to minority governments to keep them in office. Crossbenchers in this powerful position rely on mandates from their electorates — where there may actually be no more than 105,000 people voting — to justify their power. Westminster conventions also justify their power.

Importance of elections

Elections are fundamental to mandates. They must be free, fair and regular. Based on these criteria, Australia's electoral system is amongst the best in the world.

Elections for the House of Representatives are free, fair and regular. They are administered by the independent Australian Electoral Commission (AEC), achieve one vote one value, and must be held at least every three years. They result in genuine mandates for members of the House of Representatives (MPs), parties and governments formed in the House of Representatives.

Elections for the Senate are free, not especially fair, and less regular than those for the House of Representatives. The AEC administers Senate elections. However, equal state representation regardless of a state's population undermines the principle of one vote one value. Most



■ Figure 6.2 – Popular sovereignty is delegated by the people *directly* to legislators — members of parliament and political parties — through direct election. The government — the Ministry — is *indirectly* elected via the elected House of Representatives applying Westminster conventions to form the government.

Source: Stephen King, 2020

senators are elected on group tickets decided by parties, making it harder to claim they are directly chosen by the people. Six-year terms for the 72 state senators reduces the frequency of mandate renewal. The four territory senators are elected every three years and may be able to claim stronger mandates.

Background information: Mandates throughout history

Throughout history, there have been various claims about the sources and justifications of power. Pharaohs claimed to be a god. Medieval monarchs claimed the divine right of kings. Chinese emperors had the 'Mandate of Heaven'. As the first democrats, Ancient Athenian leaders claimed a mandate from their fellow citizens.

Very few leaders have been as forthright as Chairman Mao Zedong of China. Mao claimed "power comes from the barrel of a gun". For him, power justifies itself.

Contemporary representative democracies — such as Australia — vest sovereignty in the people. This is called 'popular sovereignty'. US President Abraham Lincoln described democracy as "government of the people, by the people and for the people". The problem in large democracies is that popular sovereignty must be delegated to representatives to make popular self-government practical. It is the delegation of power that grants mandates to elected officials and authorises them to use power.

Political mandates in Australian practice

Types of mandate in the Australian context

The following discussion describes three types of mandate in Australia:

1. A 'will of the majority' mandate — as claimed by the government;
2. A 'balance of power' mandate — as claimed by Senate Independent crossbenchers and minor parties; and
3. A 'right to oppose' mandate — as claimed by the Opposition.

Governments claim a 'will of the majority' mandate

Election campaigns always precede elections. Political parties lay their policies before the electorate during a campaign. Parties make specific and general promises. For example:

- specific promises might be to:
 - reform income tax;
 - reduce Australia's carbon dioxide emissions;
 - build roads and rail; and
 - abolish an existing law; and
- general promises might be to:
 - be 'fiscally responsible' by keeping the budget in balance; and
 - support 'aspirational' Australians.

Example: The Coalition's 2019 election campaign promises

The Morrison Coalition Government (Liberal Party and the Nationals) won the 2019 election after promising to:

- 1. Pass specific new laws:** The Coalition promised to reduce taxes and simplify the tax system. They promised to create a 'climate solutions fund' and to reduce Australia's carbon dioxide emissions by 26 per cent below 2005 levels by 2030. The Coalition parties promised a \$4.6 billion program of funding for Catholic and Independent schools, to increase the number of apprenticeships and to legislate for religious freedom. Many other specific promises related to infrastructure, for example, road and rail projects.
- 2. Repeal specific old laws:** The Coalition promised to repeal the Medevac laws, which had been forced upon the weakened Morrison Government in early 2019 by the Home Affairs Legislation Amendment (Miscellaneous Measures) Bill 2019. Upon their return to government, the Coalition passed the Migration Amendment (Repairing Medical Transfers) Bill in December 2019. The passage of the Medevac repeal bill relied on the support of crossbench Senator Jacqui Lambie. The government secured Lambie's support after striking a secret deal.
- 3. Adopt general approaches in particular policy areas:** The Coalition committed to return the budget to surplus and manage the economy responsibly. In 2019 it was announced that for the first time in more than a decade the budget would be back in the black, with a surplus of \$7.1 billion. However, due to the COVID-19 pandemic this election promise was not fulfilled. In response to the pandemic the government created various economic stimulus packages which have resulted in a budget deficit of \$86 billion. This is expected to grow to \$184 billion in 2020–2021. They also promised to ensure electricity would remain reliable and become more affordable, and that coal would remain part of the energy mix.

- 4. Implement changes designed to achieve a general goal:** The Liberal Party promised to reward aspiration among 'quiet and hardworking' Australians. The political, social and economic philosophy of the two Coalition parties aligns with the principle: 'reward for hard work'.

Note that 1 and 2 form **specific** objectives, whereas 3 and 4 form **general** intentions.

Specific mandates

Specific mandates are a sub-category of the 'will of the majority' mandate. Governments claim specific mandates for promises and policies canvassed during an election campaign. It can claim its pledges were endorsed by the people.

See: *Example: The Coalition's 2019 election promises* (numbers 1 and 2).

General mandates

General mandates are another sub-category of the 'will of the majority' mandate. A specific mandate cannot justify policies devised after an election campaign. To overcome this limitation, governments often justify mid-term policy or proposed legislation through an appeal to their party's worldview or values.

Coalition governments tend to appeal to their liberal or conservative values, which underpin the Liberal Party's political, social and economic philosophy. The Nationals appeal to conservatism and regionalism. Labor governments appeal to progressive values. They argue that electors chose their party to form the



■ Figure 6.3 – Scott Morrison personally led the Coalition to victory in the 2019 election.

Source: Office of U.S. Secretary of Commerce, *Scott Morrison*, 2019, Public Domain, <<https://commons.wikimedia.org/w/index.php?curid=88456010>>

government because of its political, social and economic philosophy. The electorate's choice of their party implies popular endorsement of their philosophy and, hence, any new policy or legislation based on party ideology.

See: *Example: The Coalition's 2019 election promises* (number 3 & 4).

Background information: Mandates in Australia and Britain

In Britain, a government which is unable to pass a specifically mandated policy — one which is *a significant election commitment* — through parliament is considered to have failed a no confidence motion and, by Westminster convention, should resign. Britain's weak bicameralism means a government cannot blame a hostile upper house for its failure to pass critical legislation. Therefore, a failure to legislate significant election commitments implies that a British Government has lost the confidence of the House of Commons.

In Australia, governments may blame the powerful and independent Senate for a failure to legislate election commitments. There is a long history of Australian governments not resigning when unable to legislate significant election commitments. Some recent examples include:

- the Rudd Government (2007–2010), which could not get its Carbon Pollution Reduction Scheme passed;
- the Abbott Government (2013–2015), which could not legislate its promised parental leave reforms; and
- the Turnbull Government (2016–2018), which was unable to legislate its full tax cuts as promised.

The three governments above all had critical bills blocked in the Senate. However, none resigned because the House of Representatives passed their policies. If the lower house had rejected them, the result would probably have been entirely different.

Senators claim a balance of power mandate

There are several features that make the Senate unique in terms of mandates. The Senate:

- is a powerful chamber;
- is a states' house;
- is usually an independent chamber; and
- exhibits electoral malapportionment.

Australia's political system exhibits strong bicameralism, where both houses of parliament have co-equal powers. Strong bicameralism means Senate parties and Independents must be able to justify their power.

As members of a states' house, senators may claim a constitutional right to exercise power on behalf of their state. Section 7 of the Constitution is the basis of these claims.

The Senate's proportional representation electoral system tends to result in a 'hung house'. A good part of the time, no party or coalition of parties has a majority of Senate seats. Without the numbers to form a Senate majority on their own, the government has to 'build' Senate majorities via negotiation for every piece of contentious legislation or vote on a Senate motion. Individual senators may possess the deciding vote when assembling majorities by negotiation.

The government and Opposition each have just under half the seats in a typical Senate. Senators from minor and micro parties or Independents make up the balance. They sit in party groups or individually on the Senate crossbench. These crossbench senators hold the 'Senate balance of power', placing them in a powerful position. They are able to use their position to vote with or against the government to pass or defeat government bills.

Senators holding the balance of power are powerful because they decide what passes the Senate if the government and Opposition do not agree with each other. Perceptive students will also note that Senators holding the balance of power represent small fractions of the electorate because they need only 14.3 per cent of a state vote to win a Senate quota. Students might also like to consider this level of power and what justifications there might be for claiming a mandate from such a small proportion of Australian electors.

■ Figure 6.4 – The Jacqui Lambie Network held the balance of power in the 46th Parliament.
Source: Gary Houston, *Memorial unveilings Bernie*, 2015, Public Domain, <<https://rationalwiki.org/wiki/File:Memorial-unveilings-Burnie-20150331-001-crop.jpg>>



The Senate balance of power mandate	
Justifications	Criticisms
Section 7 of the Constitution states that “the Senate shall be composed of Senators for each State, directly chosen by the people of the State”. Thus, electors in states directly elect the Senate, giving it a democratic mandate to wield power over legislation.	The Senate is designed by, and entrenched in, Section 7 of the Constitution as a states’ house. It is a federal chamber and not a people’s house. The Senate does not represent the people — it represents states.
Dual voters — also called strategic voters — cast their votes as follows: • they vote for a major party in the House of Representatives — that is, the party they wish to form the government; and • they vote for a different party or Independent senator in the Senate — that is, a party or Independent they wish to hold the government accountable via the Senate’s ‘house of review’ function.	Equal state representation creates malapportionment, which results in: • electors in different states being unfairly represented; and • the power of senators from small states being significantly enhanced. The Senate does not act as a states’ house; in practice, it is partisan and independent.
See: <i>Background information: Growing support for minor parties</i>	See: <i>Background information: Senate voting and the strength of a mandate</i>
See: <i>Table 6.2 showing the percentage of dual voters</i>	See: <i>Example: Tasmanian senators with the Senate balance of power</i>

■ Table 6.1 – Justifications and criticisms of the Senate balance of power mandate.
Source: Stephen King, 2020

From a mandate perspective, there is a constitutional problem with Senate representation. Section 7 of the Constitution ensures the Senate — as a states’ house — represents all states equally despite the differences in their populations. In short, electors voting for the Senate do not have equal voting power, and the Senate suffers from malapportionment as a result. Small states are over-represented, and large states are under-represented. For example, it makes a Tasmanian Independent senator sharing control of the balance of power one of the most powerful, yet unrepresentative, members of parliament. See: *Example: Tasmanian senators with the Senate balance of power*.

Great power in the hands of a few senators who represent a small proportion of the Australian population requires a mandate. See: *Background information: Senate voting and the strength of a mandate*.

See Table 6.1 for the justifications and criticisms of the Senate balance of power mandate.

Background information: Growing electoral support for minor parties

Falling electoral support for the two major parties — the ‘parties of government’ — is steadily undermining their claim to a ‘will of the majority’ mandate. Meanwhile, rising support for minor parties and Independents is enhancing their claims to a ‘balance of power’ mandate. The Coalition parties and Labor now rely on a strong flow of second preferences to win seats. Relying on preferences dilutes Coalition and Labor governments’ claims to represent the ‘will of the majority’.

Table 6.2 indicates the percentage of Australian electors who vote strategically. The larger the number, the more valid the claim to a senate balance of power mandate.

Minor parties and Independent senators assert that dual — or strategic — voting expresses a democratic intention to hold the government to account through the Senate. They claim strategic voting validates their use of the ‘balance of power’.

Election	House of Representatives (per cent)	Senate (per cent)	Difference between Senate and House (dual voters) (per cent)
2013	21.3	32.2	10.9
2016	23.5	35.03	11.53
2019	24.7	33.22	8.52

■ Table 6.2 – Percentage of electors voting for minor parties or Independents in the 2013, 2016 and 2019 elections.
Source: Stephen King, 2020

Background information: Senate voting and the strength of a mandate

The Senate voting system can distort mandates for individual senators. Senators elected by above the line group tickets are less 'directly chosen by the people' because electors chose the party, not the person. Independent senators are more likely to be elected through an active elector choice to vote below the line for a specific candidate. Independents elected via a 'below the line campaign' can claim a significantly stronger mandate when using their balance of power vote.

Example: Tasmanian senators with the Senate balance of power

A historical example — which still resonates in contemporary Australia — is that of Independent Senator Brian Harradine from Tasmania. Holding the balance of power between 1994 and 1999, Harradine could veto government bills. Harradine is the prime example of a senator with unrepresentative power. He held the balance of power for a period during Prime Minister Paul Keating's government (1991–1996). Keating famously referred to the Senate as "unrepresentative swill"¹ in frustration at having Harradine wield such immense power.

When first elected, Harradine polled around 0.12 per cent of Australia's eligible voters and never polled higher than 21.3 per cent of the Tasmanian vote — around 9,000 voters. Despite representing a small percentage of the overall Australian vote and about a fifth of Tasmanian votes Harradine had the power to veto bills in the period 1994 to 1996.

Jacqui Lambie is a contemporary example of a Tasmanian senator sharing the Senate balance of power. See the *Case study: Jacqui Lambie*.

Governments versus the balance of power senators

A government can claim a mandate through attracting votes from more than half of the electors represented by 151 electorates around Australia. A senate crossbench with the balance of power represents a tiny fraction of the Australian electorate.

Both governments and balance of power senators can make claims to legitimate democratic power. Yet their mandates conflict.

The dilemma is illustrated by the following two questions:

- should the will of the majority of Australian electors override the expressed wishes of strategic voters or state electors? and
- alternatively, should the Senate respect the will of the majority of Australians and pass government legislation with little resistance, even though it has the power to block bills?

Thinking about underlying political philosophies can help us understand competing mandates. Philosophy will not resolve the dilemma, but it helps us understand and accept it. See: *Background information: Political philosophies and competing mandates*.

Background information: Political philosophies and competing mandates

Australia is a 'liberal democracy'. Liberal democracy combines two political philosophies that are complementary, yet can be in tension with one another.

1. Liberalism argues for limited government and protection of individual freedoms and rights. The Senate represents a greater diversity of Australians and is a powerful and independent house of review. These features make the Senate the appropriate chamber for upholding liberalism.
2. Democracy supports the will of the majority. The House of Representatives accurately reflects electors' wishes due to its one vote, one value electoral system. It is the house of the people, and it is the house of government. These features make the House of Representatives the appropriate chamber for reflecting in government the will of the majority, that is, for democracy.

Liberalism and democracy are complementary because democracy allows the people to govern themselves. It embodies freedoms such as freedom of speech. Liberalism and democracy can conflict if a majority of citizens choose an 'illiberal' government. Imagine the majority despise a particular group in society and elect a government that persecutes that minority — it would be an elected tyranny. An elected tyranny would be an 'illiberal democracy'. Table 6.3 summarises the two political philosophies.

Perceptive students will note that the complementary and competing natures of

¹ Hon Paul Keating, Prime Minister, 'Loan Council arrangements', Questions without notice, Hansard, 4 November 1992, p 2547.

liberalism and democracy coexist in the Australian political system by design. The Founding Fathers designed it that way, and subsequent changes to Senate voting — specifically the 1949 change to proportional voting for Senate elections — have enhanced

this feature of Australian democracy.

From a philosophical perspective, the answer to the question: ‘which mandate should take precedence?’ is ‘both mandates deserve their place in a liberal democracy’.

	Liberalism The Senate	Democracy The House of Representatives
	The Senate balance of power helps achieve the following liberal principles:	The House majority (that is, the government) helps achieve the following democratic principles:
Underlying philosophical position	emphasises individual liberty and rights	emphasises collective will of the people
Attitude to government	distrust of government and a belief that its power threatens individual liberties	belief in government as a force for progress and the betterment of society
Attitude to limits on government power	belief in limited government through strong liberal institutions — for example, the Senate	trust in government as an expression of the will of the people should be respected
Attitude to minorities and their rights	resists a ‘tyranny of the majority’. Minorities must have a voice in parliament to protect their liberties from the majority	respect for minorities, tempered by a belief that they must not be able to veto the will of the majority
Philosophical support for	‘balance of power’ mandate	‘will of the majority’ mandate
Impact on houses of Parliament	Senate is a ‘liberal’ institution	House of Representatives is a ‘democratic’ institution

■ Table 6.3 – The complementary and competing nature of ‘liberalism’ and ‘democracy’ in modern ‘liberal democratic’ government.
Source: Stephen King, 2020

Opposition’s right to oppose

The Opposition in a Westminster system has a legitimate role in opposing, scrutinising and holding the government to account. As the second-largest party in the House of Representatives, the Opposition also has a significant level of electoral support, giving it some claim to represent the interests of a significant minority of Australians.

Example: A mandate to oppose government

See the *Case study: A tale of three Oppositions* for information about recent Oppositions.

Oppositions have two legitimate roles in a Westminster system, namely:

- holding the government accountable; and
- providing a viable alternative government.

Both roles of the Opposition are made legitimate by constitutional conventions.

Both the Abbott and Shorten Oppositions were authorised — that is, mandated — by the constitutional arrangements of the Westminster system to oppose, scrutinise

and hold the Rudd, Gillard, Abbott, Turnbull and Morrison governments to account. They used powers available through parliamentary processes and procedures to limit government power and hold it in check.



■ Figure 6.5 – Australian Labor Leader Bill Shorten speaking at a rally in Melbourne protesting cuts to the ABC and SBS.
Source: John Englart (Takver), Flickr, *Bill Shorten*, CC BY-SA 2.0, <<https://commons.wikimedia.org/w/index.php?curid=43428859>>

Mandates — Big claims with little substance

Any claim to a mandate is a purely political device without any legal basis.

Power is relational. Mandates serve to alter the power relationships between those wanting to exercise power. In other words, a mandate is claimed by anyone who wishes to influence power in the hope that it will strengthen their ability to do so.

There is no LEGAL argument for any mandate. However, there is a *philosophical* argument for both the will of the majority and balance of power mandates. Australia — like most modern democracies — is a liberal democracy. The term liberal democracy combines two political philosophies that are in tension with one another. The tension between them is the source of the conflict.

Democratic values are based on:

- a belief in government as a force for progress and reform;
- trust in government as an expression of the will of the majority which should be able to enact that will; and
- respect for minorities tempered by a belief that they must not be able to veto the majority will.

The above is a good argument for the **‘will of the majority’ mandate**.

Liberal values are based on:

- distrust of government because its monopoly on coercive force may threaten individual liberties;
- the belief that strong liberal institutions must limit government; and

- a fear of democracy as a ‘tyranny of the majority’. Minorities must have a voice in parliament to protect their liberties from the majority.

The above is a good argument for a **‘balance of power’ mandate**.

“A mandate is claimed by anyone who wishes to influence power in the hope that it will strengthen their ability to do so.”

Thinking about mandates

Students are encouraged to debate these philosophical points of view. At the heart of every liberal democracy — including Australia’s — is a tension caused by these two essential, yet contradictory, ideas. Both are right, but struggle to co-exist.

Readers should be aware that the will of the majority mandate and the balance of power mandate are inherently incompatible with each other, and that is why they are competing mandates. Despite their incompatibility, philosophical arguments can be made in support of each — as outlined above.

Summary

- The exercise of power must be legitimate if the people are to accept its influence over their lives.
- Historically, power has been legitimised by claims to mandates from heaven, from God, from the ability to control military power, and from ideology. None of these is acceptable in a liberal democracy.
- In a liberal democracy, sovereignty is permanently vested in the people. Therefore, the authority to exercise power must come from the people.
- In representative democracies, the people delegate their sovereignty to their governments and legislators through periodic elections.
- Governments and parliaments enter into a 'social contract' with the people via an election. If they break the contract through broken promises, poor governance or corruption, the people may withdraw their consent at the next election and delegate their sovereignty to new governments and parliaments. A 'mandate' is a claim to power based on a contract with the people.
- Democratically elected governments are expressions of majority rule. They represent a 'will of the majority' and claim to exercise power based on this democratic ideal. The House of Representatives — which is elected by an electoral system based on 'one vote, one value' — forms the government and gives it democratic legitimacy.
- Westminster Oppositions — such as Australia's — are loyal to the system of government, but can legitimately oppose the government of the day. They may claim a 'right to oppose', especially if a government has a slim majority or is a minority government.
- Crossbenchers in the House of Representatives may claim mandates when threatening confidence or supply against a minority government — that is, threatening either of the two conditions for a government to remain in office.
- A complex system of proportional representation elects the Senate. The system cannot deliver one vote, one value because of equal state representation, and this undermines claims to democratic legitimacy. Nevertheless, senators and minor parties claim a 'balance of power' mandate because they are democratically elected. In doing so, they are basing their claims on liberal values which justify limits to governmental power to prevent tyranny. Senate voting reforms in 2016 have increased the democratic legitimacy of senators by taking from parties the power to determine preferences and giving it to electors, and by simplifying the method of voting.
- In reality, power is relational. It depends entirely on power balances within parliament, and between the parliament and the government. Mandates are claims to power; they do not legally authorise power. They can only be used to persuade and convince others with power.

Exam practice questions

Short Answer

- 1a) Explain what is meant by 'political power'.
- 1b) Outline **three** arguments in favour of senators claiming they have a 'balance of power' mandate.
- 1c) Discuss the extent to which the current government holds a mandate.
- 2a) Define the term 'political mandate'.
- 2b) Outline **three** types of mandates in the Australian context.
- 2c) Discuss the claim that 'mandates are grounded in political theory, but operate in the world of political reality'.
- 3a) Identify **two** elements of Section 24 of the Commonwealth Constitution (Australia).
- 3b) Distinguish between **two** 'competing mandates'.
- 3c) Discuss **one** argument for and **one** argument against the proposition that 'a majoritarian mandate and a balance of power mandate both have a place in a liberal democracy'.
- 4a) Explain what is meant by the 'will of the people'.
- 4b) Explain the relationship between mandates and elections.
- 4c) Discuss **one** argument for and **one** argument against the proposition that 'the Opposition has the right to oppose a government's mandate'.

Source analysis

Read the source below and answer the questions that follow.

The source is adapted from: J R Nethercote, 'The legitimacy of 'mandate''.¹

Few observers of Australian national politics will be surprised that, with a change of government, questions about 'mandate' asserted themselves almost immediately. In the past six decades, 'mandate' has been an important rhetorical device employed against or by a range of governments, notably those of Chifley, Menzies, Whitlam and Howard.

'Mandate' has particular and active pertinence in Australia. Since adoption of the present method of electing the Senate, it has provided a rhetorical framework for inter-house battles that are at their most intense when a new ministry takes office. In this period, only one such ministry has had a majority in the Senate — that of Malcolm Fraser in 1975.

Otherwise, new governments have invariably had a bicameral fight on their hands; when it is said that their vanquished opponents live to fight another day, the instrument as well as the forum for continuing battle is the Senate.

Its prominence in the past 150 years stems from association with democratic government. Dwight D. Eisenhower, President of the United States from 1953 to 1961, best captured its meaning. He titled his presidential memoirs *Mandate for Change* and the relevant chapter 'Promises to Keep'.

In parliamentary democracies, 'mandate' evolved to meet the view that, at elections, voters should be informed about how their representatives, if successful, would conduct themselves in parliament and in office; elections were increasingly considered to be about measures as well as men.

continued overleaf

¹ J R Nethercote, 'The legitimacy of 'mandate'', *The Sydney Morning Herald*, 13 September 2013, <<https://www.smh.com.au/politics/federal/the-legitimacy-of-mandate-20130912-2tncq.html>>.

Benjamin Disraeli gave the concept added significance when he successfully advanced the proposition that governments should not make major changes in the constitution of the nation (broadly conceived) without first submitting themselves to the judgment of the people.

In Australia, because of the combination of the great powers of the Senate and its elected character and legitimacy, new governments, having jumped the electoral hurdle, must then, usually, jump a parliamentary hurdle, the more formidable because of the rigid party discipline that marks our politics.

- 5a) Outline what is meant by a 'general mandate'.
- 5b) With reference to the source, explain in your own words, **two** problems that new governments face in implementing their respective mandates.
- 5c) Discuss **two** arguments in favour of the 'balance of power' mandate.
- 5d) Evaluate the extent to which mandates are nothing more than a political tool for the persuasion of powerful stakeholders in the Australian political system.

Essay

- 6) 'A mandate is claimed by anyone who wishes to influence power in the hope that it will strengthen their ability to do so'.
Evaluate this claim, making reference to both the theory and the practice of competing mandates.
- 7) Evaluate the extent to which competing mandates can impact the government's ability to exercise political power.

Investigation

Using the 'Browse promises' section of the ABC's 'Promise Tracker' on the Coalition Government's 2013 election commitments,² answer the following questions:

- 8a) Identify three promises that the Coalition made during the 2013 federal election campaign which were enacted after the Coalition won political power.
- 8b) Identify three promises that the government failed to implement during its time in office despite receiving a mandate at the election for their implementation.
- 8c) What is the relationship between a government making promises at an election and claiming a mandate?
- 8d) Discuss the significance of a government 'breaking' its electoral commitments.

Micro and minor parties can wield political power over the legislative agenda of the parliament.

- 9a) Investigate each of the following bills:
 - Medevac Bill 2019 — the Home Affairs Legislation Amendment (Miscellaneous Measures Bill) 2019;
 - Medevac Repeal Bill 2019 — the Migration Amendment (Repairing Medical Transfers) Bill 2019; and
 - Ensuring Integrity Bill 2019 — the Fair Work (Registered Organisations) Amendment (Ensuring Integrity) Bill 2019

² ABC News, 'Promise Tracker: The Coalition Government's 2013 election commitments', <<https://www.abc.net.au/news/2014-04-22/promisetracker/5295600>>.

- 9b) For each of the bills above, describe the role of one micro or minor party in determining the outcome of the bill's passage through parliament. Include the following details in your answer:
- the issue addressed by the bill;
 - the position of the government towards the bill;
 - the chamber in which your chosen micro or minor party had an influence;
 - the number of seats held by your selected micro or minor party; and
 - how your chosen micro or minor party exercised political power over the bill's passage or rejection.
- 9c) With reference to contemporary examples, discuss the extent to which micro and minor parties claiming a 'balance of power' mandate can limit the political power of the government.

Read the case study below and answer the questions that follow.

The Coalition went to the 2019 federal election pledging that it would deliver a budget surplus in 2020, the first in more than a decade. In February 2020, however, in response to the economic shock of the COVID-19 pandemic, the Prime Minister refused to recommit to this pre-election promise.

Speaking to journalists, the Prime Minister commented, "Now when we framed the budget a year ago, hands up those who thought there was going to be a coronavirus epidemic when the budget was released last May? Of course no one did. These are unknown global shocks, so we're dealing with those shocks".³

The economic impact of the global COVID-19 health crisis has reverberated throughout the entire domestic economy. The Morrison government's response includes increased payments for the unemployment, as well as wage subsidies and additional support for businesses. The government's stimulus package totals an unprecedented 213.6 billion dollars in direct Commonwealth spending. In April, the Treasurer, Josh Frydenberg, noted that as a result, "there will be a debt burden that will be left to pay for years to come, but we will approach those issues in the considered way that we have done in the past".⁴

Moreover, Kevin Rudd referred to himself as an 'economic conservative' during the 2007 federal election campaign, promising that a Labor government would balance the budget over its years in office. Less than a year after Rudd's election, however, world markets collapsed, triggering the global financial crisis. The Labor government's response amounted to 51 billion dollars in stimulus spending. Although Australia was one of only three developed nations to avoid falling into a recession, the government was criticised during subsequent election campaigns as having contributed to a "debt and deficit disaster".⁵

- 10a) Discuss the extent to which governments can claim a mandate to implement policies that they did not take to the Australian people at an election.
- 10b) When might a government be justified in deviating from the electoral promises for which it has a mandate?
- 10c) To what extent do the policy responses of the Rudd and Morrison Governments to unforeseen economic crises reveal a chasm between the theory and the reality of mandates?

3 Sarah Martin, 'Morrison steps away from surplus pledge amid 'unknown global shock' of coronavirus', *The Guardian*, 25 February 2020.

4 James Hennessy, 'Treasurer Josh Frydenberg warns there will be a significant 'debt burden' due to the coronavirus, but says there are no plans to raise GST', *Business Insider Australia*, 14 April 2020.

5 Mark Kenny, 'Despite huge coronavirus stimulus package, the government might still need to pay more', *The Conversation*, 22 April 2020.





Power to adjudicate – Power and the High Court of Australia

Syllabus point:

- **Roles and powers of the High Court of Australia, including Sections 71, 72, 73, 75, 76 with reference to at least one common law decision and at least one constitutional decision**

Introduction

Chapter 3 of the Commonwealth of Australia Constitution Act 1900 (the Constitution) creates the third branch of the Australian system of government. It thus completes the **separation of powers** that is a crucial principle of democracy.

The third branch of government is the ‘judicature’, which is the term the Constitution uses. In contemporary language, judicature means ‘judiciary’. Courts are the central institutions of the judiciary.

The purpose of Chapter 3 of the Constitution

Chapter 3 of the Constitution achieves several vital purposes.

1. It **creates** the federal judiciary and vests the ‘judicial power’ of the Commonwealth in a federal Supreme Court called the High Court of Australia.
2. It specifies an **exclusive power** for the Commonwealth Parliament to create new federal courts.
3. It entrenches the **independence of the judiciary** by protecting it from the other arms of government.
4. It defines **judicial powers** — called ‘jurisdictions’.
5. It provides **constitutional protection** for one of the few rights specified in the Constitution — a right to trial by jury for indictable federal offences.

Judicial power is inferior to legislative power, which is authorized by a democratic mandate. Therefore, the authority of the courts is always subject to that of parliament.

Each of these purposes — except number 5 — will be covered in detail in this chapter. Section 80 of the Constitution entrenches a right to trial by jury for federal indictable offences. Rights protection will be dealt with in greater detail in the rights component of Unit 4.

What is judicial authority?

Before considering the roles and powers of the High Court, it is worth considering the sources of its authority. The judiciary is the only arm of government that is not elected — directly or indirectly — by the people. It thus has no democratic mandate and can never claim to reflect the wishes of the people. However, it does have authority.

The sources of judicial power and authority derive from:

- the Constitution itself;
- the *Judiciary Act 1903* — the statute which sets out the legal framework for the courts;
- the common law — a large body of precedent which guides the exercise of contemporary judicial power;
- long-established norms and maxims that govern judicial decision making. *Stare decisis* — the doctrine of precedent — natural justice and the rules of statutory interpretation are examples of common law norms and maxims;
- accountability through appeals; and
- tradition and heritage. Over centuries courts have created fundamental principles — for example, *habeas corpus* — and developed common law legal rights — for example, the *right to silence* and the *presumption of innocence*.

Judicial power is inferior to legislative power, which is authorised by a democratic mandate. Therefore, the authority of the courts is always subject to that of parliament. The parliament expresses democratic majority rule and may override the courts in almost all matters. The only exceptions are High Court constitutional interpretations, which are immune from legislative power. The superiority of parliament preserves the democratic principles of popular sovereignty and majority rule concerning judicial power.

Despite being the only branch of the three arms of government with no democratic legitimacy, the people have more trust in the judiciary than in either the parliament or the executive government.¹ Its independence, dispassionate authority and political neutrality make it well respected.

¹ Barnett, Katy ‘News: High Court is Australia’s most trusted institution’, *Opinions on high*, Melbourne Law School, 2014, <<http://blogs.unimelb.edu.au/opinionsonhigh/2014/07/01/news-high-court-is-australias-most-trusted-institution/>>.

Judicial power defined

Court decisions are law

Judicial power is the power to determine “rights and duties by applying and interpreting the law, usually in order to resolve a dispute”.² In short, it is the power to adjudicate.

A defining characteristic of judicial power is its finality. The rule of law applies to judicial decisions because court rulings are a form of law. Complying with a court ruling is an obligation for the parties to a case and may create precedents with a broader application.

Section 71 — A federal judiciary

Section 71 has three functions. It:

- creates the High Court;
- enables the creation of a federal court hierarchy; and
- permits cross-vesting of judicial power.

High Court of Australia

Section 71 vests the judicial power of the Commonwealth in a “Federal Supreme Court to be called the High Court of Australia”.

Other federal courts

Section 71 specifies that parliament shall have the power to create “other federal courts”. Thus, parliament has an exclusive power to legislate for new federal courts. Over time, parliament has created a ‘federal court hierarchy’ by using its Section 71 power. Courts created under Section 71 are called ‘Chapter 3 courts’. The federal court hierarchy is separate from state court hierarchies — which is another example of the distribution of power that defines federalism.

Australia continues to operate a state-based Family Court.

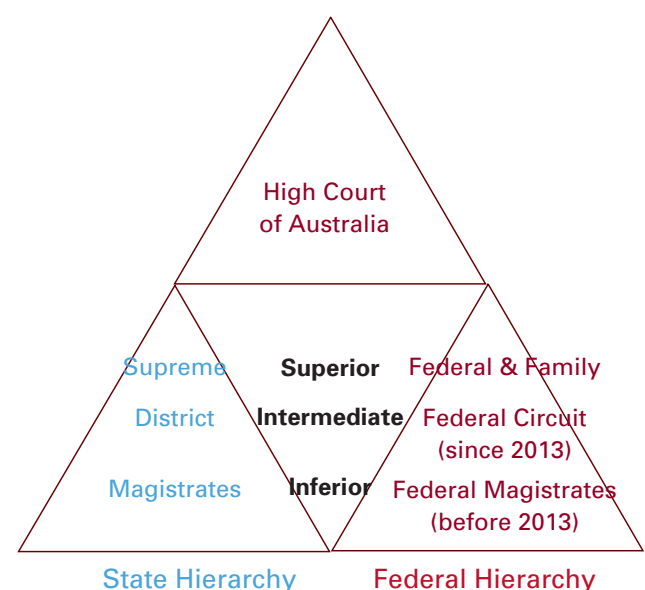
The increasing workload of the High Court led to the *Federal Court of Australia Act 1976*. Through this Act parliament created the first federal court with general federal jurisdiction. The Federal Court reduced the caseload of the High Court. Both the Family Court of Australia and the Federal Court of Australia are superior courts — equivalent in the court hierarchy to state Supreme Courts.

To cope with increasing caseloads, the Commonwealth Parliament passed the *Federal Magistrates Act 1999*. The Act created the Federal Magistrates Court, which initially was an inferior court. In 2013, however, it was redefined as an intermediate court and renamed the Federal Circuit Court of Australia with the aim of reducing the workload of the Federal Court of Australia.

Background information: Section 71 — Exclusive power to create new federal courts

The exclusive power to create new federal courts was rarely used until the 1970s. Until then, ‘cross-vesting’ allowed most federal matters to be adjudicated by state and territory courts using the federal jurisdiction vested in them by parliament. In 1930 the Federal Court of Bankruptcy was created, followed in 1956 by the Australian Industrial Court. Both of these courts were highly specialised federal courts.

The *Family Law Act 1975* created the federal Family Court of Australia, a court with specific jurisdiction in family law. Except for Western Australia, all states have referred their family law powers to the Commonwealth and abolished their family courts. Western



■ Figure 7.1 – A simplified diagram of the Australian court hierarchy, with the federal judiciary shown in red text. All federal courts are ‘Chapter 3 courts’ created under Section 71 of the Constitution.

Source: Stephen King, 2020

2 Saunders, Cheryl, *The Australian Constitution*, Constitutional Centenary Foundation, Carlton, 1997, p 76.

As a result of increasing federal caseloads, since the 1970s the Commonwealth Parliament has created additional Chapter 3 courts. Following the establishment of a federal court hierarchy using the power expressed in Section 71, the Commonwealth has relied less on cross-vesting federal jurisdiction in state courts.

A simplified Australian federal and state court hierarchy is shown in Figure 7.1 on previous page.

Cross-vesting

Section 71 allows the parliament to vest courts in other jurisdictions with federal power. The practice of vesting judicial power across jurisdictions is called ‘cross-vesting’. Cross-vesting gives state and territory courts the power to hear federal cases. Vesting state courts with federal jurisdiction reduces the cost of operating multiple courts in many jurisdictions. It also reduces the duplication of legal skills and personnel.

The *Jurisdiction of Courts (Cross-vesting) Act 1987* is Commonwealth legislation that vests state courts with federal jurisdiction. As the Preamble to the Act states, “inconvenience and expense have occasionally been caused to litigants by jurisdictional limitations in federal, State and Territory courts”.³ Cross-vesting reduces these inconveniences and costs. Each jurisdiction passes reciprocal legislation.

Cross-vesting was commonly used by the Commonwealth until the 1970s, but as federal caseloads grew the Commonwealth created federal courts arranged in a federal court hierarchy to reduce its workload. See: *Background information: Section 71 — Exclusive power to create new federal courts*, which is located above.

Background information: High Court defends the separation of powers

On several occasions the High Court has interpreted ‘judicial power’ as it is defined by Chapter 3 of the Constitution. The High Court can interpret its powers and those of other federal courts when it defines the meaning of Section 71. The High Court has vigorously defended the independence and separation of federal judicial power. As a result, only the High Court and other Chapter 3 courts created by parliament under Section 71 can exercise judicial power.

The *Boilermakers Case (R v Kirby; Ex parte Boilermakers Society of Australia)* [1955–56] 94 CLR 254) involved a dispute over the powers of the Commonwealth Court of Conciliation and Arbitration. Section 51(xxxv) of the Constitution limits the Commonwealth to ‘arbitration and conciliation’ as methods to resolve industrial disputes which involve more than one state – ‘adjudication’ is not included. The Commonwealth Parliament established the Commonwealth Court of Conciliation and Arbitration under Section 71 to adjudicate industrial disputes. The statute vesting the new industrial court with judicial power allegedly breached the separation of powers created in the Constitution. In a decision which (a) strictly separated the judicial power from other powers, and (b) narrowly defined ‘judicial power’, the High Court ruled that the Commonwealth Court of Conciliation and Arbitration could not exercise both an ‘arbitration’ power and a ‘judicial’ power. The effect of this case was to limit judicial power strictly to Chapter 3 courts.

Brandy’s Case (Brandy v Human Rights and Equal Opportunity Commission) [1995] 183 CLR 245) involved a dispute concerning the powers of the Human Rights and Equal Opportunity Commission (HREOC). Mr Harry Brandy had an order made against him by HREOC. The HREOC — not being a court — could not enforce its decisions. However, the *Human Rights and Equal Opportunity Commission Act 1986* allowed its decisions to be registered in the Federal Court, making them enforceable by that court. Brandy argued that this effectively gave HREOC judicial power, despite it not being a Chapter 3 court. The High Court agreed with him. Brandy’s Case stripped HREOC of judicial power.

Both of these cases mean that only courts created under Chapter 3 of the Constitution may be vested with judicial power.



■ Figure 7.2 — The High Court sits at the apex of the court hierarchy in Australia.

Source: John Conway, *High Court of Australia*, 2004, CC BY-SA 3.0, <<https://commons.wikimedia.org/w/index.php?curid=362517>>

3 Preamble, *Jurisdiction of Courts (Cross-vesting) Act 1987*.

Section 72 — Judicial independence

The separation of powers is a crucial principle of democracy. The rule of law requires a judiciary free from interference by either the executive or legislative branches of government.

Section 72 of the Constitution achieves the separation and independence of the judiciary by separating the powers to appoint and remove judges, and protects their pay. See: *Background information: The Governor-General's role in appointing and removing judges*. Separation and independence of judicial power are achieved by:

- Section 72(i) — the Governor-General appoints federal judges on the advice of the Attorney-General, a member of Cabinet;
- Section 72(ii) — the Governor-General may remove judges after the legislative branch — both houses of parliament — vote to do so, but only on the grounds of “proven misbehaviour or incapacity”; and
- Section 73(iii) — protects judges’ pay, which can increase, but never reduce.

Background information: The Governor-General's role in appointing and removing judges

The Governor-General possesses the formal power to appoint and remove judges. However, these powers are only used on advice from the government — for appointments — and the parliament — for removals. The role of the Governor-General in appointing and removing judges reflects the fusion of the executive and legislative branches. Recall that the Governor-General is part of the executive and the parliament.

Section 72 ensures the involvement of the other two branches of government in the appointment and removal of judges. It incorporates these

checks and balances to ensure the independence of judges. Moreover, because the government is often a party to cases, the power to remove judges — a power that may be misused to threaten them — is deliberately separated from the executive.

The parliament’s power to remove judges is restricted and can only be used on the grounds of “proved misbehaviour or incapacity”. This prevents parliament from dismissing a judge for political reasons. The Constitution does not define any of the words ‘proved’, ‘misbehaviour’ or ‘incapacity’. The vagueness of these words is deliberate and forces parliament to debate the conduct or capability of a judge before voting to remove them. Parliamentary debates are public, ensuring public accountability for the ultimate power of dismissal. Parliament has never removed a federal judge under Section 72(ii) — a fact that reinforces the sanctity of judicial independence.

Section 72 was altered by referendum in 1977 to make it compulsory for judges to retire by age 70. Before 1977, judges could serve for life. This change reflects the need to refresh the High Court with new talent and perhaps reduce the issue of ‘incapacity’.



Figure 7.3 — Chief Justice Susan Kiefel is due to retire in 2024 when she reaches the age of 70.
Source: High Court of Australia

Roles and powers of the High Court of Australia

Jurisdictions

Jurisdiction means ‘where the law speaks’. Its jurisdictions define the High Court’s roles and powers. See: *Background information: Roles and powers of courts*.

Background information: Roles and powers of courts

The role of courts is to interpret the law, declare its meaning and resolve disputes. A court’s powers depend on the extent of its jurisdictions, namely:

- its geographical authority;
- the areas of law over which it has authority; and
- its rank in a court hierarchy.

Geographically, Chapter 3 federal courts have jurisdictions that usually apply to the whole of Australia. The Federal Family Court is an exception because Western Australia has not referred its family law powers to the Commonwealth.

The Federal Court and Federal Circuit Court are courts with general legal jurisdiction, whereas the Federal Family Court has a specific legal jurisdiction restricted to family law.

Within a court hierarchy, inferior courts hear simple — summary — matters. In contrast, intermediate and superior courts hear more serious cases where the law and the cases are complex, and the consequences more serious.

The High Court's jurisdictions are as follows:

- geographical jurisdiction — the whole of Australia and its territories;
- legal jurisdictions — sole jurisdiction over the Constitution, treaties, legal disputes between Australian governments and other forms of law specified in the Constitution. See: *Background information: Appellate and original jurisdiction*; and
- appeals — the High Court is the final court of appeal, situated at the peak of all federal, state and territory court hierarchies — from which appeals originate.

The roles of the High Court follow from its jurisdictions. For example, its jurisdictions include interpreting the Constitution and acting as Australia's final court of appeal.

The powers of the High Court also follow from its jurisdiction. For example, it has the power to alter the Constitution's meaning because it has jurisdiction to interpret its words. It has the power to create new common law because appeals are often the source of new precedents.

High Court legal jurisdictions

The High Court has two types of legal jurisdiction, both assigned by the Constitution:

- appellate jurisdiction; and
- original jurisdiction.

Background information: Appellate and original jurisdiction

A court with the power to decide appeals has appellate jurisdiction. Its role is to review the decisions of lower courts. Only courts

at the intermediate and superior levels in a court hierarchy have appellate jurisdiction. It is noteworthy that courts with appellate jurisdiction may create new common law — meaning one role of the High Court is the development of common law.

A 'court of first instance' has original jurisdiction. Original jurisdiction refers to the areas of law a court can interpret. Some courts have general jurisdictions and some have specialist jurisdictions. A court of first instance has the role of hearing cases the first time they appear in court. The court's role is to resolve a legal dispute by applying the law and considering the facts — the evidence — when deciding a new case. Courts have the power to impose legally binding decisions on the parties. If one or both of the parties to a case is dissatisfied with the judgment, they may appeal the decision. If so, they must appeal to a court vested with appellate jurisdiction.

Some decisions — if made in higher courts — can become precedents and create new common law. Courts may develop new common law within their original or appellate jurisdiction. However, a new precedent is more likely to come about as a result of an appeal.

The High Court has both original and appellate jurisdiction.

The High Court's appellate jurisdiction — Section 73

Section 73 of the Constitution specifies and defines the appellate jurisdiction of the High Court. The High Court has the power to hear appeals on all civil, criminal, administrative and other matters arising from Australia's lower courts in the federal, state and territory hierarchies. The court's appellate powers give rise to its role as the ultimate court of appeal.

Section 73 gives parliament the exclusive power to determine which appeals the High Court may hear. Section 35A of the *Judiciary Act 1903* specifies the circumstances for a Special Leave to Appeal. Special Leave to Appeal controls the caseload of the High Court by giving it the power to decide which appeals it will hear. As a result, there is no automatic right to appeal to the High Court. An appellate court — like the WA Court of Appeal — will have heard an appeal before a case reaches the High Court. As a rule, the High Court will only grant Special Leave to Appeal if it appears there may be:

- a miscarriage of justice;

- a question of law, which creates the possibility to develop the common law — that is, a new precedent may be set; or
- a conflict between courts.

If the High Court rejects an application for Special Leave to Appeal, the case ends and the previous decision stands. The parties then will have exhausted all appeal options.

The High Court is a *final* court of appeal, not a *general* court of appeal because Special Leave to Appeal is not automatic.

Background information: The High Court becomes Australia's final court of appeal — Section 74

Since 1986, the High Court has been Australia's final court of appeal. The High Court's appeal decisions are final; there is no further avenue of appeal. However, this was not always the case.

Section 74 of the Constitution once permitted appeals from Australian courts directly to Britain's Privy Council, the highest court of the former British Empire and the contemporary Commonwealth of Nations. Beginning in 1968, the Commonwealth Parliament progressively limited appeals from Australian courts to the Privy Council.

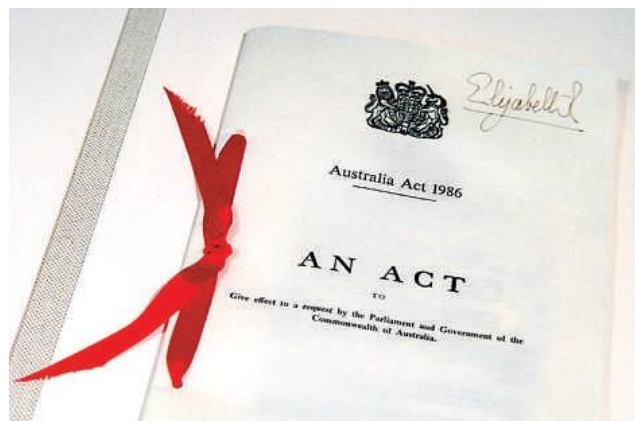
Before 1975, the British Privy Council could hear appeals from the High Court. The *Privy Council (Appeals from the High Court) Act 1975* closed this avenue of appeal. However, appeals directly from state Supreme Courts to the Privy Council — bypassing the High Court — could still occur. The *Australia Act 1986* — passed by the Commonwealth, state and Westminster Parliaments — finally severed appeals from Australia to the Privy Council.

The *Australia Acts 1986* mark the judicial independence of Australia from Britain. Section 74 has since become a 'dead letter' section of the Constitution.

The High Court's original jurisdiction — Sections 75 and 76

Two sections of the Constitution specify the High Court's original jurisdictions.

Section 75 specifies original jurisdiction over treaties with other countries and international organisations such as the United Nations. Cases involving the states or the Commonwealth as parties, and cases between different governments of the Australian federation — called *inter se* cases — are also part of the High Court's Section 75 original jurisdiction.



■ Figure 7.4 – The *Australia Act 1986* document.

Source: Simon East, *The Australia Act 1986*, 2005, CC BY-SA 3.0, <<https://commons.wikimedia.org/w/index.php?curid=5074463>>

Section 75(v) specifies the High Court jurisdiction over writs of mandamus, prohibitions or injunctions. These are legal remedies the High Court can impose to right wrongs committed by the executive branch.

Background information: Link to Unit 4 — Executive accountability through judicial review

The High Court's role of checking, reviewing and holding the executive to account flows from its Section 75(v) powers.

Mandamus, prohibitions and injunctions are three remedies the High Court can award where a party proves the government has committed administrative wrongs. Mandamus is a remedy that can compel a particular government official to carry out a specific action required by the court. Writs of prohibition and injunctions are remedies that can prevent a government from doing a particular thing.

Section 75(v) remedies are judicial checks on executive power. Judicial review of government decisions is a topic covered in Unit 4 under the accountability of the executive.

Section 76 allows the parliament to grant additional original jurisdiction to the High Court. This section permits some flexibility for High Court roles and powers to be expanded by the parliament as it sees fit and as circumstances change. Section 76 is an example of how the Australian Constitution is adaptable to future needs.

The High Court's most well-known original jurisdiction — its power to interpret the Constitution — is granted by parliament under Section 76, which, in part, states:

The Parliament may make laws conferring original jurisdiction on the High Court in any matter:

i. arising under this Constitution, or involving its interpretation.

Section 30 of the *Judiciary Act 1903* confers this original jurisdiction on the High Court. It is a further example of how parliament may use ordinary statute to expand the original jurisdiction of the High Court.

Background information: What is the source of the High Court's constitutional jurisdiction?

It is one of the oddities of the Constitution that the power to interpret the Constitution was placed in Section 76 and, therefore, subject to the will of the parliament, and not

explicitly in Section 75, where it would be immune from any statute. Section 76(i) states that original jurisdiction may be conferred on the High Court by parliament in any matter "arising under this Constitution, or involving its interpretation". Sections 75(iii) — matters in which the Commonwealth is a party; 75(iv) — matters involving different state jurisdictions; and 75(v) — matters involving a writ of mandamus — do, however involve constitutional matters without directly stating "matters arising under or involving its interpretation".

Section 75, therefore, specifies power to interpret the Constitution. Further jurisdiction is granted by the *Judiciary Act 1903*, which specifies additional Section 76 powers to interpret Australia's fundamental law.

The High Court's role in interpreting the Constitution flows from the powers specified in Sections 75 and 76.

The roles of the High Court of Australia

The roles of the High Court flow from its jurisdictions. In broad terms, the High Court has two leading roles:

- determining constitutional cases under its Sections 75 and 76 original jurisdictions; and
- hearing appeals under its Section 73 appellate jurisdiction. Appeals may lead to new precedents; hence the High Court has a role in developing the common law.

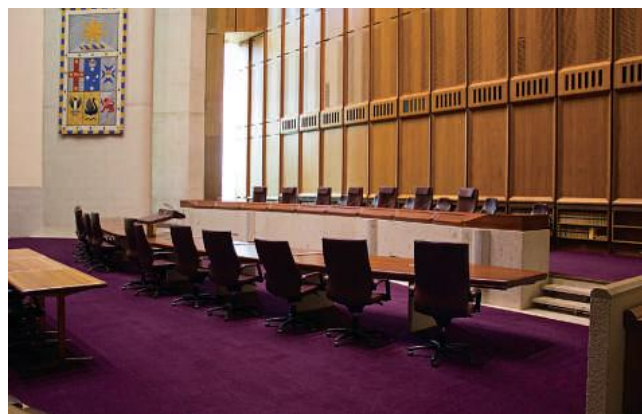
It also hears cases between governments — see: Chapter 9 on Australian Federalism; cases involving treaties — see: Chapter 15 on human

rights; and others matters such as when it acts as the Court of Disputed Returns in relation to election results.

Interpreting the Constitution

The Australian constitutional system is a combination of written and unwritten rules that create, define and allocate the powers of government. The Constitution also specifies some governance processes such as election frequency. It protects some rights and provides for other major institutions and practices of the Australian system of government, the primary example being federalism.

Not all parts of the constitutional system are within the power of the High Court to interpret. The High Court can interpret only the written Australian Constitution. It cannot directly interpret unwritten conventions. See: *Background information: The Constitution — What can the High Court interpret?*



■ Figure 7.5 – Court Room 1 is used for hearings that require a full bench of seven justices.

Source: Bidgee, Robert Myers, Court Room 1 of the High Court, 2011, CC BY-SA 3.0 au, <<https://commons.wikimedia.org/w/index.php?curid=19673306>>

Background information: The Constitution — What can the High Court interpret?

There are two elements to Australia's constitutional system:

- Westminster conventions; and
- The Australian Constitution.

These two elements of Australia's constitutional system impact the roles and powers of the High Court.

First, unwritten Westminster conventions are non-justiciable, meaning a court cannot adjudicate them. Courts can only interpret written law. The High Court has limited roles and powers in this sphere of the constitutional system. Nevertheless, it may make interpretations based on implications inherent in a Westminster system. The scope of executive power — implied by Section 61 — is an example of powers governed by conventions that have been interpreted by the High Court in cases such as *Williams v Commonwealth of Australia* [2012] HCA 23.

Second, the *Commonwealth of Australia Constitution Act 1900* is an Act of the Westminster Parliament. Being a written law, the Constitution is justiciable and capable of interpretation. Disputes over how to understand the meaning of the Constitution are the basis of 'constitutional cases' heard by the High Court.

From time to time, disputes arise as to the meaning of the Constitution. Disputes centre on what particular words mean.

Typical constitutional disputes centre on:

- whether its words should be interpreted narrowly or widely;
- whether its words should be interpreted strictly or flexibly;
- whether its wording contains unstated inferences or implications; and
- whether the spirit or nature of the Constitution — for example, the essence of *federalism* — should imply how the Constitution ought to operate.

Words are powerful — especially the words of the Constitution. High Court interpretations of its words can change their meaning and can affect:

- the scope and federal division of legislative power — the power to make statute;
- the scope and federal division of financial power — the power to tax and spend money;
- the extent and limitations of executive prerogative power — the power of the executive branch to act independently of parliament and without its approval;
- rights and how they are protected; and
- the nature of judicial power.

Students should refer to *Case studies: Court cases on the High Court's interpretation of the Constitution*.

The High Court's interpretation of the Constitution

Individuals, pressure groups, political parties, corporations and governments may wish to question the meaning of the Constitution. They may become parties to constitutional cases heard by the High Court.

Discovery of implications contained within the Constitution

The meaning of the Constitution as a whole, not merely its words and sections, is capable of interpretation by the High Court. For example, the Constitution establishes at least two features of the Australian political and legal system that the High Court has found determine the character of the Australian political system:

1. Representative democracy; and
2. Federalism.

Both these political concepts have resulted in broad interpretations about the nature of the political system, not just the definitions of specific words and powers. These broad interpretations rest on the 'spirit' or 'nature' of the Constitution.

Students should refer to *Case studies: Spence v Queensland; Roach; and Discovering an implied right: The implied freedom of political communication* for further details about the cases included in Table 7.1, overleaf.

Nature or spirit of the Constitution	What is implied	Consequence	High Court cases / interpretations
The Constitution is a 'federal' constitution Chapters 1, 2 and 3 create a national government and Chapter 5 creates state governments The Constitution allocates powers to both levels	Both levels of government need sufficient power to govern within their spheres of responsibility Neither level should interfere with the other level's right to govern within its sphere of responsibility	Residual powers should be reserved for the states The states should be immune from Commonwealth power The Commonwealth should be prohibited from interfering in state responsibilities	The doctrine of reserved state powers (abolished in 1920) The doctrine of implied immunities and prohibitions (abolished in 1920) Spence v Queensland (2019) protected state powers to make electoral law
The Constitution creates a 'representative democracy' Sections 7 and 24 create two houses of parliament to be 'directly chosen by the people'	Australians have a right to vote for their representatives Australians have a right to communicate and consume political ideas so they may make informed political choices	Attempts to disenfranchise certain groups may be unconstitutional Australians are free to create and to consume 'political communication'	Roach v Electoral Commissioner (2007) protected prisoners' right to vote Australian Capital Television PL v Commonwealth (1992) established an implied right to political communication

■ Table 7.1 – Discovery of implications contained within the Constitution
Source: Stephen King, 2020

The final court of appeal

Section 73 of the Constitution specifies the High Court's appellate jurisdiction. The court may hear appeals from all federal, state and territory courts.

The High Court may create new common law through its decisions on appeal cases. Common law is developed through reversing or overruling existing precedents, distinguishing cases from previous precedents and through new interpretations of the statute. The landmark *Mabo Case* (1992) overruled an old precedent and created the common law principle of native title. The recent *Timber Creek Case* (2019) further developed the common law of native title through interpreting a statute. See *Case study : Timber Creek*

An appeal occurs when a party wishes to have a judgment reviewed by a court with appellate jurisdiction. As outlined above, the High Court must grant Special Leave to Appeal before it will hear an appeal.

Appellate courts create common law. The High Court is the ultimate appellate court. The High Court may develop common law when it:

- reverses a case on appeal; or
- interprets statute in new ways and declares the law; or
- overrules existing precedent.

For more on appeals and examples of how the High Court has changed the common law, students are referred to the *Case studies* section of this book and Chapter 14 — Accountability and the courts.

Summary

- Section 71 — the first in Chapter 3 of the Constitution — vests Commonwealth judicial power in the High Court and in other federal courts the Commonwealth Parliament may create.
- The Commonwealth Parliament has created other Chapter 3 courts. Examples are the Federal Court of Australia, the Federal Family Court and the Federal Circuit Court.
- Judicial power is the power to determine rights and duties by applying and interpreting the law, usually in order to resolve a dispute. Court decisions are legally binding — that is, they are law — and apply to the parties to the case.
- The rule of law demands an independent judiciary. Section 72 entrenches judicial independence. The High Court has further guaranteed the strict separation of judicial power in cases such as the *Boilermakers' Case* (1955–1956) and *Brandy's Case* (1995).
- The High Court has appellate jurisdiction granted by the Constitution in Section 73. It is the final court of appeal in the Australian judicial hierarchy.
- The High Court has original jurisdiction conferred by Section 75, and the parliament may add additional original jurisdiction under Section 76. Its primary original jurisdiction is its power to interpret the Constitution.
- Deriving from its original and appellate jurisdiction are the High Court's two leading roles:
 - interpreting the Constitution; and
 - deciding appeals, sometimes creating common law in the process.
- When interpreting the Constitution, the High Court may change the meaning of the legislative and/or financial powers of the Commonwealth Parliament. It may also change the meaning of the Commonwealth's executive powers in Section 61.
- High Court constitutional interpretations may also draw on the nature or spirit of the Constitution to discover what it implies. In the past, doctrines of interpretation based on implications were critical guiding principles for the High Court. Implied rights are a fundamental part of the Constitution.
- Common law develops when the High Court reverses or overrules existing precedents. It also develops when the High Court interprets statutes and declares the law.
- Cases which alter the meaning of the Constitution are called landmark cases.

Exam practice questions

Short answer

- 1a) Identify **two** functions of Section 71 of the Commonwealth Constitution (Australia).
- 1b) Outline **three** roles of the High Court of Australia.
- 1c) With reference to **one** example, discuss the significance of the High Court's original jurisdiction for the Australian political and legal system.
- 2a) Explain what is meant by the 'judiciary'.
- 2b) Identify **one** aspect of Section 72 of the Commonwealth Constitution (Australia) and briefly explain its significance.
- 2c) Discuss the significance of the Boilermakers' Case and Brandy's Case for the separation of powers.
- 3a) Define the term 'judicial independence'.
- 3b) Outline **three** sources of judicial power derived from Chapter 3 of the Commonwealth Constitution (Australia).
- 3c) Outline **one** contemporary issue involving legal power and discuss its impact on the political and legal system in Australia.
- 4a) Explain the purpose of Chapter 3 of the Commonwealth Constitution (Australia).
- 4b) With reference to the Commonwealth Constitution (Australia), distinguish between 'appellate jurisdiction' and 'original jurisdiction'.
- 4c) Discuss the significance of **one** common law decision of the High Court for Australia's political and legal system.

Source analysis

Using the judgment summary of *Pell v The Queen* [2020] HCA 12 (the Pell Case),¹ answer the following.

- 5a) Explain what is meant by 'special leave to appeal'.
- 5b) With reference to the source, explain in your own words **two** of the High Court's reasons for its decision in the Pell Case (2020).
- 5c) Discuss the significance of the High Court's decision in the Timber Creek Case (2019) for common law in Australia.
- 5d) Assess the influence of the High Court of Australia in defining the power of the legislative and executive arms of government.

Essay

- 6) With reference to examples, analyse how and why judicial power is exercised in Australia's political and legal system.
- 7) 'Decisions by the High Court have had a significant impact on the exercise of power by different arms of government across both the Commonwealth and state levels of government'. Evaluate this claim.

¹ *Pell v The Queen* [2020] HCA 12, <<https://www.hcourt.gov.au/assets/publications/judgment-summaries/2020/hca-12-2020-04-07.pdf>>.

Investigation

The Australian Constitution grants the High Court both original and appellate jurisdiction.

8a) Complete the table below:

Jurisdiction	Definition	Constitutional source of jurisdiction	Examples of cases
Original jurisdiction			
Appellate jurisdiction			

8b) Explain the relationship between the High Court's original and appellate jurisdiction.

The High Court's constitutional and common law decisions can have significant implications for Australia's political and legal system.

9a) Investigate:

- one of the following sets of constitutional cases:
 - Williams No. 1 [2012] and Williams No. 2 [2014] HCA 23
 - Love v Commonwealth [2020] and Thoms v Commonwealth [2020] HCA 3

OR

- one of the following common law cases:
 - the Timber Creek Case (2019)
 - the Pell Case (2020)

9b) For your chosen case, explain:

- why the case was brought to the High Court and by whom;
- with reference to the Commonwealth Constitution (Australia), why the High Court was allowed to hear the case; and
- discuss the outcome of the case and the significance of High Court's decision for the Australian political and legal system.





Power to influence lawmaking

Syllabus point:

- **Lawmaking process in parliament and the courts, with reference to the influence of:**
 - **individuals**
 - **political parties**
 - **pressure groups**

Introduction

What motivates people to want to change the law? A belief in the ‘ideal’ society motivates those with an ideological worldview. Self-interest often motivates people or groups of people. Sometimes a principle — for example, equality, fairness or efficiency — provides the drive to change laws.

This chapter examines how individuals and groups like political parties and pressure groups try to influence lawmaking. Table 8.1 defines the terms ‘individuals’ and two types of ‘groups’ — ‘political parties’ and ‘pressure groups’ — as they are used in this chapter.

Individuals	Any natural persons — not artificial persons like a corporation — including Independent members of parliament and public servants, but excluding persons who are partisan members of parliament, members of the executive and the judiciary.
Groups	Political parties are political associations registered with the Australian Electoral Commission. They are associations of like-minded people formed to win seats in parliament to control executive power — that is, to form a government — or influence legislative power. Partisan members of parliament are included in ‘political parties’.
	Pressure groups are associations formed to influence lawmaking. Pressure groups do not usually seek election to parliament. Instead, they exercise freedoms of speech and association, and the right to political communication to engage in a range of activities to exert pressure on the government or members of parliament, or to win court cases.

■ Table 8.1 – Definitions of ‘individuals’, ‘political parties’ and ‘pressure groups’ as used in this chapter.
Source: Stephen King, 2020

Laws

Sixteenth century English political philosopher Thomas Hobbes defined law as “the formal glue that holds fundamentally disorganised societies together”.¹ For Hobbes, laws prevented the “war of all against all” and made civilised society possible.² John Austin — an 18th century English jurist — described the law as “a body of rules fixed and enforced by a sovereign political authority”.³ Austin identified the role of a political sovereign in making and enforcing laws. Influencing the political sovereign is the way to influence lawmaking. In contemporary representative democracies such as Australia, the political sovereign is the parliament.

Laws provide the framework for a peaceful and cohesive society. They do this by compelling

some behaviours — such as paying taxes and obeying road rules — while prohibiting others, such as assault and theft. Laws are influential because they are a means of social control. To influence laws is to influence power.

The main types of law are constitutional law, statute and common law. The key lawmaking institutions in Australia are parliaments and courts. Therefore, to be able to influence laws, individuals and groups must participate in the political and legal system.

Figure 8.1 summarises the ways individuals and groups may influence lawmaking in the parliament and the courts.

TYPES OF LAW		
CONSTITUTIONAL LAW	STATUTE	COMMON LAW
Ways to influence Individuals and groups must be parties to constitutional cases in the High Court.	Ways to influence Individuals and groups must engage in political representation and popular participation to influence parliament.	Ways to influence Individuals and groups must be parties to cases decided by courts with appellate jurisdiction.

■ Figure 8.1 – The types of law and how individuals and groups may influence them.⁴
Source: Stephen King, 2020

1 Hobbes, Thomas, *Leviathan* 1651.

2 Hobbes, Thomas, *Leviathan* 1651.

3 Austin, John, *Province of jurisprudence determined*, 1832.

4 Note: This table does not include referenda as ways to influence the Constitution.

The power of law depends on the type of law. Constitutional law is superior to all other forms of law. A statute is a form of ordinary law made by parliament and is superior to common law. Common law is a form of ordinary law made by courts.

The influence individuals and groups have on lawmaking depends on the type of law.

Ways to influence lawmaking

Through the courts

Court decisions influence the common law and the meaning of a statute. Chapter 3 of the *Commonwealth of Australia Constitution Act 1900* (the Constitution) vests the High Court of Australia (High Court) with original and appellate jurisdictions that may alter the meaning of the law. Other federal courts are vested with jurisdictions by the *Judiciary Act 1903*. Superior and intermediate federal courts may alter the meaning of the law.

High Court cases can influence the meaning of the Constitution. Parties to a court case may influence the common law, statute or the Constitution depending on the nature of their case and jurisdiction of the court.

Individuals, political parties and pressure groups must be parties to a case if they are to influence lawmaking through the courts. Political parties may also be parties to court cases in areas of law that are being challenged by others.

An individual or pressure group who wins a High Court constitutional case will influence the political and legal system itself. Moreover, parliament and other courts will not be able to undo the changes they make. See the section titled *Individuals influence lawmaking*.

Through the parliament

The parliament is the most potent lawmaking institution. Section 1 of the Constitution vests it with the legislative power of the Commonwealth. It makes statute which can override the courts' common law and delegate legislative power to the executive. Parliament is superior to the executive and judicial branches in all aspects of law except the Constitution. Therefore, control of parliament is the most effective way to influence lawmaking in Australia.

Political parties are more effective than individuals or pressure groups in influencing statute. The reason is that political parties are the critical powerbrokers of legislative power within the parliament. However, any member of parliament — including Independent members — may introduce bills, participate in legislative

debate, propose amendments in committees and vote on bills — all of which can influence statutes.

Australian political parties exist to win electorates in the House of Representatives or win Senate seats in each state. They have several strategies for influencing lawmaking in the parliament. The strategies they choose depends on the degree and geographical distribution of their electoral support.

“Individuals, political parties and pressure groups must be parties to a case if they are to influence lawmaking through the courts.”

Individuals may also influence statute by participating in political activities such as writing submissions to parliament or contacting their representative.

Pressure groups influence statute through a range of strategies such as advertising, lobbying, direct action and other methods. These strategies aim to pressure MPs or the Ministry to make changes to statute.

Table 8.2, overleaf, summarises how individuals, political parties and pressure groups influence the major types of laws.

Type of law	Sub-types of law	Ways to influence	Significance
Constitutional law	Australian Constitution	Referendums are initiated by political parties, often in response to community pressure. ⁵ High Court challenges by individuals, political parties and pressure groups are based on interpretations of the Constitution.	Eight out of 44 referendums were successful. While infrequent, sometimes the impact is significant. Example: Constitution Alteration (Aboriginals) 1967 Act High Court interpretations have been enormously significant.
	Unwritten constitutional conventions	Influenced by 'political actors'	Not applicable
Statute	Government bills	Forming a government is the most successful way for any political party to influence statute. The party forming the government dominates the House of Representatives and its legislative processes. It also initiates all money bills. Forming a coalition or alliance with a major party in government is a successful way for minor parties to influence statute.	Government bills form the overwhelming majority of bills passed by parliament. Government bills are highly influential — the government introduces many types of legislation, including 'policy', 'amending', 'consolidating' and 'repealing' legislation. These bills form the bulk of legislation.
	Money bills	Being in Opposition is a less successful way for a major party to influence statute. A small group of minor parties and Independent senators often control the Senate. They have significant power to influence lawmaking. Holding the Senate balance of power is a successful way for a minor party to influence statute.	Money bills must start in the House of Representatives — the government introduces them. The government's budget is the most significant financial legislation introduced in any particular year.
	Private members' bills	Pressure groups and individuals lobby government, members of parliament and political parties to influence statute. They also write submissions to parliament.	Money bills may be 'negotiated' by the Senate through the Estimates process where non-government political parties may influence government spending. Private members' bills are rarely successful. The Opposition political party, government back benchers and Independent members introduce private members' bills.
Common law	Developing the body of common law	Individuals, political parties and pressure groups must have standing in order to be 'parties to a case' and take court action. Parties must convince the court their case should be distinguished from older precedents or reverse or overrule existing precedents.	The impact depends on the level of the court in a court hierarchy. The common law developed by the High Court is binding on all Australian courts. State Supreme Court precedents bind lower state courts and are persuasive precedents for other Australian courts.
	Declaring the meaning of a statute	Individuals, political parties and pressure groups must have standing in order to be 'parties to a case' and take court action. Cases resulting in new statutory interpretations alter the meaning and operation of a statute.	The impact can be significant depending on the social, economic or other function of the particular statute.

■ Table 8.2 – The major types of law and the ways individuals, political parties and pressure groups can influence them.
Source: Stephen King, 2020

5 Note: Unwritten constitutional conventions and referenda are not discussed in this chapter.

Parliament and the courts

Before examining how individuals, political parties and pressure groups influence lawmaking, it is essential to understand the roles and powers of the two major lawmaking bodies through which they may influence laws.

There are two principal lawmaking institutions within the Australian political and legal system; they are the parliament and the courts. Each has its separate roles, powers and characteristics, which complement the other. Table 8.3 compares these two lawmaking bodies.

The parliament, characterised by:	The courts, characterised by:
Democracy — no other institution in the system is directly elected by the people. Sections 7 and 24 of the Constitution require each house to be 'chosen by the people'.	Authority — courts rely on deeply entrenched legal maxims and norms that have evolved over centuries. The hierarchy of courts reinforces this tradition. The doctrine of precedent is an example.
Sovereignty — parliament is the final authority on the law because it has democratic legitimacy.	Apolitical independence — courts respect the separation of powers when interpreting a statute and common law. Unless interpretations are unjust or absurd, judges will read Acts in plain English — as parliament intended.
Superiority to other lawmaking institutions — statute is superior to common law made by courts and regulations made by the executive. Parliament is superior due to its democratic and sovereign nature.	Inferiority to parliament — judges are subject to statute law. Parliament may over-ride (abrogate) common law. Common law created by courts does not have any democratic legitimacy; that is why it is inferior.
Flexibility, responsiveness and proactiveness — parliament can legislate new Acts, and repeal and amend existing ones at any time. Statutes are general and future focused (<i>in futuro</i>). They can develop quickly and respond to developing circumstances.	Incrementalism and reactivity — law made by courts (called 'case' law or 'common' law) — develops case by case. It develops slowly and in response to unforeseen events after they have occurred (<i>ex post facto</i>).

■ Table 8.3 – A comparison of the parliament and courts as the two key bodies through which individuals, political parties and pressure groups attempt to influence lawmaking.
Source: Stephen King, 2020

Individuals influence lawmaking

Many people wish that laws were different. Only a few will actively try and change them, and of these people few are successful. Why?

Most people limit their political participation to voting in elections. However, some individuals may be very active, highly motivated or influential because of personal factors such as drive, wealth, circumstances celebrity or knowledge

Individuals can influence the law by taking court action that may result in new common law, or different interpretations of statute law or of the Constitution. Some individuals become Independent members of parliament and influence statute law directly through participation in the legislative process.

Individuals are usually not very influential in lawmaking because they lack:

- resources — they do not have enough money or time;
- access to the key decision makers — that is, ministers and parliamentarians; and

- organisational support — they are on their own.

However, there are instances where individuals have been successful, some impressively so.

Influencing lawmaking in the courts

Individuals are 'natural persons', which simply means they are real people. In law, corporations, governments and other parties to court cases are 'artificial persons' with the same legal rights as natural persons.

To take action in court, an individual must first have 'standing'; that is, they must have a lawful reason to bring an action to a court. Second, the individual needs resources because success in the Australian adversarial system often relies on legal expertise, which can be expensive. Finally, an individual's case must be significant enough to create a new precedent or result in a new interpretation of a statute or the Constitution if they are to influence lawmaking through the courts.

A significant case is one heard in an intermediate or superior court or a case that has been appealed up through the court hierarchy to a court with appellate jurisdiction. A landmark case is one which significantly alters the law,

either by developing new common law through being distinguished from previous precedents, overruling older precedents or reversing decisions on appeal. See Table 8.4 for how courts can influence laws.

Type of case	Nature of influence	Degree of influence
Cases that distinguish from existing precedent or overrule or reverse existing precedent	Develop the common law	State courts influence common law within their state jurisdiction. Federal courts influence the common law throughout Australia. Common law is inferior to statute, so any influence on lawmaking depends on the willingness of parliament to allow common law to endure.
Statutory interpretation cases	Change the meaning and operation of a statute	Statutes vary in their impact. Some affect the entire community. For example, the Competition and Consumer Act 2010 governs consumer warranties, guarantees and retail. Interpretations of these statutes can have a significant impact. Statutes which raise revenue — for example, taxes — can have significant financial impacts for the government and taxpayers when courts interpret them. Interpretations of less significant statutes will have correspondingly less influence. <i>See: Example: Common law and statutory interpretation — Individuals influencing lawmaking in the courts and parliament; and Federal Court statutory interpretation leads to amendments by parliament.</i> This demonstrates how Federal Court statutory interpretation of the Native Title Act 1993 led to amendments by parliament. <i>See: Example: Backpacker tax interpretation.</i> Parliament can override statutory interpretations by amending the statute to clarify and impose parliament's intent.
Constitutional cases	Change the meaning and operation of the Constitution	Highly influential. Changes to the fundamental law of Australia can affect parliament's legislative and financial powers, citizens' rights, the political system, the legal system and the federal system. <i>See: Case studies: the courts</i> for relevant cases. <i>See: Example: Individuals influence lawmaking in the courts — Section 51(xix) the 'aliens' power.</i>

■ Table 8.4 – Types of law and how the courts may influence them.
Source: Stephen King, 2020

Example: Constitutional law — Individuals influence lawmaking in the courts — Section 51(xix) the 'aliens' power

The Constitution specifies the legislative powers of the Commonwealth and states. Changes to the interpretation of legislative powers can have a profound influence on lawmaking in parliament. In response to constitutional cases which redefine its legislative powers, the Commonwealth

Parliament may need to enact new legislation to amend existing statutes.

For instance, in 2019 two Aboriginal men, Daniel Love and Brendan Thoms — who were overseas born but lived in Australia without citizenship, and who also had criminal convictions — were to be deported as aliens having failed the character test. They challenged the meaning of 'aliens' in Section 51(xix) of the Constitution. *Love v the Commonwealth* [2020] HCA 3 and *Thoms*

v the Commonwealth [2020] HCA 3 changed the meaning of who can be classed as an alien under the Constitution and influenced the legislative power of the parliament. The parts of the *Migration Act 1958* enabling the deportation of migrants who failed a character test no longer applied to Aboriginal non-citizens because they could not be classified as aliens.

Section 51(xix) is the legislative head of power for Australian nationality, citizenship and migration law. In interpretation of statutes relating to nationality, citizenship and migration Aboriginal people cannot be classified as aliens. These laws work with a binary definition — every person in Australia is either a citizen or an alien. After Love and Thoms, Attorney-General Christian Porter argued there was now a third category, a non-citizen non-alien or ‘belonger’.⁶

The Love and Thoms cases have influenced constitutional law through the courts. They will also have influenced various statutes if parliament amends citizenship and nationality laws as a consequence of their constitutional case. For more information about Love and Thoms, see: *Case study: Love and Thoms*.

Example: Common law and statutory interpretation — Individuals influencing lawmaking in the courts and parliament; and Federal Court statutory interpretation leads to amendments by parliament

Ms Mingli Wanjurri McGlade was the lead applicant of a group of litigants — called the McGlade applicants. The ways these individuals influenced lawmaking is outlined below.

- Through the courts: In *McGlade v Native Title Registrar* [2017] FCAFC 10 they won a Federal Court case — McGlade 1 — which altered the meaning of the *Native Title Act 1993* and set a common law precedent for future interpretations of the *Native Title Act*. The decision clarified the meaning of the Native Title Act, saying that Indigenous Land Use Agreements (ILUAs) had to be signed by all registered claimants to be registered with the Native Title Tribunal.

- In the parliament: The Turnbull Government — alarmed at the impact of McGlade 1 — rushed the *Native Title Amendment (Indigenous Land Use Agreements) Act 2017* through parliament to override McGlade 1 and restore certainty to existing and future ILUAs. See *Case studies: McGlade 1 and 2*.

A subsequent case, *McGlade v South West Aboriginal Land & Sea Aboriginal Corporation (No 2)* [2019] FCAFC 238 — called McGlade 2 — led to an application for Special Leave to Appeal to the High Court. This application was granted and may still influence law. Students should refer to the High Court website for an update on the appeal.

Influencing lawmaking in the parliament

Individuals may influence lawmaking in parliament by:

- voting in elections;
- contacting their local member of parliament;
- joining a political party;
- writing submissions to parliament’s legislative or references committees;
- becoming an Independent member of parliament — that is, a legislator; or
- being a partisan member of parliament willing to introduce a private member’s bill.

Voting is compulsory for Australian citizens over 18 years old. Voting is also of fundamental importance as a way individuals can exert influence. However, because it is difficult to assess any particular individual’s influence, this topic is not covered further in this chapter.

Table 8.5., overleaf, summarises the ways individuals may influence lawmaking in parliament.

⁶ Attorney-General Christian Porter cited in Karp, Paul and Wahlquist, Calla, ‘Coalition seeks to sidestep high court ruling that Aboriginal non-citizens can’t be deported’, *The Guardian*, 12 February 2020.

Individual action	Explanation	Degree of influence
Contacting a local member of parliament	In their role as their constituents' delegates, members of parliament represent individuals' concerns in the parliament. Members of parliament represent individuals in their party room, in parliamentary committees and on the floor of the parliament.	Not very significant. Members of parliament hear about many issues from many constituents. Only pressing or public issues are likely to generate momentum for a change to the law. Individuals living in marginal seats are more likely to be influential because their member of parliament is vulnerable to constituent dissatisfaction.
Joining a political party as an ordinary member	Party members can have a role in developing their party's policies.	Influence depends on rank within the party organisation, type of party — major or minor — and a party's internal democracy. Some parties have centralised policy decision making — for example, the Liberals. Others are more democratic, allowing party members a role in policy development — for example, the Greens.
Writing submissions to parliament	Individuals can write to parliamentary committees. Parliament calls for public submissions to gain democratic input from the public and expert advice. Democratic and expert advice influences committee recommendation in the statutory process.	Experts can have a significant influence in lawmaking through contributing their expert opinion and analysis to the statutory process. Other individuals can influence statute through informing parliamentary committees of public reactions to a proposed law. For example, ABC election analyst Antony Green made a submission to the Joint Standing Committee on Electoral Matters to abolish the group voting ticket for above the line voting in the Senate. His submission influenced the creation of the <i>Electoral Amendment Act 2016</i>.
Becoming an Independent member of parliament — an independent legislator	Any Australian citizen on the electoral roll and satisfying the conditions of Section 44 of the Constitution can become a member of parliament. Members of parliament are legislators.	As a legislator, an Independent member of parliament can directly influence lawmaking. They may propose private members' bills, participate in the statutory process, become members of parliamentary committees, propose amendments to bills and vote on bills. The influence of an Independent member of parliament depends on the balance of power within their chamber of parliament. If government majorities maintain recent downward trends, then minority government becomes increasingly probable, and Independents will become more influential.
Partisan members of parliament introducing a private member's bill.	Party discipline binds partisan members of parliament. However, they may introduce a private member's bill by breaking ranks with their party or during an issue of conscience.	Partisan members of parliament are free to introduce private members' bills, but most do not because of party loyalty. Their influence over lawmaking is similar to that of an Independent member of parliament, but only if they act independently of their party. <i>See: Example: Partisan member of parliament, Senator Dean Smith's private member's bill influences lawmaking in the parliament.</i>

■ Table 8.5 – How individuals may influence lawmaking in parliament.
Source: Stephen King, 2020

Example: Independent MP, Kerry Phelps' private member's bill influences lawmaking in the parliament

Kerry Phelps AM MP (Wentworth NSW, 2018–2019) influenced lawmaking in the parliament by introducing into the House of Representatives a private member's bill that inspired amendments to a government bill in the Senate. The amended government bill returned to the House of Representatives where the Opposition and crossbench members of that house (MPs) combined to vote against the minority Morrison Government and pass the bill. See: *Case study: Representation and Legislation — Wentworth and Medevac for more information.*

Example: Partisan Senator Dean Smith's private member's bill influences lawmaking in the parliament

The 43rd Parliament (2010–2013) had attempted on three occasions to deal with the issue of same-sex marriage. Three private members' bills attempted to amend the *Marriage Act 1961*. Two were introduced in the House of Representatives — one by Stephen Johns (Labor, Whitlam, NSW) and one jointly sponsored by Adam Bandt (Greens, Melbourne, Vic) and Andrew Wilkie (Independent, Denison [renamed Clark in 2019], Tas). Senator Sarah Hanson-Young (Greens, SA) introduced a private senator's bill in the Senate. None of these bills passed.

Before the 2013 general election, Prime Minister Kevin Rudd promised to introduce same-sex marriage laws, but the Australian Labor Party (ALP) lost the election. Leader of the Opposition Tony Abbott opposed same-sex marriage, and Liberal members of parliament mostly agreed with him. The Greens, on the other hand, had always supported amendments to the *Marriage Act*. Over time, however, a change of sentiment towards the issue occurred across a broad section of political parties and members of parliament.

Prime Minister Malcolm Turnbull allowed a plebiscite in 2017 — conducted by post — to gauge community sentiment on same-sex marriage. The national Yes vote was 61.6 per cent.

■ Figure 8.2 – Professor Kerry Phelps, former Independent Member for Wentworth, NSW
Source: <<https://www.aph.gov.au/api/parliamentarian/00820/image>> Reproduced with permission of Prof Phelps



By late 2017, political momentum had built up sufficiently for the 45th Parliament to deal with the issue through a conscience vote. Conscience votes occur when political parties relax discipline over their members of parliament, allowing them to debate and vote according to their conscience. Members of the House of Representatives may exercise their conscience as delegate representatives by consulting their constituents. Alternatively, they may act as trustees — an approach more suited to senators, who collectively represent entire states.

Senator Dean Smith (Liberal, WA) introduced his Marriage Amendment (Definition and Religious Freedoms) Bill in November 2017. It was a private senator's bill introduced by a partisan member of parliament.

Smith is an openly gay member of parliament who had long advocated within the Liberal party room for changes to the definition of marriage. As such, he was always influential in the changes his bill brought about. Many other members of parliament played a role



■ Figure 8.3 – In November 2017 Senator Dean Smith introduced a private member's bill in an attempt to legalise same-sex marriage.
Source: Alison Harris, *Senator Dean Smith attends PLEAWA AGM 2018*, 2018, CA BY 2.0

by bringing pressure inside their party rooms or by introducing private members' bills in the past. Nevertheless, Smith is the member most responsible for changing the law. On 9 December 2017 his private senator's bill

changed the definition of marriage in the *Marriage Act 1961*.

Political parties influence lawmaking

Political parties are political associations registered with the Australian Electoral Commission. They are associations of like-minded people formed to win seats in parliament to control executive power — that is, to form a government — or to influence legislative power. Partisan members of parliament are included in 'political parties'.

The sole purpose of political parties is to influence lawmaking. They are designed expressly to influence lawmaking in parliament. They may also be involved in court cases that develop common law or create new interpretations of a statute or the Constitution.

Through the courts

Political parties may be involved in court cases as parties to the cases. Although not frequent, parties can influence the development of common law and statutory interpretation. They may also influence Constitutional law through cases in the High Court. Consequently, through such cases they may influence lawmaking in the courts.

The most famous example of a political party influencing lawmaking through the courts is the Australian Communist Party's challenge to the validity of the *Communist Party Dissolution Act 1950*.

Example: Australian Communist Party v Commonwealth [1951] 83 CLR invalidates a statute

In the early phases of the Cold War, anti-communist sentiment ran high amongst the Australian community and political class. In February 1950 United States (US) Senator, John McCarthy made a speech that triggered widespread panic in the US over the threat of communist activity in America. It fuelled a similar response in Australia. In April 1950, the Menzies Government introduced a bill that would outlaw the Australian Communist Party.

The bill became law and triggered a High Court challenge by the Australian Communist Party to the constitutional validity of the *Communist Party Dissolution Act 1950*.

In *Australian Communist Party v Commonwealth* [1951] 83 CLR, the High Court ruled in favour of the Communist Party. The Act was found *ultra vires* and struck down.

The case limited the lawmaking power of the parliament by declaring that the parliament cannot declare an organisation such as a political party guilty and then proceed to punish it and its members. In his judgment, Justice Fullagar wrote that "the validity of a law ... cannot ... depend on the opinion of the law-maker". He used an analogy to explain how parliament had overstepped its lawmaking power, saying "a stream cannot rise higher than its source".

The effect of the case was to declare that the validity of any Act can only be determined by judicial review, not by the parliament itself.

Example: Senator Bob Day challenges electoral law reform

A party or a party member can launch a legal challenge to a law or government policy. For example, before the July 2016 election South Australian Senator Bob Day challenged the constitutionality of the *Electoral Amendment Act 2016*.

Senator Day — a member of the Family First political party — claimed that the Senate electoral reforms did not provide electors with a choice between candidates. Instead, he argued, they presented electors with a choice between voting methods.

His main arguments are listed below.

- The above and below the line voting process constituted different methods of choosing senators, something forbidden under Section 9 of the Australian Constitution.
- Above the line voting did not represent senators being "directly chosen by the people", as required under Section 7 of the Constitution.

- The Droop⁷ quota used to calculate which candidates had been elected meant that the votes of one-seventh of the electorate did not count towards the election of a successful candidate.

Votes that exhaust effectively disenfranchise voters.

Writing before the judgment was handed down, constitutional law expert Professor Anne Twomey wrote of the merits of the case:

The grounds for this challenge are not strong ... The 2016 Act is substantively different because it permits optional preferential voting, allowing votes to exhaust. [... the] 2016 Act does not mandate that votes become exhausted — they merely give voters a choice as to how their vote can best reflect their preferences. It would therefore be difficult to argue that a Senate elected pursuant to the 2016 Act was not 'directly chosen by the people'.⁸

The High Court in *Day v Australian Electoral Officer for the State of South Australia* [2016] HCA 20 dismissed Day's arguments and upheld the validity of the Act.

Through the parliament

Political parties exist to influence lawmaking in parliament. They may do so through:

- forming the government;
- forming coalitions or alliances with other political parties;
- holding the Senate balance of power, either singly or jointly with other parties; or
- directing election preferences to other political parties in return for influencing their policies.

Table 8.6, overleaf, summarises the ways political parties may influence lawmaking in the parliament.

There are three main types of political party: major, minor and micro. Each is discussed below.



■ Figure 8.4 – Pauline Hanson, leader of Pauline Hanson's One Nation party. Source: Velovotee, *Pauline Hanson*, 2007, CC BY-SA 2.0, <<https://commons.wikimedia.org/w/index.php?curid=50251798>>

Major political parties

Major political parties are defined by the capacity to form a government. In contemporary Australia, only the Australian Labor Party and the Liberal Party of Australia are major parties.

Major parties have the most influence over lawmaking because they form governments. Cabinets are responsible for over 90 per cent of bills introduced into parliament. Governing parties dominate the House of Representatives. They use their 'will of the majority' mandate to negotiate with the Senate. These advantages mean major parties are the most influential in lawmaking in parliament.

Minor political parties

Minor political parties are defined by an ability to gain parliamentary representation over several electoral cycles, but not sufficient to form a government. There are two categories of minor parties based on the nature of their electoral support:

- geographically concentrated electoral support enabling significant representation in the House of Representatives — the Nationals enjoy this type of electoral support; and
- geographically dispersed electoral support preventing significant representation in the House of Representatives, but sufficient to achieve Senate quotas. The Australian Greens enjoy this kind of electoral support.

Minor parties can be influential. The balance of power in each house is critical to their ability to influence legislation. The Nationals are uniquely influential because they can secure positions in Coalition ministries and sit at the Cabinet table. The Australian Greens, the Centre Alliance and Pauline Hanson's One Nation are three influential minor parties with Senate representation. They can influence legislation when the government

7 The Droop quota was devised in 1868 by the English lawyer and mathematician Henry Droop (1831–1884). Often used in a single transferable vote election, the Droop quota is the minimum number of votes a candidate must receive in order to be elected. Any votes a candidate receives above the quota are transferred to another candidate.

8 Twomey, Anne, 'Before the High Court: *Day v Australian Electoral Officer (SA): Senate voting reforms under challenge*', *Sydney Law Review*, 38, p 241 of pp 231–41.

Political party strategy	Explanation	Degree of influence
Forming the government	Forming government requires a political party to gain the confidence of the House of Representatives. In practice, this means winning a majority of the 151 seats in the lower house. Historically, only the ALP has been able to form government in its own right. The Liberal Party is always the dominant party in a Coalition government.	Highly influential. The governing party drives the legislative agenda of parliament, controls the lower house and dominates the legislative process through its assured majority. It claims a will of the majority mandate, which it may use to persuade other political parties to agree to government bills in the Senate. The Cabinet is the source of most bills.
Forming coalitions or alliances	Coalitions are formal agreements between two parties to form a government. They agree to support one another and act as one parliamentary bloc. Alliances are less formal than coalitions. Typically, the minor party agrees to provide confidence and supply to a major party forming a minority government. It reserves the right to vote independently on all other bills and motions. Minor parties must be able to win the absolute majority of votes required to secure a House of Representatives seat. They therefore need their electoral support to be geographically concentrated. The Nationals' support is concentrated in several regional and rural electorates.	For minor parties, coalitions and alliances with a major party can provide an opportunity to participate in government. Coalitions allow minor party members of parliament access to the ministry and Cabinet. Minor parties in a coalition enjoy the benefits of forming a government — see above. However, they must accept the dominance of their major party partner. Coalition Governments in which the Nationals form a partnership with the Liberals is an example. Minor party alliance partners may influence the governing party's bills by negotiating amendments in return for their support. They may propose bills and vote on motions in the House of Representatives. They do not usually have ministerial or Cabinet positions. Major parties in alliance with other parties may be able to form a minority government. The Gillard Government in alliance with the Australian Greens (2010–2013) is an example.
Through the Senate balance of power	Minor parties have a significantly higher chance of Senate representation because of the proportional representation electoral system. The Senate is, therefore, the favoured chamber for minor parties whose electoral support is too distributed for them to win House of Representatives seats. The Australian Greens' support is dispersed across the country and insufficiently concentrated to achieve the 50%+1 vote required to win more than one House of Representatives electorate. The inner-city electorate of Melbourne is represented by Adam Bandt, a Greens MP.	Controlling or participating in the Senate balance of power is a highly influential position from which minor parties may influence lawmaking. The Senate is a powerful chamber without an assured majority. Majorities must be manufactured through negotiation for the passage of contested bills. Negotiating amendments in return for support is a powerful method for minor parties to influence statute. The Australian Greens, Centre Alliance and Pauline Hanson's One Nation are examples. Micro parties — such as the Derryn Hinch Justice Party or the Australian Conservatives — have used this strategy.
Directing preferences to other political parties	Many smaller political parties are unlikely to achieve parliamentary representation. However, they may influence lawmaking by helping other parties get elected. Preferential voting requires an absolute majority to win an electorate. Most electorates are won 'on preferences', meaning the successful candidate needs a flow of second preferences to achieve an absolute majority. Knowing they need preferences, parties are often prepared to modify their policies before an election to secure the preferences of other parties.	Directing preferences to other parties is marginally effective in influencing lawmaking in the parliament. Electorally unsuccessful parties hope to influence the lawmaking agenda of the winning parties. However, once elected, successful parties are not bound by any formal agreements or laws to implement the agreed policies. They often ignore pre-election deals. Micro parties use this strategy. There are scores of political parties in Australia with no chance of electoral success. Preference deals are their only chance of influencing lawmaking in parliament.

■ Table 8.6 – The ways political parties may influence lawmaking in parliament.
Source: Stephen King, 2020

and Opposition are at odds over a bill, and a Senate majority must be negotiated with the crossbench. They use their 'balance of power' mandate to strengthen their negotiations.

Micro political parties

Micro political parties are those that have a very small or short-lived parliamentary presence over one or two election cycles.

Micro parties depend entirely on circumstances to win parliamentary seats and use their position to influence legislation. They are more likely to be influential in Senates elected by Section 57 double dissolution elections because of the reduced Senate quota. The smaller quota makes it easier for them to get elected and then form blocs on the Senate crossbench where they can influence legislation. Derryn Hinch's Justice Party is an example from the 45th Parliament (2016–2019).

Example: How the government is able to influence lawmaking in parliament

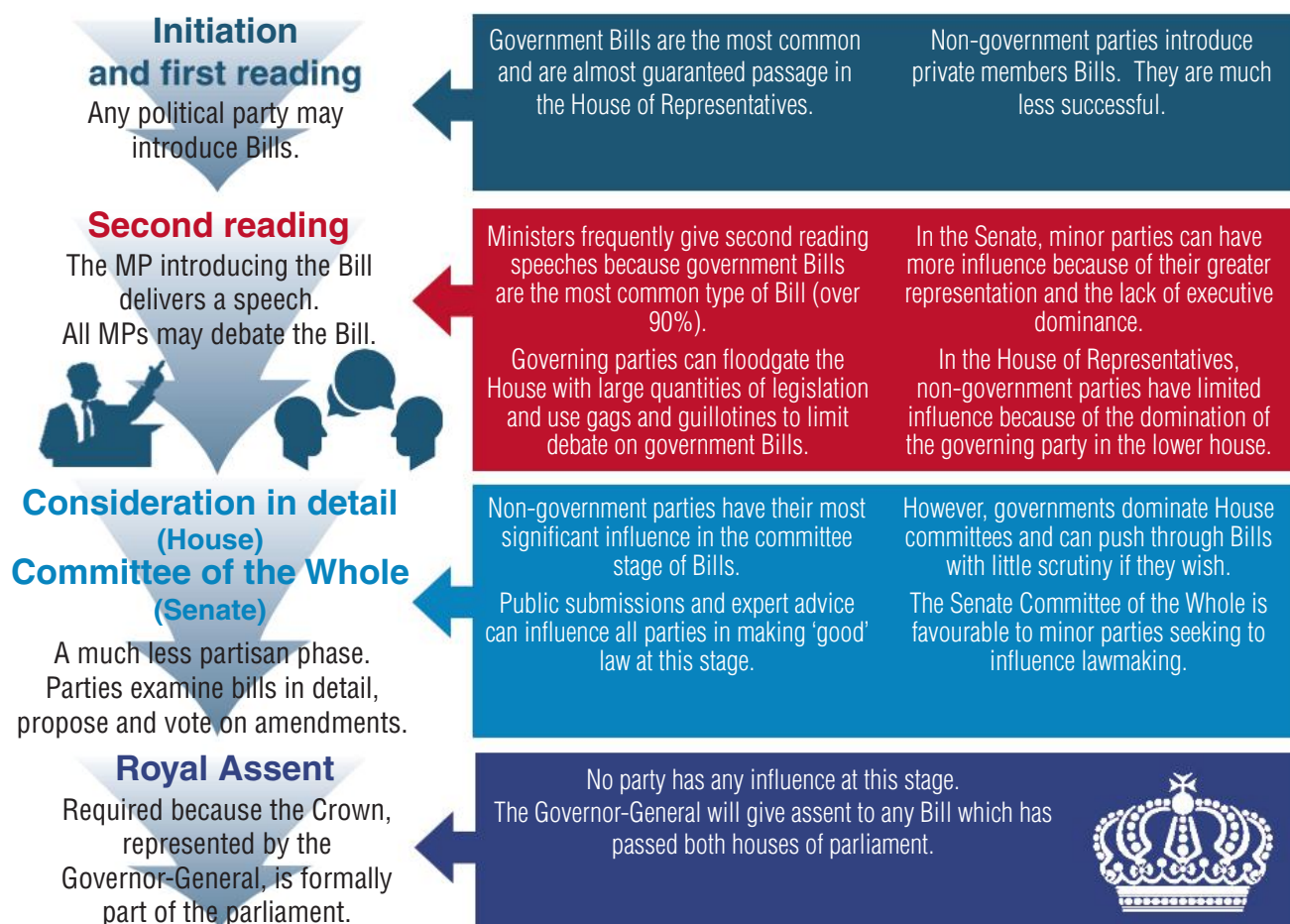
After the outbreak of the 2020 coronavirus pandemic, the Coalition Government allowed Australians to access up to \$20,000 of their superannuation savings if they are experiencing adverse economic effects. Under normal circumstances, the law prevents people from drawing on superannuation savings until they reach an age near retirement. A legislative change had to be made for the government's plan to work because an existing statute already governed superannuation age limits and withdrawal conditions.

Example: Jacqui Lambie Network supports Medevac repeal bill in secret deal

The *Home Affairs Legislation Amendment (Miscellaneous Measures) Act 2019*

passed the parliament in early 2019. The Act changed the law concerning emergency medical evacuations of asylum seekers and

STAGES OF THE LEGISLATIVE PROCESS



■ Figure 8.5 – The stages of the legislative process showing where and how political parties may influence the making of a statute.⁹
Source: Stephen King, 2020

⁹ Note: The degree of influence depends on a political party's representation and relative power within the parliamentary balance of power.

refugees from Manus Island and Nauru. The Morrison Government vowed to repeal the so-called Medevac law if it won the 2019 general election.

After winning the May election, the newly elected Morrison Government introduced the Migration Amendment (Repairing Medical Transfers) Bill 2019. The bill aimed to repeal the Medevac law. The bill passed the House of Representatives, where the government enjoyed an assured majority of two seats. In the Senate, however, the government had to form a majority through negotiation with crossbench senators.

Tasmanian Senator Jacqui Lambie indicated she would support the repeal bill if the government accepted her conditions. She refused to publicise what these were. The government accepted Senator Lambie's secret conditions and the bill passed the Senate.

Lambie — the sole member of the Jacqui Lambie Network in parliament — used the significant power of the Senate crossbench to influence lawmaking in the parliament.

Political parties influence lawmaking in parliament through direct involvement in the legislative process. They may:

- introduce bills;
- debate bills during their second reading;
- propose amendments to bills during the committee stage; and
- vote on bills.

Figure 8.5 summarises the stages of the legislative process and how parties may influence lawmaking in parliament at various stages.

Pressure groups influence lawmaking

Pressure groups are associations formed to influence lawmaking. Pressure groups do not usually seek election to parliament. Instead, they exercise freedoms of speech and association, the right to political communication, and legal rights to engage in a range of activities to exert pressure on the government and members of parliament or win court cases.

Pressure groups have a sharper focus than political parties. They tend to have a limited number of objectives, rather than the broad policy platform typical of a political party. Pressure groups usually represent interests — that is, segments of society with interests in changing the legal or regulatory environment. Pressure group activity is interest representation.

Pressure groups can be distinguished from non-political groups — or community groups — by their objectives. Pressure groups aim to influence lawmaking. Community groups are associations of individuals with common interests, such as hobbies, sports, cultural interests and so on. Community groups do not usually attempt to influence lawmaking.

Pressure groups use a range of strategies to apply pressure to lawmakers. Some common strategies are:

- lobbying the government, government ministers and members of parliament directly;
- taking direct action;
- writing submissions to parliament;
- using media — both traditional and new media;
- other means, such as contributing political donations to a political party; and
- taking legal action through the courts.

Table 8.7 summarises the ways pressure groups seek to influence lawmaking in the parliament and the courts.

Political party strategy	Explanation	Degree of influence
Lobbying the government, ministers and members of parliament directly	Lobbying is the activity of influencing lawmaking by face to face contact with lawmakers — ministers and other members of parliament — in an attempt to persuade them directly. In contemporary Australia, lobbying takes different forms. Examples include meetings, lunches, invitations to events, gifts, contributions to causes, and so on. Pressure groups with political or economic power often prefer to use lobbying. Lobbyists are professionals who provide lobbying services to pressure groups and corporations who wish to influence the legal and regulatory environment in which they operate. Left unchecked, lobbying can distort political representation. Popular representation (democratic) may suffer at the expense of interest representation (undemocratic).	Lobbying is very effective if a pressure group can gain ready access to ministers and parliamentarians. Generally, pressure groups representing economically significant interests enjoy high levels of access to lawmakers. The Minerals Council of Australia and the Business Council of Australia are examples. Other pressure groups representing interests — such as medical or professional groups — can be influential. The Australian Medical Association and the Pharmacy Guild are examples. Lobbying is less effective if the group is less relevant to the government or represents interests of little concern to the government. Environmental groups and activist groups fall into this category. Lawmakers are less likely to meet with them face to face. The Stop Adani movement and School Strike 4 Climate are examples. Lobbyists must be registered so that their influence over lawmakers is transparent. Registration counters the tendency for powerful interests to distort democracy. Registration of lobbyists is evidence of the effectiveness of lobbying.
Taking direct action	Direct action refers to political, economic or social activities undertaken by pressure groups to exert pressure on lawmakers. Pressure groups which lack political or economic power use direct action. They can mobilise the power of mass membership to stage rallies, marches or events, which draws media and public attention.	The influence of direct action is proportional to the power of the pressure group using the strategy. The size of a pressure group's membership, its ability to organise and communicate, and its ability to attract attention and mobilise public awareness and support are the determinants of the pressure group's influence. Technological developments have made direct action more influential in recent history. The internet and social media provide low-cost tools for organising and communicating. The interest or issue a pressure group represents is a crucial factor. If the issue they represent is in the public mind, then a group's direct action will be more influential. Extinction Rebellion, School Strike 4 Climate and GetUp! are examples.

table continued overleaf

table continued from previous page

Political party strategy	Explanation	Degree of influence
Using media — including traditional and new media	The media refers to the collection of organisations that channel and connect people in contemporary societies. Traditional media includes large news organisations with print and online news services. Pressure groups use media advertising to influence lawmakers. Advertising is the principal revenue source for privately owned traditional media, which makes them vulnerable to bias in favour of well-resourced pressure groups. New media refers to all forms of connection and communication outside traditional media. It includes social media. The tools of new media are free and accessible. Pressure groups use new media to communicate and influence lawmakers.	All pressure groups use new media because it is ubiquitous and cheap. Paid advertising is expensive, but can be very useful in influencing public opinion, which, in turn, brings pressure on lawmakers. Pressure groups with significant economic resources are more likely to choose paid advertising as a strategy. Pressure groups with less access to financial resources use new media as their primary channel of communication and influence. Media campaigns exert maximum pressure on lawmakers at critical times. Elections are a typical event targeted by pressure groups. Lawmakers are most vulnerable to pressure at election time. Media campaigns employ paid advertising and new media channels to pressure lawmakers. GetUp! specialises in media campaigns using new media. It launches Internet-based campaigns, encourages the signing of online petitions and tries to generate enough pressure so that its campaigning gets reported by the traditional media.
Writing submissions to parliament	Pressure groups often harbour great expertise in the area of their interest. They write detailed submissions to parliament to influence statute. Their submissions are often technical rather than persuasive. They seek to influence statutes in ways that minimise the administrative burden on their members.	Experts can have a significant influence in lawmaking by contributing their expertise during the drafting of a statute Pressure groups can influence statutes by informing parliamentary committees about how a proposed law may be more efficient or have fewer unintended consequences. Pressure group submissions can be powerful influences over the technical details of proposed legislation.
Other means — such as making political donations to a political party	There are other strategies available to pressure groups. Contributions to political parties are a common practice. Political parties must raise funds for election campaigns and other events. There are legal limits to the size of political donations because of the risk of political corruption. Donors must declare donations for a specific period of time. For 1 July 2019 to 30 June 2020, parties needed to declare individual donations over \$14,000. Members of parliament must declare donations they receive. Using the celebrity status of a famous person is another strategy.	The effectiveness of different strategies varies depending on the circumstances. Laws have tightened to prevent the influence of money on lawmakers. Regulation of donations can limit their effectiveness as an influence on lawmaking. Celebrities often lend their public profile to pressure groups. They may do so free of charge if they are passionate about the cause or interest the group represents. Or, they may charge fees to be the public face of a powerful pressure group. Celebrities may be world-famous or ‘Insta-famous’. What matters is their ability to use their celebrity as a platform to promote a pressure group’s interest or cause. Actor Simon Baker, musician Julia Stone and Jarrad Seng, a photographer who has 200,000 Instagram followers (March 2020) — supported Greenpeace Australia Pacific’s #DearScotty campaign after the 2020 bushfires. Greenpeace aimed to influence the Morrison Government’s climate policies and any laws it might introduce.

Taking legal action through the courts	Pressure groups are artificial persons in the eyes of the law. Pressure groups can take legal action through the courts. Cases may alter common law, statutory interpretation and constitutional interpretation.	In the eyes of the law, there is no difference between an individual — a natural person — and a pressure group — an artificial person. Therefore, a pressure group may influence lawmaking through the courts in the same way an individual can. The main difference between individuals and pressure groups is the resources available to a pressure group to pursue expensive legal action. Access to resources makes them more able than most individuals to influence lawmaking in the courts.

■ Table 8.7 – Ways in which pressure groups seek to influence lawmaking in the parliament and courts.
Source: Stephen King, 2020

There are thousands of pressure groups in Australia. They provide interest representation for sectors of Australian society and the many causes that motivate people to form associations aiming to change the law. A few pressure groups are immensely influential. Some can be influential depending on the circumstances, and a great many are relatively inconsequential.

Very influential pressure groups

Some powerful pressure groups and the interests they represent are:

- Business Council of Australia — business and companies;
- Minerals Council of Australia — mining companies;
- Australian Coal Association — coal mining companies;
- Australian Council of Trade Unions — workers;
- Australian Petroleum, Production and Exploration Association — energy companies;
- Clubs Australia — clubs, casinos and other businesses dependent on gambling revenues;
- The Pharmacy Guild of Australia — pharmacists;
- Australian Banking Association — banks and financial institutions;
- Returned & Services League of Australia — for returned soldiers, sailors and air force personnel — assisting people to access services such as pensions, injury cover and so on — and promoting defence in the national interest; and
- Australian Medical Association — for the medical profession and the health interests of all Australians.

These groups share some common features. They:

- represent significant economic, professional or national interests;
- have significant resources, often obtained through membership fees; and
- can lobby lawmakers directly because they enjoy access to ministers and other members of parliament.

Moderately influential pressure groups

The influence of some pressure groups depends on the circumstances prevailing at any particular time. Some examples are provided below.

- *Recognise* — advocated for constitutional recognition of Aboriginal and Torres Strait Islander peoples and the removal of race-specific sections of the Australian Constitution;
- *Australian Conservation Foundation* — advocated for environmental protection and conservation;
- *Stop Adani* — which took direct action against the Adani's proposed Carmichael coal mine in Queensland; and
- *Australian Marriage Equality* — which advocated for equal marriage rights for same-sex couples.

These groups share the following characteristics despite the diverse range of interests they represent.

- Their influence depends on the political context. The *Australian Conservation Foundation* has more influence at times of environmental crisis such as the 2020 bushfires or a major coral bleaching event on the Great Barrier Reef.
- *Stop Adani's* influence grows each time climate change becomes a more

prominent issue or when the Carmichael mine's approval process passes significant milestones such as an environmental approval by the Queensland Government.

- *Australian Marriage Equality* was less influential until the issue gained momentum. In the late 2010s, more and more countries legalised same-sex marriage, and the Australian public became more receptive to changing the legal definition of marriage. Its goal now achieved, the group's influence has diminished to secondary issues related to defending the changes won.
- *Recognise's* influence waxed and waned as the issue of Aboriginal rights moved from the centre to the fringes and back to the centre of the political debate. Its influence grew after the 2017 *Uluru Statement from the Heart*. The *Recognise* campaign is now over, but its parent organisation *Reconciliation Australia* will take responsibility for this work in the future.
- Membership and publicity are critical to the success of these groups.

Less influential pressure groups

Some groups with limited influence include the:

- Australian Republic Movement — advocates for Australia to change from a constitutional monarchy to a republic;
- Waubra Foundation — argues that wind turbines cause 'wind farm syndrome'. It has pressured governments to limit wind farm developments;
- Australian Vaccination-risks Network — advocates limitations to vaccination programs.

As the following points show, these groups share characteristics which reduce their influence over lawmakers.

- The Australian Republican Movement is currently ineffective because the issue of Australia becoming a republic was dealt with by referendum in 1999. Australians overwhelmingly voted No. While the Queen is respected and admired, there are now more pressing issues occupying political debate.
- The Waubra Foundation uses pseudo-science to justify its claims about wind farms. It was deregistered as a health promotion charity by the Australian Charities and Not-for-profits Commission because of its false and misleading claims. It took action in the

courts, but failed to have its charity status reinstated.

- The Australian Vaccination-risks Network influences many Australians' choices about vaccinating their children, but has failed to influence lawmakers to change laws regarding vaccination. Its claims about vaccination are unsupported by any scientific evidence.

Example: Pressure group takes legal action 1

GetUp! is a progressive political activist group that was established in 2005. In June 2010 it was estimated that approximately 1.4 million Australians were not enrolled to vote. As a part of its policy to foster greater representative democracy, *GetUp!* created a website — *OzEnrol* — that allowed people to enroll to vote online using an electronic signature. The *OzEnrol* site generated a claim form for enrolment in accordance with the statutory requirements, completed the relevant details, applied the signature generated using the signature tool and then generated a document in portable document format (PDF). That PDF document was then emailed to *UTBox*, a third party provider of online fax services. *UTBox* then faxed the enrolment form to the Australian Electoral Commission.

The Australian Electoral Commissioner would not accept these enrolments, claiming that forms had to be signed by hand. This barred those who had enrolled via this method from voting in the upcoming federal election.

In August 2010 *GetUp!* took the Electoral Commissioner to the Federal Court of Australia. The Federal Court declared that an online voting enrolment using a signature generated by a digital pen was in order for entry on the roll of electors. The *Electronic Transactions Act 1999* applied to the *Commonwealth Electoral Act 1918* and, therefore, enrolling on the website was a perfectly acceptable manner of registration.

Example: Pressure group takes legal action 2

GetUp! successfully challenged the *Commonwealth Electoral Act 1918* in the High Court. The law — amended by John Howard in 2006 — closed the electoral rolls on the day that the writs for an election were issued. This effectively disenfranchised many people who were not enrolled by that date. *GetUp!* ran a campaign to fund the High Court challenge.

On 13 August 2010 the High Court found the amendments to be unconstitutional and invalid.

Example: Adani — Political parties, pressure groups and individuals

The Adani Group is an Indian transnational corporation. It mines coal and owns coal-fired power stations in India. It obtains additional coal supplies from other countries. Adani plans to open one of the world's largest coal mines in Queensland's Galilee Basin and export Australian coal to the Indian market. Adani's proposed Carmichael mine has sparked both support and opposition from different pressure groups.

Political parties and Adani

The Coalition Liberal and National parties have a pro-Adani stance. The Liberal Party supports the coal industry because of the value of coal exports to the economy. The Liberal-dominated Coalition Government introduced amendments to the *Environment Protection and Biodiversity Act 1999* after the Mackay Conservation Group won a court case halting the mine on environmental grounds. The Coalition has also made promises to assist with funding a rail line from the mine to Queensland ports to facilitate the export of coal — such funding would likely require legislation.

The Nationals support coal mining and the Adani project because they represent rural and regional Australia, and the mine will create jobs and support towns and communities in regional Queensland. They have supported the Liberal Party in legislative changes to assist the project.

Pauline Hanson's One Nation supports the Adani mine because it has a strong regional conservative base in Queensland and believes it can win over ex-Nationals voters by supporting the issue. It uses its Senate position to back legislation that supports the development of coal mining and export.

The ALP is pro-Adani because it supports job creation in regional areas. However, it also has more substantial carbon dioxide (CO₂) reduction policies which conflict with the idea of increased coal mining and export. Holding contradictory positions can be challenging for any party. Labor paid a heavy price in Queensland electorates during the 2019 general election for trying to 'walk both sides' of the issue. As the party in Opposition, it has

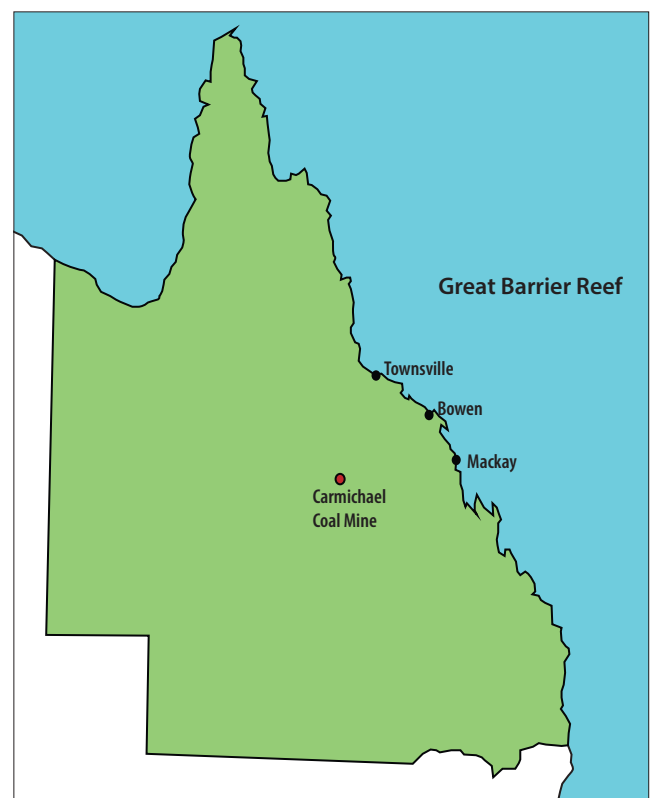
supported government legislation aimed at facilitating the construction of the Carmichael mine.

The Australian Greens are fundamentally opposed to coal mining, export and use in power generation because burning coal is a significant source of CO₂ emissions which cause climate change. They have opposed government legislation on the issue. In February 2018 the Greens introduced the Galilee Basin (Coal Prohibition) Bill 2018 aimed at banning the construction of all new coal mines.

Pressure groups and Adani

Pressure groups have tried to influence laws on both sides of the issue. The major pro-Adani pressure groups are collectively known as the **coal lobby**. In Australia, the coal lobby includes the Minerals Council of Australia, the Business Council of Australia, the Australian Chamber of Commerce and Industry, and the Australian Industry Group.

Those opposing Adani organise together under the hashtag/name #StopAdani. #StopAdani is an association of environmental pressure groups, local Queensland communities, indigenous groups and individuals. The Environmental Defenders Office (EDO) supports them in the courts. The EDO is a legal service that provides legal aid to groups



■ Figure 8.6 – The location of the Carmichael coal mine.
Source: Nicol Davis, *Carmichael coal mine*, 2020, Public Domain



■ Figure 8.7 – #Stop Adani is a grass roots environmental protection pressure group.

Source: #Stop Adani, Melbourne launch of the School Strike for Climate Action, 2019, CC BY 2.0, <<https://commons.wikimedia.org/w/index.php?curid=87744653>>

and individuals using the courts, and is a pressure group itself.

The coal lobby has vast resources and direct access to those with political power — not just in Australia, but globally. The coal lobby responded to the threat that laws limiting CO₂ emissions would pose to their core business — coal mining.

The coal lobby's first strategy was to question climate science by promoting climate-sceptic arguments through the media. The aim was to sow doubt in the public mind about whether human CO₂ emissions caused climate change. The coal lobby cultivated relationships with climate-sceptic scientists and politicians. It lobbied representatives using scientific counter-arguments and public-good arguments based on economic growth and jobs.

The coal lobby's second approach was to promote the benefits of coal. International coal giant, Peabody Coal, employed Burson-Marsteller — a public relations firm — to develop a strategy which they called *Energy for Life*. *Energy for Life* provided 'talking points' for politicians around the world, including Australia. The *Energy for Life* campaign constructed a pro-coal narrative in public debate. The Minerals Council of Australia adapted *Energy for Life* to Australian conditions with its marketing campaign "*This Little Black Rock. Coal. It's an Amazing Thing*".

Adani itself employed the government relations company Next Level Strategic Services to lobby government. Cameron Miller and David Moore founded Next Level. Between them, Miller and Moore have worked at senior levels in both major political parties. Adani uses their political expertise and connections within the two major parties to access and pressure politicians for its coal mining interests. Miller is an ex-Chief of Staff to ALP Opposition Leader, Bill Shorten, and Moore is a former Chief of Staff to Liberal-National Party Queensland Premier, Campbell Newman.

The **#StopAdani coalition** comprises a broad range of pressure groups, including established promotional groups such as the Australian Conservation Foundation. It also includes groups such as the Mackay Conservation Group (MCG), formed in 1984 by Patricia Julien to oppose threats to the Daintree Rainforest. MCG is composed of local communities at the epicentre of the proposed Carmichael mine. #StopAdani also has many individual activists such as Paola Cassoni, a resident near the mine-site.

There are dozens of groups across Australia. They combine with the organisational and fund-raising ability of GetUp! to coordinate actions through online and real-world activism.

In 2015 the MCG took court action with the support of the EDO to challenge an environmental approval for the Carmichael mine. Their court case — *Mackay Conservation Group Inc v the Commonwealth of Australia* [2015] NSD33/2015 (the Adani Case) — temporarily halted the mine and led to amendments to the *Environment and Biodiversity Conservation Act 1999*.

#StopAdani aims to create the most extensive environmental campaign since the successful bid to stop the Franklin Dam Campaign in the early 1980s.

Individuals and Adani

Mechanical engineer John Hepburn (Greenpeace Australia), corporate researcher Bob Burton (Coalswarm) and Sam Hardy (Graeme Wood Foundation) produced a funding proposal and a campaign strategy called *Stopping the Australian Coal Export Boom*.¹⁰ People such as Hepburn, Burton and

¹⁰ Hepburn, John, Burton, Bob and Hardy, Sam, *Stopping the Australian coal export boom. Funding proposal for the Australian anti-coal movement*, 2011, Greenpeace Australia Pacific, <http://www.abc.net.au/mediawatch/transcripts/1206_greenpeace.pdf>.

Hardy partnered with legal practices — like the EDOs in each state — to launch court action aiming to halt the mine.

The *Stopping the Australian coal export boom* document proposed community organising, effective communications and pro-bono legal expertise provided by sympathetic lawyers as the key strategies for #StopAdani.

In 2012 Patricia Julien of the MCG met UNESCO when they visited the town of Mackay on a fact finding tour related to the health of the Great Barrier Reef. Media covered the event, firmly linking the reef's health to the Adani mine in the public mind.

The sequence of the #StopAdani and individuals' grassroots-to-international action plan is provided below.

1. Motivated and skilled individual volunteers taking action alone or in groups produce funding and strategy plans like *Stopping the Australian coal export boom* — for example, Julien, Hepburn, Burton, Hardy.
2. Community-based direct action — for example, MCG.
3. Court action — MCG and EDO, Queensland.
4. Online political communication, political action and fund-raising — for example, *GetUp!*.
5. Building a broader community of protest in the tens of thousands — for example, #StopAdani.
6. Operational and promotional support from larger pressure groups with similar aims but more experience, personnel and resources — for example, Greenpeace and Australian Conservation Foundation.
7. Involving major international bodies — UNESCO.

The #Stop Adani action plan also includes regular publicity about their activities in all forms of media.

Despite setbacks and delays to the Adani Carmichael mine project itself, the coal lobby has been very successful convincing governments of the continuing value of coal.

So far, court action by pressure groups and individuals has only delayed the mine's approvals. The major political parties still support the mine, and they control lawmaking in parliament. However, the ALP tried to walk both sides of the issue because of pressure from the #StopAdani coalition.

#StopAdani has grown its membership across Australia and now has supporters in every state. Momentum and membership are essential for pressure groups like #StopAdani so they can continue pressuring lawmakers and take court action.

Summary

- There are two lawmaking institutions — the Commonwealth Parliament, which makes statute law; and the courts, which make common law.
- Individuals — as citizens of a democracy — have political and legal rights and freedoms they may use to influence lawmaking. Generally speaking, individual citizens have limited success, but there are instances where individual action has been very successful.
- Political parties and pressure groups are associations of individuals who collaborate to achieve their aims.
- Political parties have broad aims determined by their ideologies and policies. They seek to win seats in parliament as the most effective way to influence lawmaking. The strategies used and their level of success depends on the type of political party. Winning government is the most potent way a party can influence lawmaking. Other parliamentary strategies — such as forming coalitions or alliances and controlling the Senate balance of power — are also influential.
- Pressure groups have narrow aims motivated by interests. They use a variety of techniques to influence lawmaking. Contemporary political contexts influence their level of success, which also depends on the importance of who or what they represent.

Exam practice questions

Short answer

- 1a) With reference to lawmaking, explain what is meant by an 'individual'.
- 1b) Explain the relationship between the parliament and the courts.
- 1c) Discuss **one** argument for and **one** argument against the proposition that 'political parties are more influential than pressure groups in shaping statute law'.
- 2a) Define the term 'micro party'.
- 2b) Outline **three** strategies that pressure groups can use to influence lawmakers.
- 2c) Discuss the effectiveness of an individual in influencing the lawmaking process in the courts.
- 3a) Explain the purpose of statutory interpretation.
- 3b) Outline **three** ways that individuals can influence lawmaking in the parliament and the courts.
- 3c) Discuss the claim that 'minor or micro parties can have a significant impact on the lawmaking process in the Commonwealth Parliament'.
- 4a) Explain what is meant by 'having standing'.
- 4b) Distinguish between major and minor political parties.
- 4c) Discuss **one** argument for and **one** argument against the proposition that 'individuals are limited in their ability to influence the parliamentary lawmaking process'.

Source analysis

Read the source below and answer the questions that follow.

The source is adapted from: Kate Crowley, 'Conservative but green independent MP Zali Steggall could break the government's climate policy deadlock'.¹

On Monday, Independent Zali Steggall released her Climate Change (National Framework for Adaptation and Mitigation) Bill 2020. It will be presented to the House of Representatives on March 23 for a vote.

On the same day as its release, Business Council of Australia CEO Jennifer Westacott put forward her support for a net zero emissions target, saying Zali's bill offered a sensible climate target the major parties could agree on.

But the main strength of Zali's bill is its non-partisan nature. And it's important for side stepping toxic climate politics and for proposing reasoned, apolitical, tried and tested policy solutions.

All it would take for Zali's bill to pass is for a majority of MPs in the House of Representatives to vote for it, meaning some members of the government would need to use their vote.

Although members of parliament are elected to represent their constituents, political allegiance invariably trumps popular will as they vote along party lines. So Steggall is appealing directly to voters to contact their MP to secure support for her bill, and through her "Climate Act Now" petition.

This is an almost impossible task, but Zali will likely build support as she did in seeking her election in Warringah, by staying focused, by meeting as many people as possible, and by staying true to her ideas.

¹ Kate Crowley, 'Conservative but green independent MP Zali Steggall could break the government's climate policy deadlock', *The conversation*, 12 February 2020, <<https://theconversation.com/conservative-but-green-independent-mp-zali-steggall-could-break-the-governments-climate-policy-deadlock-131644>>.

- 5a) Explain what is meant by an 'Independent'.
- 5b) With reference to the source, explain in your own words, **two** issues that may arise from the introduction of this bill into parliament.
- 5c) Discuss the extent to which individuals have a more significant impact on the lawmaking process in the courts than in the parliament.
- 5d) Compare the influence of pressure groups on the parliamentary lawmaking process with that of political parties.

Essay

- 6) Analyse the extent to which political parties are always more successful than pressure groups in influencing lawmaking.
- 7) Evaluate the impact of individuals or pressure groups, compared to that of political parties, on the lawmaking process.

Investigation

Independent members of parliament are individuals in the lawmaking process.

- 8a) Identify one Independent member of parliament.
- 8b) Outline how your chosen Independent member of parliament has attempted to influence lawmaking.
- 8c) Discuss how successful your chosen member has been in influencing lawmaking in comparison to both a political party and a pressure group that you have studied.

Students will undertake a jigsaw activity.

- 9a) The class will be divided into groups of three students each.
- 9b) Each student will be allocated one of the following sets of actors in the lawmaking process:
 - individuals;
 - political parties; or
 - pressure groups.
- 9c) Each student will become an expert on their assigned actor by collating information on the following points:
 - provide examples of your actor attempting to influence the lawmaking process in the parliament and the courts;
 - examine ways that the influence of your actor has led to changes in the law; and
 - overall, to what extent has your actor been significant in influencing the lawmaking process?
- 9d) Students will present their findings to the other students in their group.



Powers in balance — Australian federalism

Syllabus point:

- **federalism in Australia with reference to:**
 - **Constitutional powers of state and Commonwealth parliaments, including exclusive, concurrent and residual powers, Sections 51, 52, 90, 107 and 109**
 - **Financial powers of the Commonwealth Parliament, including taxation power, tied or special purpose grants, including Sections 51(ii), 87, 90, 92 and 96**
 - **Change in the balance of power since federation, with reference to:**
 - i. **Financial powers, including vertical fiscal imbalance and horizontal fiscal equalisation, the Grants Commission**
 - ii. **Referral of powers, Section 51(xxxvii)**
 - iii. **The Council of Australian Governments (COAG)**
 - iv. **National Federation Reform Council (NFRC) and the National Cabinet (replaced COAG June 2020)**
 - v. **Cooperative federalism as opposed to coercive federalism**
 - vi. **High Court of Australia constitutional interpretation, including external affairs power Section 51(xxix), corporations power Section 51(xx), and taxation powers**

Introduction

The geographical organisation of a country's **sovereignty** has a profound effect on its political and legal system and the nature of power. There are two ways to geographically organise the sovereignty of a nation state:

- as a unitary system; or
- as a federal system.

Unitary systems concentrate political and legal power in one national government. Of course, in unitary systems that are democracies the three branches of government are separated, and check and balance each other. However, there is no division of powers between national and regional levels. Executive, legislative and judicial powers of unitary systems have nationwide jurisdictions limited only by legal, not geographical, limitations imposed by their constitutions. Britain and New Zealand are examples of unitary systems. Each Australian state is also a unitary system within its geographical jurisdiction.

Federal systems divide political and legal power between one national and two or more regional governments. Federal constitutions not only determine the legal jurisdictions of government powers, but they also divide powers between the two levels geographically. Therefore, each level — the national and the regional — has executive, legislative and judicial powers. There is a separation of powers *within* each level and a division of powers *between* each level. The United States of America (US), Canada and Australia are examples of federal systems.

Australia is a federal State; consequently, political and legal power is fundamentally affected by the *division of powers* that is the defining feature of federalism.

Australian federalism followed the US model. However, it has developed specifically Australian characteristics in the 120 or so years since federation.

This chapter examines:

- how the powers of government are divided; and
- the balance of powers that is the consequence of a division of powers into two spheres.

A federal constitution *geographically divides* the powers of government; that is, there is a division of the executive, legislative and judicial powers. This chapter examines the division of **legislative powers** in detail. There is a further division of

financial power, which influences **the balance of power** within a federation. The division of the executive and judicial power is not the subject of this chapter.

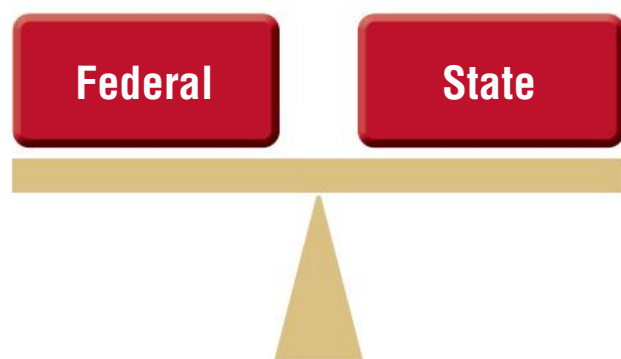
Background information: Legislative and financial powers

Strictly speaking, financial power is a subset of legislative power. Parliamentary authorisation of revenues and expenditures is part of the checks and balances inherent in the separation of powers.

Parliament authorises revenue and expenditure by passing appropriations bills — often called money bills. Appropriations bills are a type of legislation. Hence, financial powers are a subset of legislative powers. The *Commonwealth of Australia Constitution Act 1900* (the Constitution) divides these legislative and financial powers between the Commonwealth and the states.

Each level of government in a federation needs sufficient financial capacity, otherwise it may not possess the monetary resources to perform its governance roles and responsibilities.

When power is located in two geographical jurisdictions — one national and the other regional, each with a quantum of power — a balance between them is the result. The balance of legislative and financial powers may be more or less equal between these jurisdictions, and the balance may shift over time as circumstances change.



■ Figure 9.1 – In any system where there are two levels of government, there will always be a balance of power between them.

Source: Jacky Holland, Direction Design, 2020

Background information: Sovereignty and the State

'Nations' are peoples who share a common history, traditions, languages and culture.

'States' are organised political entities with a government. Countries are examples of States. So too are the subnational units in federations — often called states or provinces.

'Nation states' are self-governing political entities composed of a people who share a common history, traditions, languages and culture.

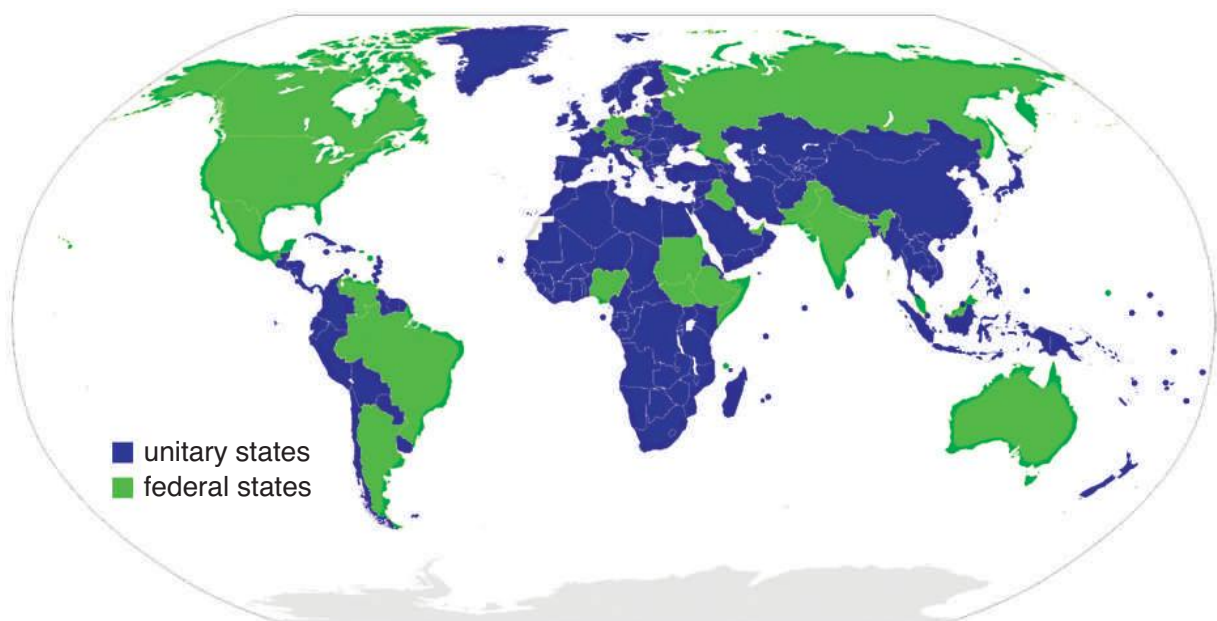
A nation state possesses four elements — sovereignty, a territory, a population and a government.

Sovereignty is the supreme authority of a State — no higher political or legal power exists. It is an essential ingredient of statehood. States are different from any other form of human organisation. Corporations, businesses, sporting teams — even the United Nations — are all forms of human organisation, but none are States; they do not possess sovereignty.

Sovereignty is a political and legal concept that has geographic and demographic domains. It extends over a part of the earth's surface and encompasses a **territory** and a **population**. Territory and population are two essential ingredients of a State. Within a sovereign power's territory, no other country can exercise authority. The population of a nation state is subject to the sovereign's laws and the laws of no other.

A government exercises the sovereign power of a State. In democracies, sovereignty is vested in the people. Citizens of democratic States delegate their power to a government at an election, giving it the mandate to govern for a limited period. Governments exercise sovereignty through laws. They make, carry out and adjudicate laws through the three branches of government. Laws apply to a State's entire population and the whole of its territory. Government is the fourth essential ingredient of a State.

In contrast, some nations are not States because they do not possess the four elements described above. Aboriginal Australians are an example. Aboriginal peoples form many distinctive Australian nations. After settlement, the British declared the territory of Australia legally *terra nullius* — land belonging to no-one. *Terra nullius* provided the legal basis for the establishment of British sovereignty over Australia's territory and its people — both settlers and the Aboriginal populations. British laws — and later colonial laws made under British sovereignty — applied over the territory and peoples of Australia. When Australia became a nation state after federation in 1901, Australian sovereignty largely replaced British sovereignty. Over the 20th century, Australian sovereignty expanded as residual British sovereignty retreated. However, Aboriginal nations pre-settlement sovereignty has never been recognised or acknowledged. The Mabo Case in 1992 swept *terra nullius* away, but the High Court of Australia (High Court) made it clear



■ Figure 9.2 – World map showing unitary (blue) and federal (green) systems.

Source: Lokal_Profil, Map of unitary and federal states, 2007 CC BY-SA 2.5, <<https://commons.wikimedia.org/w/index.php?curid=2744912>>

that its decision in *Mabo* did not undermine Britain's original claims to sovereignty in 1788. Aboriginal nations are not States because they cannot make laws governing territories or peoples. Indeed, much of today's debate about the future of Aboriginal political and legal rights centres on the argument that Aboriginal sovereignty has never been ceded by treaty, that it remains in some form and must be recognised in Australia's Constitution. Unit 4 examines these issues in greater detail.

Background information: Describing and classifying federal systems

Federal systems are classified according to the balance of power between the national and regional governments.

The distribution of powers between the two levels can favour one level over the other, leading to a dominant level. Alternatively, there may be an even balance where neither level dominates. The balance can also change over time.

A **federal continuum** describes the relative power of one level compared to the other. The central government can either be dominant, equivalent or weak compared to the regional governments.

The federal continuum

A dominant centre — A stronger national government

Coercive federalism describes a situation in which the central government is powerful, and the regional governments lack autonomy

within their sphere of sovereignty. The central government uses its powers — whether legislative or financial — to dictate policy to the regional governments and interfere in their areas of sovereignty.

Equivalent powers — The national and regional governments are equivalent

Dual federalism describes a balance of power between national and regional governments. There are two forms of dual federalism:

coordinate federalism, which describes a situation in which each level of government is more or less autonomous within its sphere of sovereignty. There is little cooperation, and each level pursues its policies with little input or interference from the other level. Interaction between the levels of government takes place through federal institutions, but they are weak in coordinate systems; and

cooperative federalism, which describes an even balance of power between central and regional governments. Neither is dominant. There is substantial cooperation between the levels, which distinguishes cooperative federalism from coordinate federalism. Cooperative federal systems have strong federal institutions that link the two levels and allow for joint decision making and action between the levels of government.

A weak centre — Stronger regional governments

Confederation describes a very loose federation in which the central government is weak and the regional governments are strong.

The European Union (EU) is a good example. In the EU the 'regional' governments are sovereign countries — for example, Germany, France and others — and have not surrendered much of their sovereignty to the European Commission — the EU's executive branch — or the European Parliament — the EU's legislative branch.



■ Figure 9.3 — The federal continuum in Australia.
Source: PLEAWA, 2020

Australian federalism

The Founding Fathers intended Australian federalism to be coordinate or cooperative. Over time it has become more coercive.

Australian federalism operates through a division of powers between the Commonwealth and the six states. Each is sovereign within its territory and over its state population, and has a government.

Australia's national government: The Commonwealth

The Commonwealth is sovereign over all Australian territory — including any overseas territories — and the people of Australia.

It has a national government comprised of:

- a Commonwealth Parliament;
- a federal government — that is, the Queen represented by the Governor-General, the Prime Minister and Cabinet as well as the Commonwealth Public Service; and
- federal courts.

Chapters 1, 2 and 3 of the Constitution — described in detail earlier — allocate exclusive and concurrent legislative and financial powers to the national government.

Australia's regional governments: The states

The Australian states are sovereign over their state territories and state populations.

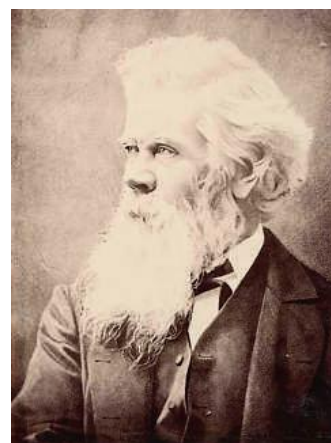
Each has a state government, comprised of:

- a state parliament;
- a state government — that is, the state Governor as the Queen's representative, the Premier and Cabinet as well as the state public service; and
- state courts.

The states are unitary within their geographical jurisdictions. They delegate powers to local governments under state legislation, usually by a statute called the *Local Government Act* or similar.

Chapter 4 of the Constitution — titled “Finance and Trade” — aims to provide the six states with financial autonomy and ensure free trade between them. Chapter 5 of the Constitution — titled “The States” — preserves state sovereignty, meaning they can enact laws in areas of concurrent and residual legislative and financial power.

Theoretically, the Commonwealth is not a higher power than the states; it just exercises power in different spheres of authority.



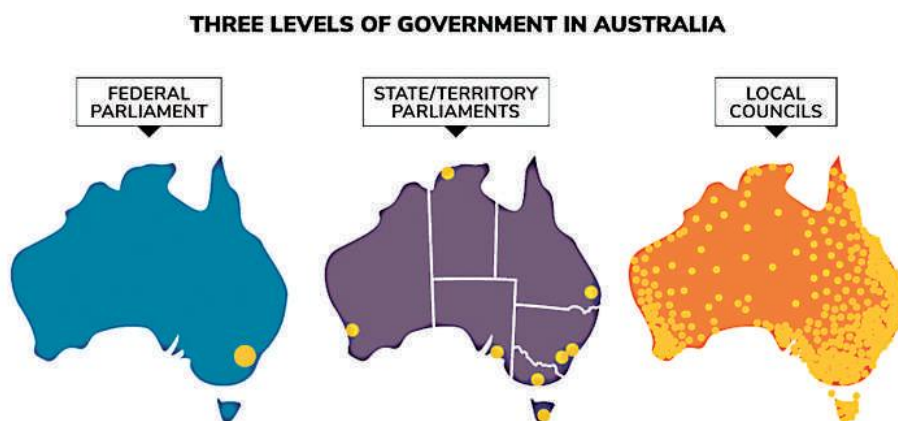
■ Figure 9.4 – Henry Parkes is often referred to as the Father of Federation.

Source: ‘Henry Parkes’, in Eminent citizens [of] New South Wales, 1850–1900, 1910, Public Domain, <<https://commons.wikimedia.org/w/index.php?curid=381512>>

Other non-sovereign Australian governments: Territory and local governments

There are two self-governing mainland territories — the Australian Capital Territory (ACT) and Northern Territory (NT) — but the Commonwealth delegates law making powers to them. The Commonwealth is a higher power in relation to territories. Territories are not sovereign, and the Commonwealth can override any of their laws.

Local governments have no Constitutional power. The states are higher powers than councils, shires and cities because they delegate power to local governments. They do this through their respective *Local Government Act*.



■ Figure 9.5 – Three levels of government in Australia.

Source: Parliamentary Education Office, Three levels of government in Australia, CC BY-SA 3.0, <peo.gov.au>

State and Commonwealth powers

The Constitution achieves the division of powers by allocating a list of specific powers to each level of government and reserving the rest to the states. Achieving a division of powers requires a written constitution because:

1. exclusive and concurrent legislative and financial powers must be specified for each level;
2. a system to balance revenue and expenditure at each level must be established; and
3. a system for resolving disputes between governments within a federation is needed.

Numbers 1 and 2 above are the focus of this chapter. Perceptive students will recognise that the High Court is the solution to number 3. All three are reasons why Australia could not merely adopt the British system of unwritten constitutional conventions without also needing a US-style written federal constitution.

Dividing the powers

The US is the oldest existing 'modern' federation. Australia's Founding Fathers drew on US constitutional principles when developing the Australian system of government. The US Constitution divides the powers within the American federation by making all the powers exclusive, concurrent or residual. Australia's Constitution does precisely the same thing.

Exclusive powers

Exclusive powers belong to the Commonwealth alone. The Constitution specifies them — that is, they are written. They are also enumerated — that is, numbered — in sections and subsections. These powers are relatively few and are found throughout the Constitution rather than listed in one section. Two examples are:

- Section 52 — a legislative power over the Commonwealth public service and the site of the Commonwealth seat of government — the ACT; and
- Section 90 — a financial power in which the Commonwealth alone make laws to raise revenues by charging customs duties and excise, which are forms of taxation.

Concurrent powers

Concurrent powers are also specified and enumerated within the Constitution. All the concurrent powers are in:

- Section 51 — the longest section of the Constitution, containing 40 subsections specifying a range of powers.

Concurrent powers belong to both the Commonwealth and the states. Students who have read the relevant parts of the Constitution may note that the word 'concurrent' is not in the Constitution. Concurrent powers exist because the term 'exclusive' is absent from Section 51. The absence of this word means that the states are *not excluded* from using the 40 powers listed. Two examples are:

- Section 51(ii) — a financial power that enables both levels of government to make laws to raise revenues from taxation, except for Section 90 customs duties and excise revenues; and
- Section 51(xx) — a legislative power that enables both levels of government to make laws governing corporations.

Despite the long list of powers, not all of the 40 powers in the Section 51 list are concurrent. Understanding the character — or nature — of a particular power is essential. Some powers are more suitable for the Commonwealth because they have a national character or nature — and this is so even if the Constitution does not specify that power is exclusive to the Commonwealth.

Concurrent powers that are 'exclusive by their nature'

Some Section 51 powers are 'exclusive by their nature'. The Commonwealth alone legislates under these heads of powers even though the Constitution does not specify the power as an exclusive Commonwealth power. An example is:

- Section 51(xxix) — a legislative power enabling Australian governments to enter into international agreements such as treaties, military alliances, overseas environmental and trade agreements, and the like. These activities are 'external affairs' because they are overseas agreements with other countries or international bodies such as the United Nations. Australia's external affairs are an exclusive realm of Commonwealth power because of their 'national' character. Thus, Section 51(xxix) is exclusive by its nature. The states do not make laws under this head of power despite the Constitution not preventing them from doing so.

Concurrent powers in conflict

Laws may conflict with each other if both levels of government make different laws under a concurrent head of power. Contradictory laws

would be contrary to the rule of law, which requires laws to be unambiguous so that everyone can comply with them. Without a way to resolve these conflicts, a person obeying a state law may be breaking a Commonwealth law or vice versa.

The Founding Fathers resolved this problem by including a mechanism for dealing with conflicts:

- Section 109 — states that where a Commonwealth and state law conflict, Commonwealth law will prevail “to the extent of the inconsistency”. It means state laws are invalid if they conflict with Commonwealth law. Only the part of a state law which conflicts with Commonwealth law ceases to operate — the rest of the law continues to function. Section 109 is a legislative power. Nevertheless, it can affect financial powers. For example, a Commonwealth taxation law may conflict with a state taxation law, in which case the state tax law may be invalid.

Background information: Covering the field of law and the impact of the High Court on the federal balance of power

A ‘field’ of law is the legal and geographical jurisdiction provided by a head of power. The states have joint legislative power in concurrent fields. However, if the Commonwealth chooses to ‘enter the field’ of a concurrent power, it can enact legislation that will invalidate all state law in that particular field. For instance, a Commonwealth law intended to be the *only* law in a particular field will invalidate *all* state laws in the same field.

‘Covering the field’ illustrates the pivotal role the High Court has in changing the balance of legislative powers between the two levels of government.

An inconsistency between Commonwealth and state laws could be quite small. In the first decades after federation, the High Court had interpreted Section 109 narrowly, restricting its impact to small inconsistencies and protecting state laws to the maximum extent possible.

Later the High Court began to interpret Section 109 more broadly. The Court accepted that when legislating under a Section 51 concurrent ‘head of power’, the Commonwealth could specify within the wording of an Act that its law is ‘intended to be the only law’ in that field. When passed

with this intent a Commonwealth law **covers the field** of the concurrent power completely. Such law conflicts with all state law in the same field.

Any Commonwealth law containing this intent will invalidate all state law in the field because the extent of the inconsistency between Commonwealth and state law will be 100 per cent.

The High Court developed this attitude to Section 109 over several cases, reaching its final stance in *Ex parte McLean* [1930] HCA 12. By this stage, Section 109 had emerged as a powerful mechanism for enhancing Commonwealth power.

The role of High Court decisions changing the balance of powers within the federation is examined later in this chapter.

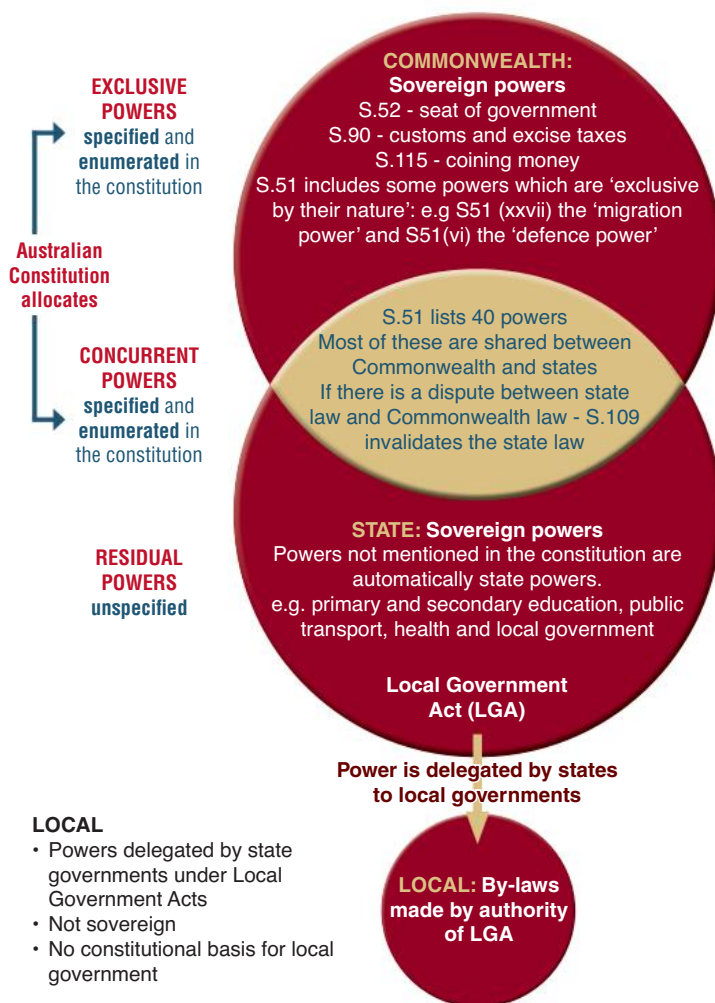
Residual powers

Residual powers belong to the states. They are unspecified — that is, not written in the Constitution. All unspecified legislative and financial powers fall into this category. Section 107 of the Constitution ‘saves’ the powers of the state parliaments. Any powers that were not exclusively vested in the Commonwealth in the Constitution remained with the states.

Powers not written in the Constitution — called unspecified powers — include primary and secondary education, health, roads and traffic rules, local government, public transport, railways, mental health and many others. A feature of many residual powers is that they are public goods and services that governments provide to citizens.

State governments are closer to the people they govern, making them best placed to determine the need for these public goods and services. It is worth noting at this point that public goods and services are also expensive for the states to deliver. For example, health is a residual power that is subject to rapidly expanding costs because of new medical technologies and an aging population. The states bear these costs.

The concept of residual powers meant the Founding Fathers did not have to anticipate all the powers needed by future governments — an impossible task. Residual powers are a kind of ‘blank cheque’ that can cover any power not expressed in the Constitution. It means that the Constitution can automatically adapt every time government steps into a new area of law making. It also means that state roles and responsibilities can increase incrementally over



■ Figure 9.6 – The federal division of powers.
Source: Stephen King, 2020

Commonwealth financial powers

Governments must raise and spend money. The Constitution makes provisions for each level of government to raise revenue in order to finance their roles and responsibilities. These powers are often referred to as financial powers because they are relevant to taxing and spending. Recall, financial powers are a subset of legislative powers because revenue and spending require special legislation called appropriations or money bills.

The financial powers of the Commonwealth Parliament include:

- Section 51(ii) — the taxation power (a concurrent power);
- Section 90 — customs, bounties and excise (an exclusive power); and
- Section 96 — the grants power (an exclusive power).

Other financial powers relevant to the states are:

- Section 87 — a section designed to guarantee state revenues; and

time, and so can the cost of delivering them.

Perceptive students will note a problem for the states here — their roles and responsibilities can increase because they are unspecified. However, their financial powers remain largely fixed because the Constitution specifies the financial powers of both levels of government. Very astute students will note a further dilemma for the states — their powers are unspecified and, therefore, the High Court cannot interpret them. Because residual powers are 'non-justiciable', the High Court has not been able to easily reserve them to the states when interpreting the Constitution without inventing particular 'doctrines of interpretation'. See: *Background information: Doctrines of interpretation during the High Court's early period.*

- Section 92 — a section requiring interstate trade to be "absolutely free".

The sections noted above are described in detail below.

Section 51 (ii) — The taxation power

The Commonwealth uses this head of power to raise taxes. It is an extensive concurrent power. The states may also raise taxes under this power except for customs, bounties and excises, which Section 90 makes exclusive to the Commonwealth.

Since World War 2, only the Commonwealth raises money through income tax, which is the largest source of government revenue, even though there is no constitutional prohibition on the states imposing an income tax.

Commonwealth taxing powers have increased substantially at the expense of the states' tax powers, mainly due to High Court constitutional interpretations.

Changes in how Section 51(ii) operates have been affected by High Court 'landmark cases' which have upheld the validity of Commonwealth taxation laws. These cases have been a significant source of change in the federal balance of power. They increased the taxing power of the Commonwealth and diminished that of the states.

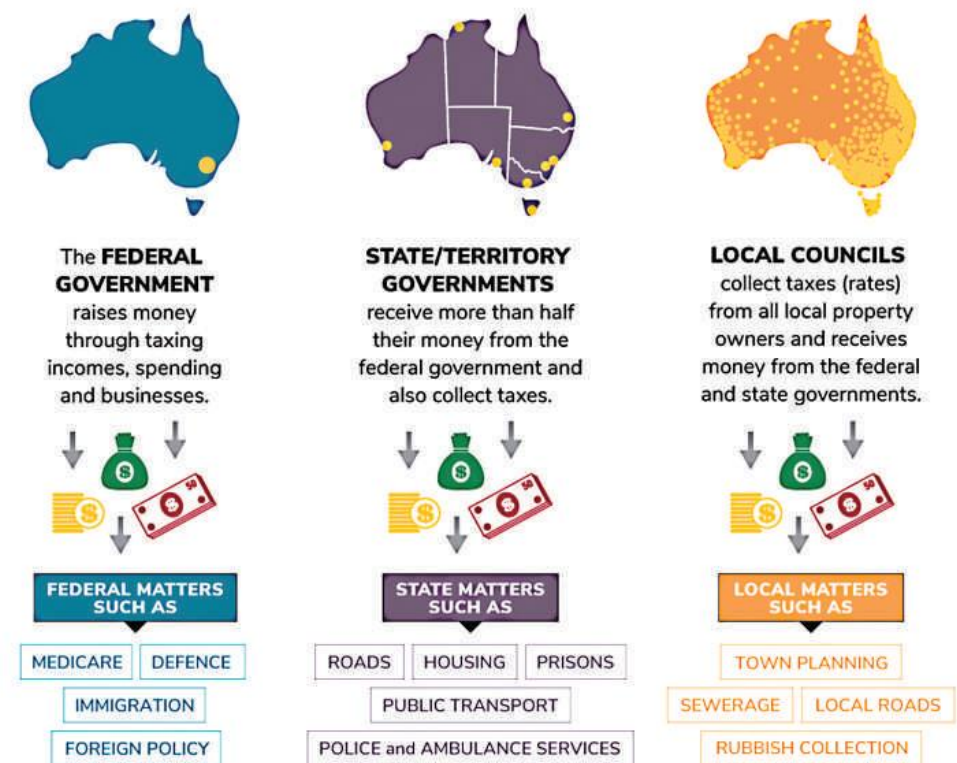
Section 90 — The customs, duties and excise power

As the Preamble of the Constitution says, a significant reason for the six colonies agreeing to federate into "one indissoluble Federal Commonwealth" was to abolish barriers to trade between the states.

Customs, bounties and excise are government charges on goods when they cross a border. They are forms of taxation applied to imported goods which make them more expensive to consumers. They also hamper economic efficiency by protecting unproductive industries against competition from cheaper imports. Several colonies imposed these taxes on other colonies' goods. Customs, bounties and excise discouraged intercolonial trade before federation in 1901 and were an impediment to economic growth in the 1890s which was a decade of recession, high unemployment and strikes. Getting rid of these 'protectionist' and divisive taxes was a significant motivation for the federation of Australia.

To prevent the states from reintroducing these inefficient 'taxes on trade', the Constitution gave the power exclusively to the Commonwealth. Section 90 makes the collection of customs, duties and excise an exclusive power of the Commonwealth.

From 1901, only the Commonwealth could impose these taxes. The problem for the states was that these taxes were a lucrative source of revenue forever lost to them. Section 90 created an imbalance between the revenue and spending capacities of the new national government and



■ Figure 9.7 – Commonwealth and states' financial powers.

Source: <https://peo.gov.au/understand-our-parliament/how-parliament-works/three-levels-of-government/three-levels-of-government-governing-australia>

the states. From the day of the new federation, due to its Section 90 power the Commonwealth has collected more revenue than it needs to cover its expenses — that is, it has 'surplus revenues'. The states are in the reverse situation — their sources of revenue are insufficient to cover their (ever-expanding) costs.

'Vertical fiscal imbalance' (VFI) is the term used to describe a financial imbalance in a federal system of government. Australia's Constitution entrenched a VFI at the point of federation. See: *Background information: Vertical fiscal imbalance*.

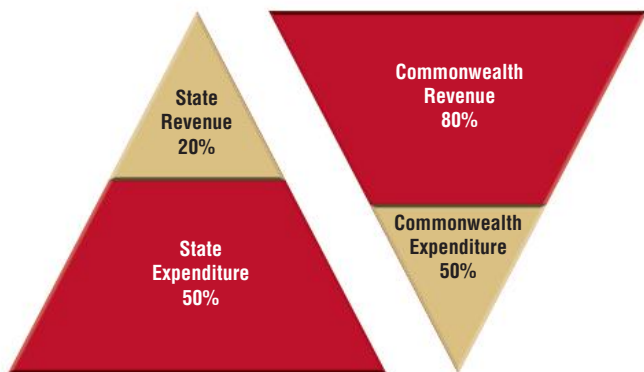
Background information: Vertical fiscal imbalance

Vertical fiscal imbalance (VFI) is the term used to describe the disproportionate taxing powers and spending obligations of the Commonwealth and the states. It means:

- the Commonwealth collects more revenue than it needs; and
- the states must spend more than they collect as revenue.

The VFI creates the need for transfers of money from the Commonwealth to the states, and this is discussed at greater depth later in this chapter.

The Commonwealth collects approximately 80 per cent of total revenues, leaving 20 per cent to be collected by the states. Each level spends approximately 50 per cent of total expenditure. The Commonwealth has substantial surplus revenues, and all the states are in more or less permanent deficit. Commonwealth surpluses fund state deficits by transferring money to the states as Section 96 grants.



■ Figure 9.8 – Vertical fiscal imbalance.
Source: PLEAWA, 2020

A feature of customs, bounties and excise is that the Constitution does not clearly define them. Being undefined made them open to interpretation and has led to High Court cases over the meaning of these words. High Court constitutional disputes between the states and the Commonwealth — over Section 90 and other sections — have led to landmark cases that have resulted in significant impact on the federal balance of power.

A student with a keen understanding of how important the meaning of words can be may recognise that the interpretation of 'excise' is enormously significant for the size of the VFI. If a tax — for example, a franchise fee — is defined as an excise then only the Commonwealth can collect it because Section 90 makes excise an exclusive power. A broad definition of excise — that is, one that allows the definition of many fees as excise — will fill the Commonwealth's accounts and impoverish the states by preventing them from collecting franchise and other fees. A narrow definition will preserve state financial power. The essential concept here is: High Court interpretations of financial powers can significantly change the federal balance of power because they make the states more or less reliant on Commonwealth money.

Section 96 — The grants power

The Founding Fathers had the foresight to understand the consequences of their decision to make customs, bounties and excise an exclusive Commonwealth power. They knew the Commonwealth would collect more revenue than it needed and would end up with surplus revenues — that is, money left over after it had spent what was necessary to fund its roles and responsibilities. They also understood that the states would need more money than they could raise from their limited sources of revenue. In short, the Founding Fathers knew there would be a VFI.

The Constitution contains several mechanisms to allow for the transfer of Commonwealth surplus revenues to the states. Section 96 — called the 'grants power' — is one of these transfer mechanisms.

The Commonwealth makes Section 96 grants to the states. They are funded from the surplus revenues of the Commonwealth and administered by the **Commonwealth Grants Commission**, which monitors the grants programs and ensures states spend the grants as intended. Section 96 states, "the Parliament may grant financial assistance to any State on such terms and conditions as the Parliament thinks fit". These are critical words for the federal balance of power.

Section 96 grants are made through the Commonwealth enacting a statute granting a state or several states money. The statute may grant money in one of two ways:

- the grant may be 'untied'; that is, the state government may spend the money at its discretion. These are **general purpose payments (GPPs)**; or
- Section 96 permits the Commonwealth Parliament to attach conditions "as it thinks fit". This power allows conditional grants, dictating how the states spend the money. Grants made with conditions are **specific purpose payments (SPPs)**.

SPP grants occur in three ways:

1. **tied grants** to states, which must then comply with the Commonwealth's conditions. The Commonwealth monitors state spending to ensure compliance with the grant conditions. Tied grants are an example of coercive federalism;
2. **incentive payments** made to states after they have met the specific conditions of the grant. The grants provide incentives

for states to perform specific actions — for example, economic reforms — specified by the Commonwealth. States must prove their achievement of the conditions before the Commonwealth makes the grant. Incentive payments are still coercive; or

3. **‘National Partnership Payments’** (NPPs) made to states to achieve agreed National Projects negotiated by Commonwealth and state governments under the National Reform Agenda (NRA). See: *Example: From coercive to cooperative federalism — How incentive payments have reformed the Australian federation.*

Conditions attached to Section 96 grants by the Commonwealth have had a significant impact on the federal balance of power. The national government may interfere with residual powers by using its superior financial power this way.

Example: From coercive to cooperative federalism — How incentive payments have reformed the Australian federation

Tied grants make Australian federalism more coercive because the Commonwealth can dictate terms to the states and extend its reach into their residual powers. For example, where the Commonwealth may lack the *legislative* power to carry out an objective, it can use its *financial* power to coerce the states into using their legislative powers to achieve the Commonwealth’s aims.

As the 20th century progressed, the changing international environment created a need for nationally coordinated policy. Tied grants provided one means by which the Commonwealth sought to achieve national aims using state powers. An early example was school funding. Schooling is a residual (state) power. In 1957 — during the Cold War — the Soviet Union launched the world’s first satellite. Fearing the Soviet Union was gaining an advantage in science, the Menzies Government made tied grants to the states, forcing them to build science laboratories in state high schools.

As internationalisation and globalisation increased, the need for national economic reform became urgent. The National Competition Policy (NCP) of the Keating-era (1991–1996) reformed state-controlled energy, gas and water markets. The Keating Government sought to force the states to privatise their assets by selling them to private companies. The NCP was an early incentive

payment scheme which saw states rewarded with Commonwealth grants if they sold their assets to private companies. The NCP was coercive because it dictated narrow goals to the states.

The NRA — agreed in 2006 — was underpinned in 2009 by the Intergovernmental Agreement on Federal Financial Relations (IGAFFR). The IGAFFR was negotiated and signed by Australian governments and is a fundamental reform of the federal financial system. It is the cornerstone of modern Australian cooperative federalism.

Under the NRA and IGAFFR, Australian federalism has become more cooperative. The new federal financial system works in the following way:

- the two levels of government enter into National Agreements;
- under the five National Agreements, they enter into National Partnerships — that is, Commonwealth-state partnerships;
- specific National Projects are then agreed and worked on by both levels of government. See examples below.
- The Commonwealth provides the funds — via Section 96 grants called National Partnership Payments — and the states provide the legislative power and human resources needed to achieve the National Projects.

Example 1: National Agreements have slashed the number of Section 96 tied grants from 92 to five, significantly reducing the complexity and cost of the grants system.

Example 2: An example of a National Project is Auslink. Auslink is a shared investment in transport infrastructure by both levels of government. The National Disability Insurance Scheme (NDIS) is another. Commonwealth money pays for the NDIS, but the scheme relies on state health and other resources to deliver government services to the disabled.

NPPs are useful in contemporary Australia, where national goals — such as economic reform — often require state powers and human resources to achieve. Both levels of government cooperate through the NRA and IGAFFR system — the Commonwealth providing its financial resources and the states providing their legislative powers and government resources to achieve national objectives.

Section 87 — The ‘Braddon Blot’

Section 87 was another mechanism intended to transfer funds from the Commonwealth to the states. The so-called ‘Braddon Blot’ was an attempt to guarantee the financial resources of the states after federation. As history would prove, it was a far-sighted idea.

Section 87 requires the Commonwealth to pay the states 75 per cent of the revenue it collects from Section 90 customs, bounties and excise. This section had a 10-year time limit after which the Commonwealth could decide whether or not to keep paying 75 per cent of its Section 90 revenues to the states. The Commonwealth ended the payments as soon as it was able to do so. Time limited sections — like Section 87 — are termed ‘spent sections’. Once the time limit expires, they cease to operate unless the parliament wishes to continue the provision.

Sections intended to compel the Commonwealth to distribute its surplus revenues to the states are either spent, redundant or give discretion to the Commonwealth, allowing them to dictate how the states spend their grant money.

Section 87 is known as the Braddon Blot after Edward Braddon, the Tasmanian Colonial Premier at the time of the Constitutional Conventions of the 1890s. He was involved in drafting the Constitution at these conventions. Braddon feared that the Commonwealth would eventually collect the lion’s share of taxes, leaving the states impoverished and at the mercy of the Commonwealth. He insisted this section be included, against the wishes of many of the delegates at the Conventions. Some dubbed Section 87 the ‘Braddon Clause’. Those who opposed it called it the



■ Figure 9.9 – Edward Braddon, the 18th Premier of Tasmania. Source: National Library of Australia, *Edward Braddon*, 1898, Public Domain, <<https://commons.wikimedia.org/w/index.php?curid=383797>>

Braddon Blot. A blot is a stain — Braddon’s colleagues thought his idea was an unnecessary impediment to the federal system they were designing. Nevertheless, Braddon was proven correct by history.

Background information: How federal financial arrangements built a centralising coercive tendency into the Constitution

Recall that the states have expensive roles and responsibilities, requiring them to provide public services and goods. However, they have a limited tax base of their own. Remember also that the Founding Fathers were aware that the Commonwealth would end up collecting surplus revenues.

Section 87 and Section 96 are two of several measures written into the Constitution to deal with the fact that the Commonwealth would collect more revenue than it spent, and the states vice versa.

Another measure to transfer funds from the Commonwealth to the states was Section 94, which required the Commonwealth to distribute its surplus revenues to the states in any manner that the parliament ‘deemed fair’. Soon after 1901, the Commonwealth Parliament deemed it fair to pay all its surplus revenue into trust funds to cover future spending, thus eliminating the surplus and leaving no money to distribute to the states. The states challenged this in the Surplus Revenue Case 1908. However, the High Court found the Commonwealth’s action was constitutional. Section 94 is redundant; it never operated as the Founding Fathers intended, and it was a constitutional dead end.

Sections 87, 94 and 96 are all mechanisms for transferring surplus revenues from the Commonwealth to the states. Astute students will see that all the sections intended to compel the Commonwealth to distribute its surplus revenues to the states are either spent, redundant or give discretion to the Commonwealth, allowing them to dictate how the states spend their grant money. These facts have caused a large VFI, creating a financially powerful Commonwealth and financially dependent states. Consequently, the Constitution’s financial arrangements have built a centralising tendency into the Constitution which has had a very significant impact on the federal balance of power. Australian federalism is sometimes termed ‘fiscal federalism’ because of these factors.

Section 92 — Trade between the states to be ‘absolutely free’

As already noted, the removal of interstate trade barriers was one of the motivations for federation in the first place.

Section 92 is a guarantee that no state can make laws that have the effect of creating a trade advantage to itself or a disadvantage to other states. It says that interstate trade shall be “absolutely free” — no state can impose customs, bounties, excise or any other costs or barriers on goods (and services) crossing its border from another state.

Section 92 is the most litigated section of the Constitution and has been the subject of more High Court cases than any other. Such extensive testing in the High Court indicates that its meaning is unclear. The case that settled

the meaning of Section 92 for many years was *Cole v Whitfield* (1988) 165 CLR 360. This case redefined the meaning of ‘absolutely free’. The High Court overruled the original interpretation — a precedent set by the Bank Nationalisation Case in 1948. The right of an *individual* to

“Section 92 is the most litigated section of the Constitution”

trade freely was the foundation of the original meaning. *Cole v Whitfield* [1988] replaced the individual right with an *economic concept* of free trade, which is broader than an individual right. The case limited state legislative power and is discussed in *Case studies: the courts*.

Changes in the federal balance of power

Intentions and realities

At the time of federation, Australia was a Dominion of the British Empire, and much of its international relations followed the Empire’s imperial policy. Most of the colonies had been self-governing for half a century or so. They were the established governments in Australia, not the new Commonwealth. Most of the Founding Fathers were colonial politicians, such as Edward Braddon. For them, federation aimed to resolve intercolonial rivalries — such as protectionist trade policies — that were hampering economic growth, and unite the colonies to provide a common defence against perceived threats — such as non-white immigration and German imperialism — in the Asia-Pacific region. They certainly did not intend for the new Commonwealth to eclipse their states in the new Australian nation.

Instead, the Founding Fathers wanted the states to hold on to most of their pre-federation powers. They envisioned a small Commonwealth government with limited roles of a national character — and even then, some matters — like Australia’s foreign policy — would be decided in Britain.

The Constitution they drafted reserved most of the domestic roles and responsibilities to the states. As evidence, note how few of the Commonwealth’s powers are exclusive. The drafters of the Constitution wanted a coordinate/cooperative federal system with the states at least equivalent in power to the Commonwealth.

Despite these intentions, the Australian federation did not turn out that way. Over time, the **federal balance of power** evolved in a way that increased Commonwealth power at the states’ expense. Perceptive students will have noted that the way the Founding Fathers dealt with federal financial arrangements unintentionally sowed the seeds for much of the change in the balance of power that followed. See: *Background information: How federal financial arrangements built a centralising coercive tendency into the Constitution*. They may have hoped that the Senate — as the states’ house — would have been a defender of states’ rights at the Commonwealth level, but that was not to be. As noted in Chapter 2, the Senate quickly became a partisan house, not a states’ house.

How has the federal balance of power shifted from the intended cooperative/coordinate model to a more coercive system? Can we say that this is still true in contemporary Australia, or has a new era of cooperation emerged? To answer these questions, students must note the most critical factor of all — the *meaning* of the Constitution. Why is the Constitution so important? Because its words allocate the legislative and financial powers to each level of government. Also, because the Constitution is fundamental, the High Court — with its original jurisdiction to interpret its meaning — has become the most significant factor in changing the federal balance of power.

Changes in the federal balance of power occur as a result of two related factors:

- changes to the words of the Constitution (a formal change) — which has been relatively insignificant; and
- changes to the way the Constitution operates (informal changes) — which has been very significant.

Table 9.1 provides an overview of the formal and informal ways the Constitution can be changed. The formal way of changing the Constitution — a referendum — is the subject of the next chapter. Many of the informal ways of changing the operation of the Constitution are the subject of this chapter.

Federations have multiple governments that either cooperate and coordinate activity, or operate in such a way as one coerces the others. Cooperation, coordination and coercion are all relationships. Relationships depend on forums where exchanges of information occur. Federal bodies or institutions are forums that mediate intergovernmental relationships. See: *Background information: The institutions of Australian federalism*.

Intergovernmental relationships bind the two levels of government together. They also explain power relationships. Cooperative and coordinate federalism, in particular, rely on these links. See: *Example: From coercive to cooperative federalism — How incentive payments have reformed the Australian federation*.

Background information: The institutions of Australian federalism

Intergovernment interactions take place through the institutions of Australian federalism.

The Constitution

Naturally, the Constitution links the two levels — it creates the Commonwealth and preserves

the states. It formalises their relationship with each other and guides their interactions. Some key parts of the Constitution are:

- Chapters 1 and 5 allocate most of the powers to each level. Section 109 resolves legislative conflicts between them;
- Chapter 1, Section 51(xxxvii) allows the states to refer their powers to the Commonwealth if they wish;
- Chapter 3 establishes the High Court as the mechanism for resolving intergovernmental disputes;
- Chapter 4 specifies several important financial powers, notably Section 90. It also contains Section 92, which prevents states from creating barriers to interstate trade and Section 96 which provides for transfers of money from the Commonwealth to the states; and
- Chapter 5 contains Section 117, which prohibits the Commonwealth favouring any state over the others.

The Commonwealth Grants Commission

The Commonwealth Grants Commission is a **statutory authority** — which is an executive agency established by statute. The statute concerned is the *Commonwealth Grants Commission Act 1973*. The purpose of the Commission is to distribute Commonwealth monies to the states under Section 96. In simple terms, it administers Commonwealth grants.

A key purpose of the Grants Commission is the achievement of **horizontal fiscal equalisation (HFE)**. HFE aims to ensure all Australians enjoy a similar standard of government services, whether their state of residence is richer or poorer. The Grants Commission calculates the size of grants to states based on

Constitutional change can be:	
Formal	Informal
Alteration of the words of the Constitution	Alteration of the meaning of the Constitution
How? • Referendum – a formal vote by the people of Australia to change the words of the Constitution – Section 128 of the Constitution outlines the referendum process	How? • High Court interpretations of words and sections in the Constitution can change their meaning • Referral of powers by states to the Commonwealth • Cooperation between states and Commonwealth through COAG and unchallenged legislation • Coercion of the states through the use of Commonwealth financial power

■ Table 9.1 – Ways of changing the Constitution.
Source: Stephen King, 2020

how much money each state needs to provide a level of government services equivalent to all other states. For example, Western Australia and Queensland receive substantial own-source revenues from mining royalties that other states lack. Victoria and New South Wales have larger manufacturing and services sectors in their economies from which they collect more revenue than other states. Small states — such as South Australia and Tasmania — with small populations, fewer natural resources and lower tax bases, would have lower levels of government services than Western Australia or Victoria if not for Commonwealth grants designed to top up their revenues in order to achieve HFE.

Since 2000 the Grants Commission has been responsible for the distribution of the 'Goods and Services Tax' (GST) to the states. The GST is technically a form of excise — that is, a Section 90 tax — and therefore exclusive to the Commonwealth. To reduce the impact of the VFI and restore some financial independence to the states, the Commonwealth grants the entire GST to the states as Section 96 untied grants — that is, with no conditions attached. The Grants Commission applies a complex formula to determine each state's GST entitlement. HFE is the principle behind GST distributions.

HFE has been a feature of Australian federalism since 1933 and the establishment of the Grants Commission.

The Council of Australian Governments (COAG)

The Council of Australian Governments replaced the former Premiers' Conferences, which were a forum where leaders of Australian governments would meet to coordinate intergovernment activities. As legislative and financial powers centralised over time, Premiers' Conferences descended into contests between state premiers asking the Prime Minister for money. In 1992, the Keating Government restructured intergovernmental relations by reforming the Premiers' Conferences — they became the Council of Australian Governments or **COAG**.

COAG included the two territories and the President of the Local Government Association — so all three levels of government were represented.

COAG had eight 'COAG Councils' dedicated to specific areas of Commonwealth/state relations. Three examples include the Energy

Council, the Disability Reform Council and the Federal Financial Relations Council. The Energy Council coordinates the National Electricity Market (NEM). Energy is a residual state power, but economic and technological change has caused the six electricity grids of the five eastern states and the ACT to interlink, creating a national-scale grid requiring national level governance. The NEM is a massively interconnected system of power stations, transmission poles and wires across the whole of eastern Australia. It is far beyond the states' abilities to manage themselves. Cooperation between states — and between states and the Commonwealth — is essential. COAG's Disability Reform Council coordinates the National Disability Insurance Scheme (NDIS). The NDIS utilises state health services, but is a federally designed and funded scheme. Therefore, cooperation is essential. A final example is COAG's Federal Financial Relations Council, which negotiated the IGAFRR. The IGAFRR was a fundamental reform of the federal financial system and was the cornerstone of modern Australian cooperative federalism before the COVID-19 pandemic wrought change. For an examination of the impact of the COVID-19 pandemic on federalism, see: *Example: National Cabinet*.

COAG was the forum where the NRA, National Agreements, National Projects and NPPs — a form of Section 96 grant — were negotiated. See *Example: From coercive to cooperative federalism — How incentive payments reformed the Australian federation*.

Example: National Cabinet

In early 2020 the COVID-19 pandemic began to spread around the world. It soon became apparent that it was a health emergency that would have profound economic impacts. As a federation, Australia's response required cooperation between Commonwealth, state and territory governments because the powers and resources to fight COVID-19 are divided between the two levels of government.

Since March 2020, Australia has had a new executive committee, called National Cabinet. It was originally created to coordinate the nine Australian governments in their fight against COVID-19.

Described as 'executive federalism', the National Cabinet brought the heads of Australia's governments together at meetings three times a week during the crisis to process the advice of the Australian Health Protection

Principal Committee (AHPPC) — the nation's principal decision making committee for health emergencies. National Cabinet brought together into one executive body the power to implement measures to control the rate of COVID-19 infection across all Australian jurisdictions.

During the pandemic, National Cabinet acted as 'COAG in crisis mode'. It is not strictly a 'cabinet' in the Westminster sense. Instead it was a federal inter-executive body in which AHPPC data, research and recommendations were debated and then acted upon by the appropriate levels of government. It brought together all the machinery of government, regardless of the Commonwealth or state jurisdiction in which it resided.

National Cabinet clarified expert recommendations through a process of vigorous debate. It moulded the AHPPC advice into specific actions for each state according to its regional circumstances. The result was not to be uniform and identical arrangements across Australia. Instead, it was consistent action — from the same source, but adapted to state circumstances. Federations achieve precisely this form of governance.

National Cabinet defused the partisan divide at a time of national crisis. There were governments from both the Coalition and Labor represented. It helped to depoliticise the messages and ensure clarity of purpose, which aided communication. Nevertheless, states possessed the autonomy to enact social distancing measures and shutdowns ahead of National Cabinet decisions. Some criticised premiers for acting outside the framework, but they were responding to conditions in their home states. In most cases, National Cabinet approved these independent actions for the sake of unity.

The management of schools illustrates the divergence between the Commonwealth and the states — and between the states themselves. Prime Minister Morrison wanted schools to remain open. However, the states overrode his preferences and shut their state schools down.

The pandemic illustrated the different responsibilities of state and federal governments in the federation. Preventing the spread of infection relied on social distancing and closing down activities involving large public gatherings. These are mostly state responsibilities enforced by state public health laws. Western Australia's Public Health

Act 2016 is an example of state legislation used during the crisis. State police and public health officials enforced these policies. For example, WA public health officials detained a woman under the *Public Health Act 2016* for failing to follow self-isolation and quarantine rules.

Massive government intervention in the economy was required to place it in hibernation during the economic shutdown phase. This is mostly a Commonwealth responsibility, illustrated by the passage of laws to fund nearly \$200 billion worth of Commonwealth spending to preserve jobs and businesses. The Commonwealth doubled the *JobSeeker* allowance and legislated a new *JobKeeper* payment in an emergency sitting of the Commonwealth Parliament. Commonwealth agencies such as Centrelink and the Australian Tax Office implemented these initiatives.

National Cabinet has been described as 'executive federalism'. The Commonwealth and state parliaments had little role in response to COVID-19 except to pass legislation introduced by their respective executives. Parliaments are diminished by dominant executives and the nature of the crisis — which caused the suspension of parliament due to COVID-19 infection risks. The Commonwealth Parliament met to pass emergency legislation, but had little role in scrutinising the Morrison Government, except for the establishment of a select committee. Much the same situation exists in the states and territories.

In June 2020 the Prime Minister announced that COAG meetings would be replaced by a new National Federation Reform Council (NFRC), with National Cabinet remaining at the centre of the NFRC. The Department of the Prime Minister and Cabinet advised that:

National Cabinet will continue to meet regularly and be briefed directly by experts to inform decision making. During the COVID-19 epidemic, National Cabinet will meet every two weeks via telepresence, but it is foreseen that in the future, meetings will take place once a month. The Council on Federal Financial Relations (CFFR), consisting of Commonwealth Treasurers, will report to National Cabinet. Taskforces will continue in critical areas, including the taskforce on women's safety and domestic violence, and the Indigenous affairs taskforce, with a particular focus on Closing the Gap. Once a year, National Cabinet,

the CFFR, and the Australian Local Government Association (ALGA) will meet in person as the National Federation Reform Council to focus on priority national issues. It is intended that the new model will streamline processes, enabling improved collaboration, communication and effectiveness.¹

National Cabinet will be composed of reform committees on seven topics: rural and regional; skills; energy; housing; transport and infrastructure; population and migration; and health.

The continuation of National Cabinet in place of COAG was largely due to the success of National Cabinet during the pandemic. Scott Morrison said the new structure would mean state and territory leaders would be able to communicate more regularly and ‘with less paperwork’. Morrison stated that “We’ve been able to find that candour and collegiality in that new format”.

Since its inception, the bureaucracy surrounding COAG had grown significantly. Each meeting of COAG was accompanied by months of negotiation between federal and state public servants. Although COAG has achieved significant outcomes — including competition reform, Murray-Darling River action and the NDIS—it was sometimes known as ‘where good ideas go to die’. It remains to be seen whether the same bureaucracy and complex negotiation process will accompany National Cabinet.

Another important feature of the new structure is that it will operate under the same rules as Federal Cabinet, which will mean greater levels of security of documents, process and procedure. Under the convention of Cabinet secrecy, Federal Cabinet discussions are not made public until after 30 years. COAG meetings were always closely reported by the media and a communique of meeting outcomes was always published immediately after each meeting. This level of openness may not apply to National Cabinet. Perceptive students will note that this poses issues for the transparency of intergovernmental discussions.

As 2020 has worn on and Victoria has experienced both a second wave of COVID-19



■ Figure 9.10 – National Cabinet meetings took place online during the COVID-19 pandemic.

Source: https://commons.wikimedia.org/wiki/File:National_Cabinet_meeting.jpg
CC BY 4.0

and a second lockdown, conflict has erupted between the states and the federal government over ‘hard borders’. National Cabinet has begun to develop ‘cracks’. See: *Case study: Response to COVID-19* for further discussion of the impact of COVID-19 pandemic on federalism.

The High Court of Australia

When disputes over legislative and financial powers arise, constitutional arguments between Australian governments may occur. Cases where Australian governments are parties are called inter se cases. The High Court is the final adjudicator — that is, it has original jurisdiction in constitutional cases (see Chapter 7).

High Court interpretations of the words of the Constitution can have a dramatic effect by changing what it means and the way it operates. As a result, the High Court has been the dominant influence over the federal balance of power. It is worth noting here that High Court decisions have been the most influential mechanism for constitutional change in Australia’s political and legal history (see Chapter 10).

¹ News Centre, Department of the Prime Minister and Cabinet, *COAG becomes National Cabinet*, 2020, <<https://pmc.gov.au/news-centre/government/coag-becomes-national-cabinet>>.

Financial powers of the Commonwealth

The financial powers of the Commonwealth are discussed above. Refer to the following *Background information* sections in this chapter:

- *Background information: How federal financial arrangements built a centralising coercive tendency into the Constitution;*
- *Background information: Vertical fiscal imbalance;*
- *Background information: The institutions of Australian federalism — COAG;*
- *Background information: The institutions of Australian federalism — Commonwealth Grants Commission; and*
- *Background information: Recent financial relations reforms — The National Reform Agenda.*

Recall that there are two financial factors enabling the Commonwealth to coerce the states:

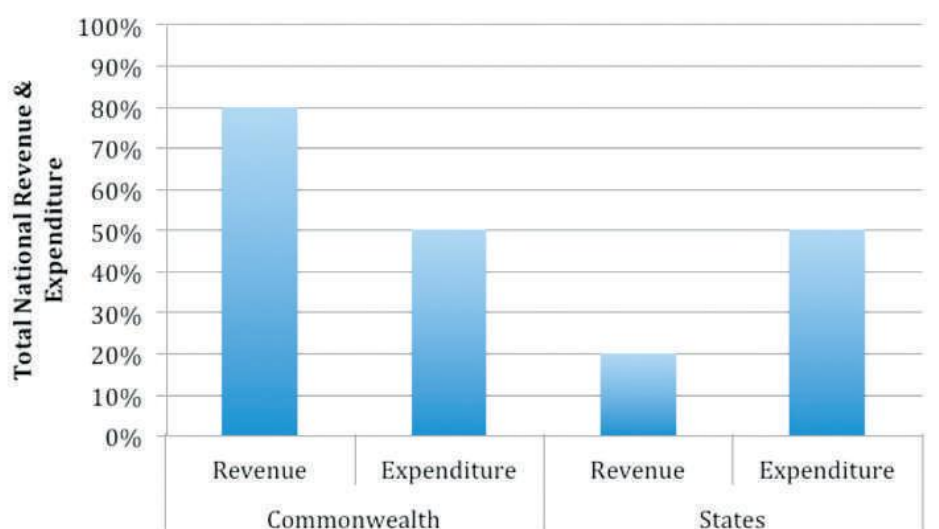
1. the large VFI — see: Figure 9.8 and *Background information: Vertical Fiscal Imbalance;* and
2. Section 96, which permits the Commonwealth to attach conditions to its grants.

The combination of these two factors shifted Australian federalism from cooperative/coordinate federalism towards coercive federalism — sometimes called ‘fiscal federalism’. See: *Background information: How federal financial arrangements built a centralising coercive tendency into the Constitution.*

However, since the NRA and the signing of National Agreements between the Commonwealth and the states — organised through COAG — the emphasis has shifted to cooperative federalism. See: *Background information: The institutions of Australian federalism — COAG;* and *Background information: Recent financial relations reforms — The National Reform Agenda.*

The GST has reduced the effects of the VFI by providing the states with a significant and reliable source of revenue based on a growth tax that increases with the size of the economy. See: *Background information: The institutions of Australian federalism — Commonwealth Grants Commission.* The GST provides financial autonomy to the states because the grants are Section 96 General Purpose Payments — that is, untied grants — by the Grants Commission. The GST enables the states to fund their own roles and responsibilities without Commonwealth interference. The effect is to encourage coordinate federalism because the states can act with more autonomy.

The GST’s purpose is HFE. States receive grants proportional to their capacity to deliver public goods and services to their citizens. The Commonwealth Grants Commission calculates the rate of GST per state based on a formula which includes the states’ own-source revenue — for example, Western Australian mining royalties — and the costs of public goods and service delivery in each state. HFE encourages coordinate federalism because the states can act with autonomy in delivering government services. See: *Background information: The institutions of Australian federalism — Commonwealth Grants Commission.*



■ Figure 9.11 – Graph illustrating the vertical fiscal imbalance.
Source: Stephen King 2020

Background information: Recent financial relations reforms — The National Reform Agenda

During the Howard Government's time in power COAG agreed on a new model for Commonwealth/state financial arrangements for the delivery of services. It was known as the **National Reform Agenda**. At its heart was a new financial arrangement called the *Intergovernmental Agreement on Federal Financial Relations* which came into effect on 1 January 2009.

It was a vital part of the Howard National Reform Agenda. The 2009 *Intergovernmental Agreement* gave authority for the Commonwealth to make grants for services delivered by the states through National Specific Purpose Payments and National Health Reform funding. The Act also allowed the Federal Treasurer to decide National Partnership payments, which were incentive payments, and GPPs to the states from the 'COAG Reform Fund'.

The *COAG Reform Fund Act 2008* created the COAG Reform Fund. The COAG Reform Fund set aside a pool of Commonwealth money to make grants to the states and Territories. The *COAG Reform Fund Act 2008* used the powers of Section 96 to specify the terms and conditions of financial assistance granted from the fund.

ThenewarrangementsbroughtCommonwealth/state financial arrangements under greater COAG control. They are an example of how COAG's importance grew in the period 2009 to 2019. See: *Background information: The institutions of Australian Federalism*.



■ Figure 9.12 –The redistribution of the GST is a contentious issue discussed at COAG.

Source: Matt Golding, *Sydney Morning Herald*, 2017, author's permission, <<https://www.smh.com.au/politics/federal/gst-system-unfair-but-it-does-us-little-damage-productivity-commission-20171009-gywwfb.html>>

Referral of powers — Section 51(xxxvii)

Section 51(xxxvii) makes it possible for states to hand over their powers to the Commonwealth if they choose to do so. A **referral of power** affects only the referring state — all the other states retain their power. Section 51(xxxvii) also contains an 'adopting power', which allows other states to adopt the Commonwealth legislation if they wish.

A referral of power by a state to the Commonwealth changes the balance of powers within the federation.

Referrals of power are relatively rare since the states are usually protective of their powers. Some examples include:

- between 1986 and 1990, all states — except Western Australia — referred state powers over the custody and maintenance of the children of divorced parents to the Commonwealth. As a consequence, the Commonwealth created a new 'Chapter 3 court' using its Section 71 powers. The new federal court is called the Family Court of Australia. It has jurisdiction over the newly referred power (see Chapter 7); and
- Victoria referred its industrial relations powers to the Commonwealth in 1996 after Premier Jeff Kennett made large scale changes to the state's industrial relations laws.

Example: Referral of state criminal law powers for anti-terror laws

The crime of terrorism has led to referrals of state criminal law powers. The *defence power* in Section 51(vi) does not cover law and order within Australia and cannot be used by the Commonwealth to make anti-terror laws. The bulk of criminal law is within the realm of state power.

The Commonwealth does not have any express powers within the Constitution over terrorism or criminal law. However, the Howard Government wished to develop a set of strong uniform national laws to deal with this newly emerging criminal threat. To pass some of these new national laws, the Commonwealth had to rely on other powers. The external affairs power in Section 51(xxix) comes into play if there is an international agreement that the federal government has signed. As the government had signed the *International Convention for the Suppression of Terrorist Bombings* in 1997, the external affairs power was enough for the Commonwealth to pass

the *Criminal Code Amendment (Suppression of Terrorist Bombings) Act 2002*.

However, the Commonwealth had no power to pass the *Security Legislation Amendment (Terrorism) Act 2002*. The purpose of this law was to create a particular category of crime by criminalising terrorist acts — but crime is a state responsibility. The Howard government requested the states to refer certain criminal law powers to the Commonwealth to give it the constitutional authority to pass the new law.

The states referred the necessary crime powers. This case is an example of cooperative federalism in pursuit of a national goal. It also changed the balance of power by increasing Commonwealth power.

The Council of Australian Governments — COAG

COAG is discussed above. Refer to:

- *Background information: The institutions of Australian federalism — COAG; and*
- *Background information: Recent financial relations reforms — The National Reform Agenda.*

COAG meets regularly, debates, plans and monitors reforms and programs that are jointly administered by the Commonwealth, and the states and territories. Some examples include:

- the National Disability Insurance Scheme — NDIS;
- *Closing the Gap* — an initiative on Indigenous social and economic outcomes;
- infrastructure — for example, Auslink;
- water — for example, the Murray Darling Basin Plan — see below;
- coordinating anti-terrorism laws — see: *Example: Referral of state criminal law powers for anti-terror laws; and*
- tax reform — see: *Background information: The institutions of Australian federalism.*

COAG has attempted to encourage the development of **cooperative federalism**, especially in the latter years of the Howard and the early years of the Rudd governments.

- The *Murray Darling Basin Plan* — implementation of this plan was first attempted by the Howard government. The Commonwealth wished to create a unified set of laws covering Australia's most extensive river system which flows through

four states. It needed to convince the four Murray River Basin states (NSW, Vic, Qld and SA) to refer their powers over their parts of the river to the Commonwealth. The attempt failed when Victoria refused to accept the conditions necessary to receive Commonwealth grants. After the Rudd Government took office in 2007, the Murray Darling Basin Plan (MDBP) came into effect with the passage of the *Water Act 2007*. The MDBP shows how the Commonwealth and the states can cooperate to achieve a national objective — for example, the health of the nation's largest river system — when the Commonwealth lacks the constitutional power to legislate in its own right.

- *Intergovernmental Agreements* — so-called National Agreements between the Commonwealth and the states have been an increasing feature of federal relations since the Rudd Government. Programmes such as the Gonski education funding reforms and the NDIS use the National Agreements model. These programs involved significant Commonwealth funding, but needed state legislation to implement them. The National Agreements in education and health permitted the implementation of these large scale Commonwealth funded reforms with the cooperation of the states.

Cooperative as opposed to coercive federalism

The nature of Australian federalism is discussed above. Refer to:

- *Background information: Describing and classifying federal systems;*
- *Background information: Covering the field of law and the impact of the High Court on the federal balance of power;*



■ Figure 9.13 – The Murray Darling Basin Plan is an example of cooperative federalism.

Source: Nathan Hurst, River redgums growing along the Murray River at Echuca, Victoria, 2001, CC BY-SA 3.0, <<https://commons.wikimedia.org/w/index.php?curid=68034339>>

- *Background information: How federal financial arrangements built a centralising coercive tendency into the Constitution;*
- *Background information: The institutions of Australian federalism — COAG;*
- *Background information: Recent financial relations reforms — The National Reform Agenda;*
- *Background information: Doctrines of interpretation during the High Court's early period; and*
- *Example: The Council of the Australian Federation, COAG and how governments cooperate to achieve national reforms.*

Australian federalism was intended by its designers to be a system of dual federalism — probably more coordinate than cooperative federalism. Nevertheless, the Commonwealth came to dominate the states, making the federal system more coercive.

Centralising tendencies built into the Constitution — such as the distribution of financial powers and the effects of Section 109 — explain how this occurred. Other factors — chief among them decisions of the High Court — have contributed to centralising power at the Commonwealth level. See the section titled *Evolving High Court constitutional interpretation*, below.

Table 9.2 summarises reasons for the emergence of coercive federalism.

However, the federal balance of power has changed over time. Arguably, recent and contemporary Australian federalism exhibits higher degrees of cooperation than in the past. Recall that there has been no change in the distribution of real power — the Commonwealth still possesses greater legislative and financial power than the states. What has changed is the relationship between the two levels of government. In recent times, a greater willingness from both levels to cooperate to achieve reforms that benefit the nation as a

Centralising tendencies	Centralising effect on federalism
Commonwealth financial power	The VFI and Section 96 enable the Commonwealth to dictate how the states carry out their roles and responsibilities.
Section 109	The Commonwealth can override state legislation in areas of concurrent power by invalidating state law. It may even enter and then 'cover the field', taking over concurrent powers entirely by excluding the states.
Design of the Constitution	The wording of the Constitution left open the possibility of broad interpretations of the Commonwealth's legislative and financial powers by the High Court. Moreover, the Constitution does not specify state powers — they are residual — so the High Court cannot interpret or defend them.
High Court interpretations of the Constitution	Section 107 only reserves state legislative power in general terms. It does not specify particular legislative powers. In the early years of the federation the High Court adopted 'doctrines of interpretation' which reserved and protected state power. These doctrines were abandoned by the 1920s, exposing the states to Commonwealth power.

■ Table 9.2 – Reasons for the emergence of coercive federalism.
Source: Stephen King, 2020

Decentralising factors	Decentralising effect on federalism
Goods and Services Tax, 2000	The Section 96 grants system was reformed to provide states with the financial capacity to fund their roles and responsibilities without Commonwealth interference.
Need for national reforms in the late 20th and early 21st centuries	Increasing internationalisation and globalisation created the need for national reforms for which the Commonwealth lacked the power. For example, significant economic and environmental reforms needed state cooperation. An example was the national gun law introduced by the Howard Government following the 1996 Port Arthur mass shooting. The Commonwealth persuaded the states to legislate uniform gun control laws to create a scheme of national firearms regulation. COAG established the NRA to implement cooperative reforms through National Agreements, National Projects and NPPs. See: Example: The Council of the Australian Federation, COAG and how governments cooperate to achieve national reforms.

■ Table 9.3 – Reasons for recent and contemporary changes from coercive federalism to cooperative federalism.
Source: Stephen King, 2020

whole and its constituent states is evident. In this new era, the Commonwealth is prepared to negotiate with the states, lending its power to assist them to implement state-based reforms, the sum of which add up to a national benefit. In this new relationship, the Commonwealth accepts the states are different from one another and allows them greater freedom to decide how to implement agreed national projects and objectives. Examples of cooperation on national projects include Auslink, the NDIS and the NEM.

Table 9.3, on previous page, summarises reasons for the move to more cooperative federalism.

Example: The Council of the Australian Federation, COAG and how governments cooperate to achieve national reforms

The states can cooperate through their version of COAG — called the Council for the Australian Federation (CAF) — which is like COAG without the Commonwealth. The US National Governors' Association and the Canadian Council of the Federation were the inspiration for CAF. The states used CAF to reach a joint position before meeting with the Commonwealth at COAG. CAF helped unify the states so they could counterbalance the power of the Commonwealth within the federation.

CAF and COAG could achieve nationally consistent laws. Nationally consistent laws are laws that apply across Australia, but they are not Commonwealth laws. The following are forms of lawmaking used by states and Commonwealth when making nationally consistent laws, sometimes without the involvement of the Commonwealth at all:

- complementary applied laws;
- mirror laws; and
- framework laws.

States may pass complementary applied laws in which one state passes a law which is then adopted by all states. Complementary applied laws result in nationally consistent identical laws based on state cooperation. Examples include foods standards laws — which were also adopted by New Zealand.

Mirror laws are based on a 'model law' passed by one state and then other states pass the same law, but with variations adapting the law to local conditions. Examples of mirror laws are the *Uniform Evidence Acts* which established the rules of evidence for trials, *Crown Proceedings Acts* to standardise

prosecution processes, and *Crimes at Sea Acts*. Mirror laws harmonise laws rather than making them strictly consistent.

Finally, framework laws passed by the Commonwealth set up a legal structure. It then rewinds them when states enact their laws. In effect, the Commonwealth sets a standard and then withdraws from the field as the states enter the field. Examples of framework laws include the *Native Title Act 1993*, the *Environment Protection and Biodiversity Conservation Act 1999*, the *Water Act 2007* and the *Trade Practices Act 1974*. By withdrawing from the field when states adequately legislate, the Commonwealth reduces the need for people and companies to deal with two levels of government. Framework laws allow the Commonwealth to set a national standard and then reduce its involvement when the states legislate.

“The High Court has been the single most important agent of constitutional change in Australia since federation.”

Evolving High Court constitutional interpretation

Refer to:

- *Background information: Doctrines of interpretation during the High Court's early period; and*
- *Background information: Covering the field of law and the impact of the High Court on the federal balance of power.*

The High Court has been the single most important agent of constitutional change in Australia since federation. It has had a more significant impact on the federal balance of power than any other method of constitutional change — including the formal method of constitutional change by referendum specified in Section 128 of the Constitution.

The High Court's decisions in landmark cases have fundamentally altered the way the Constitution operates.

Section 71 of the Constitution establishes the High Court and Section 76 grants the court original jurisdiction to interpret the Constitution. It first sat in 1903 and has passed through various stages in its history of interpreting the Constitution.

Period	Decisions that increased Commonwealth power	Decisions that limited Commonwealth power
1903–1920 <i>See: Background information: Doctrines of interpretation during the High Court's early years</i>	Surplus Revenue Case (1908) (Section 94 — surplus revenues)	Peterswald Case (1904) (Section 90 — excise) Railway Servants Case (1906) (Section 51(xxxv) — industrial relations)
1920–1971	Engineers Case (1920) (Section 51(xxxv) — industrial relations power) Ex parte McLean (1930) (Section 96 — grants power) Uniform Tax Case (1942) (Section 51(ii) — tax power) Uniform Tax Case (1957) (Section 51(ii) — tax power) Concrete Pipes Case (1971) (Section 51(xx) — corporations power)	State Banking Case (1947) (Section 51(xiii) — banks power) Bank Nationalisation Case (1948) (Section 92 — interstate trade)
1971–present	Koowarta (1982) (Section 51(xxix) — external affairs power) Tasmanian Dams Case (1983) (Section 51(xxix) — external affairs power) Cole v Whitfield (1988) (Section 92 — interstate trade) Betfair Case (2008) (Section 92 — interstate trade) WorkChoices (2006) (Section 51(xx) — corporations power)	Spence v Queensland (2019) (Section 24 — implied right to political communication)
Key to case details: Case name (year) (section of Constitution (subsection) — name of power)		

■ Table 9.4 – High Court landmark cases which have altered the federal balance of power.
Source: Stephen King, 2020

Why is the High Court so influential?

Recall that the Constitution divides the powers within the federation by allocating exclusive and concurrent powers to the Commonwealth and states. When the High Court interprets a case in which any of the exclusive or concurrent powers are in dispute, the outcome can redefine the power(s) and so change the balance of powers between the levels of government. Both legislative and financial powers are affected in this way.

Table 9.4 summarises High Court landmark cases that have affected the federal balance of power since federation. Note the general trend over time. In the early years, the High Court acted to defend state power. To do this, it needed to develop and apply particular doctrines of interpretation. *See: Background information: Doctrines of interpretation during the High Court's early period.*

Later, the High Court abandoned these doctrines and interpreted the Constitution literally — that is, without reading 'implications' into its wording. The result was a significant and prolonged

expansion of Commonwealth legislative and financial power, and a trend towards coercive federalism. Commonwealth power continued to expand through a range of Constitutional sections.

Note the importance of Section 51(xx) — the corporations power — and Section 51(xxix) — the external affairs power — as new fields of Commonwealth expansion from the 1980s onward. Table 9.4 above summarises High Court landmark cases which have altered the federal balance of power. For more details on each case refer to *Case studies: Court cases that have altered the federal balance of power.*

Background information: Doctrines of interpretation during the High Court's early period

Unfortunately for the states, the Constitution does not express the intention to reserve powers to the states. Because of this, the judges of the early High Court — many of whom had been involved in drafting the Constitution and knew its intent — needed to

create doctrines of interpretation that would help them avoid the centralising tendencies in the Constitution.

Doctrines of interpretation are rules, guidelines or policies that courts use when deciding the meaning of a statute or constitution. They ensure consistency between successive decisions.

Protecting the states' concurrent powers

The **Doctrine of Reserved Powers** protected states' Section 51 concurrent powers. The High Court applied the doctrine when interpreting these powers. The effect was to preserve the legislative power of the states by limiting that of the Commonwealth. For example, a narrow interpretation of Section 109 saves state law if the Commonwealth entered a concurrent field.

Protecting the states' residual powers

The **federal character of the Constitution justified the Doctrine of Implied Immunities of Instrumentalities** — which implied state power should be immune from the Commonwealth. Note that an instrumentality is a state-owned business such as a railway or sawmill. The Doctrine of Implied Prohibitions had a similar effect by prohibiting Commonwealth encroachment into state powers.

These doctrines were abandoned in 1920 when the Engineers Case overruled the Peterswald and Railway Servants cases mentioned in Table 9.4. See the courts section of case studies in this book for information on these cases.

Summary

- The Founding Fathers intended Australia to be a coordinate/cooperative federal system. Over time, the Australian federation has tended to become more coercive. In recent times, a new level of cooperation between Australian governments has emerged, especially during COVID-19.

Australia's federal balance at federation

- The Founding Fathers intended for Australian federalism to move between coordinate and cooperative.
- Due to Australia's federal system of government, a written constitution was required to divide powers between the levels of government.
- The Constitution grants exclusive powers — such as Sections 52 and 90 — to the Commonwealth parliament.
- Concurrent or shared powers are specified and enumerated within Section 51 of the Constitution.
- The Founding Fathers included Section 109 in the Constitution as a mechanism for dealing with conflicting state and Commonwealth laws.
- Powers that are unspecified in the Constitution — residual powers — belong to the states. Section 107 of the Constitution saves the states' powers.
- Significant financial powers were granted to the Commonwealth at federation, including sections 51 (ii), 90 and 96.

Centralisation of power and coercive federalism

- The Constitution contains centralising tendencies that have favoured the Commonwealth.
- The VFI has grown over time, expanding the financial power of the Commonwealth.
- Tax powers became more centralised, first accelerating during World War 2 — when the states lost their income taxing power — and then in the 1990s when Section 90 'excise' was more broadly defined
- Section 96 enables the Commonwealth to exploit its financial power through tied grants.
- The Commonwealth can dominate concurrent powers by using Section 109 to cover the field.
- High Court constitutional cases since 1920 have tended to centralise power.
- During the 20th century, Australia became a middle-ranked power within the international system. It needs a stronger central government with more powers to participate in the new international order. The 'external affairs power' has grown in importance and enabled the Commonwealth to assert itself to a greater extent.
- The 'corporations power' has emerged as a new instrument of Commonwealth power since the *WorkChoices* (2006) High Court case.

continued overleaf

A return to cooperative federalism

- COAG and other institutions of Australian federalism have reversed the trend to coercion through the development of the NRA.
- The GST and other reforms have alleviated the financial problems of the states to a certain degree.
- Section 96 tied grants have diminished in importance. Ninety-two SPPs have been cut to five, and they are in the form of agreed NPPs.
- Referrals of power by the states to the Commonwealth have changed the balance of power by diminishing state power, but the referrals are always voluntary.
- The states can counterbalance the Commonwealth to some degree by being united. They can make nationally consistent laws, and the Commonwealth can withdraw from a legislative field once states have enacted their laws.
- The Commonwealth remains dominant, but there is a renewed attitude favouring cooperation.
- The National Cabinet was established as a result of the COVID-19 pandemic. It has reinvigorated cooperative federalism in Australia. In June 2020 the National Cabinet replaced COAG.

Exam practice questions

Short answer

- 1a) Explain the term 'coercive federalism' as it applies to Australia.
- 1b) Explain the significance of Section 109 of the Commonwealth Constitution (Australia) for federalism.
- 1c) Discuss the extent to which the Commonwealth Constitution (Australia) adequately defined federal financial arrangements at Federation in 1901.
- 2a) Explain the purpose of Section 87 of the Commonwealth Constitution (Australia).
- 2b) With reference to the Commonwealth Constitution (Australia), distinguish between 'exclusive powers' and 'concurrent powers'.
- 2c) Discuss the purpose of the Commonwealth Grants Commission and its impact on the federal balance of power in Australia.
- 3a) Identify **two** financial powers enshrined in the Commonwealth Constitution (Australia).
- 3b) With reference to the Commonwealth Constitution (Australia), explain the process of the referral of powers.
- 3c) Discuss **two** ways in which the federal balance of power has evolved since Federation in 1901.
- 4a) Outline **one** example of the Council of Australian Governments promoting cooperative federalism.
- 4b) Explain the relationship between excise tax and VFI.
- 4c) With reference to **one** example, discuss the role of constitutional interpretation by the High Court in changing the federal balance of power in Australia.

Source analysis

Read the source below and answer the questions that follow.

The source is adapted from: Annabel Crabb, 'In hoping to reform the Federation, Morrison has sailed into treacherous waters'.¹

The problem is much as Mr Turnbull described it. For all that the states are required — according to the Constitution — to provide, they do not raise enough revenue themselves.

What they provide (emergency services, schools, hospitals) is getting more expensive, especially in a time of national crisis, but their revenue-raising opportunities are shrinking.

The disparity is shocking: While the states and territories deliver nearly half of the operating expenditure of the entire government sector, the Commonwealth raises more than 80 per cent of the tax.

How has this inequality been rectified in the past? Through begging, bribery and above all, those funding agreements that tend to increase in complexity and number over the passage of time, and need to be renegotiated regularly at vast cost and inefficiency.

The temptation for federal governments to attach ideologically-driven conditions to these payments is nearly irresistible, as is the temptation to dive into what are ordinarily state government responsibilities.

continued overleaf

¹ Crabb, Annabel, 'In hoping to reform the Federation, Morrison has sailed into treacherous waters', ABC news, 7 June 2020, <<https://www.abc.net.au/news/2020-06-07/federal-reform-treacherous-waters-scott-morrison-capital/12320028>>.

- 5a) Explain what is meant by 'federalism' as it applies to Australia.
- 5b) With reference to the source, explain in your own words **two** reasons why there is a disparity between the revenue raising capacities of the Commonwealth and the states.
- 5c) Discuss the impact of **two** High Court cases on the federal balance of power in Australia.
- 5d) Evaluate the extent to which Australian federalism has shifted from the coordinate model envisaged at Federation towards a more cooperative model.

Essay

- 6) 'Although Australian federalism has changed from its ideal coordinate model, the federal system is more relevant than ever'.
Assess this claim.
- 7) 'The High Court has been the most important agent of constitutional change in Australia since Federation'.
Evaluate this claim.

Investigation

For further exam practice questions see page 444



Changing powers — Constitutional change in Australia

Syllabus point:

- **Formal and informal methods of constitutional change and their impact:**
 - **referendums, including Section 128**
 - **High Court of Australia decisions**
 - **referral of powers**
 - **unchallenged legislation**

Introduction

A constitution is a special type of law which is superior or fundamental law. A country's constitution provides the legal basis for how it is governed. This means that altering a constitution should not be easy and it should not be possible to change it by the typical methods used for other laws. At the same time, a constitution should not be so rigid that it becomes out of date and unable to adapt to changing circumstances.

The Commonwealth of Australia Constitution Act 1900 is Australia's superior or fundamental law; it is Australia's Constitution. Neither the Commonwealth Parliament nor the federal executive can change the Australian Constitution. Nevertheless, the Constitution is not rigid as it can be altered by other means. This chapter examines the formal and informal ways in which Australia's Constitution can be changed.

The stability of the Australian Constitution



■ Figure 10.1 – The Australian Constitution.
Source: Geoff Pryor, *The Australian Constitution*, 1983, author's permission, <<http://nla.gov.au/nla.obj-156458651>>

The Australian Constitution is considered one of the most stable democratic constitutions in the world, with only eight formal changes to its *wording* since 1901. However, there have been numerous alterations to the way the Constitution *operates*, and these have allowed it to adapt to changing circumstances.

The stability of the Constitution is testament to:

- the quality of the document itself — it has served its purpose for more than 120 years without significant alteration; and
- the success of *other ways of adapting* the Constitution so that it can keep pace with social, economic and political change.

Changing the Australian Constitution

While the Constitution is very stable, it is possible for it to be amended.

A **constitutional change** is:

- any change to the *words* of the Constitution — called a 'formal' change; or
- any change to the *operation* of the Constitution — called an 'informal' change.

Any change — formal or informal — will alter the meaning of the Constitution. This is important because the Constitution defines and limits power as well as protecting citizens' rights. It underwrites Australia's democracy.

“Any change — formal or informal — will alter the meaning of the Constitution. This is important because the Constitution defines and limits power as well as protecting citizens' rights.”

Formal change

A **referendum** — which is a direct democratic vote — is the only process that can change the text of the Constitution. A referendum is a process specified by Section 128 of the Constitution as the one *formal* process through which the words of the constitution can be changed. This formal process is a direct vote known as a referendum.

Informal change

There are other, *informal* ways to change the Constitution, including:

- High Court of Australia (High Court) decisions which declare the meaning of the Constitution;
- states voluntarily transferring powers to the Commonwealth, thereby altering the federal balance of powers; or
- Commonwealth legislation remaining unchallenged in the High Court, meaning there is no opportunity for judicial review to test its validity.

Formal constitutional change — Referendums

Because they are immune from amendment by parliaments and governments, constitutions must contain a mechanism for alteration. Section 128, Chapter 8 of the Australian Constitution provides this mechanism.

A referendum is a formal process. There are strict constitutional requirements which outline the process and timing of a referendum as well as the technical criteria for a referendum to be successful.

Referendum process

A referendum is a direct vote by eligible electors on a proposal to change the Constitution. Anyone entitled to vote in a federal election is required to vote in a referendum.

Because Australia is both *democratic* and a *federation*, the referendum process requires both:

- a vote of the people counted nationally — a *democratic* vote; and
- a vote of the people counted in each of the states — but not the territories — a *federal* vote.

Electors themselves must approve changes to the Constitution, making a referendum an example of direct democracy. Using direct democracy to approve changes to the Constitution is an idea taken from the Swiss Constitution — the Federal Constitution of the Swiss Confederation.

Background information: Ideas for constitutional change

An idea to change the Constitution may come from a variety of sources. Table 10.1 summarises several of these.

Regardless of the origin of an idea, only legislation passed by the Commonwealth Parliament can initiate the referendum process. Neither the people nor the states can do this.

Background information: The Section 128 referendum process

The following outlines the process involved in changing the Constitution via a Section 128 referendum.

- A proposal to change the Constitution must pass as a bill through both houses of the parliament or the same house twice —see below — and be given Royal Assent by the Governor-General.
- Two to six months after the bill receives Royal Assent it must be put to the people as a YES or NO question.
- To succeed, the proposal must achieve a **double majority**, which is:
 - a majority of voters in Australia, which is the **democratic majority**; and

Source of ideas of constitutional change	Examples
Government	The Howard Government initiated the 1999 referendum proposing to establish the Commonwealth of Australia as a republic.
Court cases	The 1946 Social Services referendum was a result of the High Court striking down the Pharmaceutical Benefits Act 1944, showing that the Commonwealth Parliament lacked the constitutional authority to make this type of benefits payment.
Individuals and pressure groups seeking changes to the law	The 1967 Aboriginals referendum resulted from groups and individuals — both Indigenous and non-Indigenous — advocating for equal rights for Aboriginal people. The 2017 Uluru Statement from the Heart proposed several constitutional changes. The First Nations National Constitutional Convention produced the statement.
Royal Commissions Constitutional Conventions Constitutional Commissions	The 1985–1988 Constitutional Commission was established by the Hawke Labor Government. It focussed on whether Australia should have a bill of rights. The 1998 Constitutional Convention was established by the Howard Government to develop a referendum proposal to create an Australian Republic.

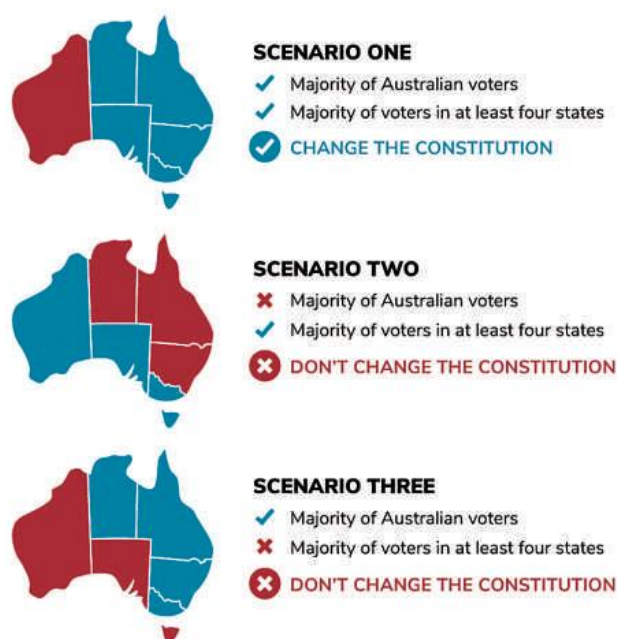
■ Table 10.1 – Ideas for changing the Constitution come from a variety of sources.
Source: Stephen King, 2020

- a majority of voters in a majority of states — that is, at least four of the six states — which is the **federal majority**. Note that the Northern Territory and the Australian Capital Territory do not count towards this second majority.

- If a double majority is achieved it means the referendum passes and the Constitution changes.

If the bill is passed by one house twice because the other house rejects it, the Governor-General may put the question to a referendum. In this situation, the Governor-General would act on the advice of the government. No government has advised a Governor-General to put a referendum to the people unless legislation authorising it has passed the House of Representatives. For example, the four questions posed for a referendum in 1977 were rejected by the Senate. However, as they were passed twice by the House of Representatives, they proceeded to the public.

The Australian Constitution can only be changed with the support of the majority of Australian voters **and** a majority of voters in at least four states.



■ Figure 10.2 – The requirements for a successful referendum. Source: Parliamentary Education Office, *Changing the Australian Constitution – double majority*, <https://peo.gov.au/understand-our-parliament/how-parliament-works/the-australian-constitution/the-australian-constitution-in-focus/>

Number of referendums	Double majority		Constitutional change
	Majority of electors	Majority of electors in a majority of states	
8	YES	YES	Successful
5	YES	NO	Unsuccessful
31	NO	NO	Unsuccessful

■ Table 10.2 – Data on referendums since federation. Source: Stephen King, 2020

The ‘labour of Hercules’

Forty-four referendum questions have been put to the people on 19 occasions since federation. Only eight have passed. Prime Minister Robert Menzies described changing the Constitution as ‘the labour of Hercules’.

The Simultaneous Elections referendum of 1977 achieved 62.22 per cent of the national majority, but only passed in New South Wales, Victoria and South Australia. It is the most extreme example of a referendum succeeding on the national vote, but failing on the states’ vote.

Table 10.2 confirms Prime Minister Menzies’s observation — achieving Constitutional change by the formal referendum method is indeed a herculean labour.

Example: The eight successful referendums

The following list outlines the eight successful referendums and the resulting constitutional change.

- *1906 Senate Elections* — altered Section 13. It altered the timing of Senate elections;
- *1910 State Debts* — altered Section 105. It expanded Commonwealth power to take over state debts;
- *1928 State Debts* — inserted Section 105A. It established the Loan Council;
- *1946 Social Services* — added Section 51(xxiiiA). It gave the Commonwealth power to legislate for a range of new benefits payments including maternity allowances, benefits to students, and pharmaceutical and sickness benefits. Before the change, the parliament could only legislate for age and invalid pensions. Laws to pay other benefits already existed, but they lacked constitutional grounds and survived only as unchallenged legislation. When the *Pharmaceutical Benefits Act 1944* was challenged and struck down by the High Court it provided the impetus for change;

YES because ...	Explanation	Examples
... they propose only minor technical changes.	Referendum questions are more likely to pass if they propose small technical changes.	• Senate Elections 1906 • Casual Vacancies 1977 • Retirement of Judges 1977
... electors do not see the proposal as a 'power grab'.	There is almost universal distrust of the expansion of Commonwealth power. However, if the extension of power benefits the people or states, it has a higher chance of success.	• State Debts 1910 • State Debts 1928 • Social Services 1946 • Aboriginals 1967
... they are perceived as the 'right thing' to do.	Referendum questions are more likely to pass if they are perceived as reasonable, moral or necessary to correct a constitutional wrong.	• Aboriginals 1967
... they have broad support.	Referendum questions are more likely to pass if they: • appeal to electors' self-interest; • enjoy bipartisan support from the major parties; or • provide benefits for the states.	• Social Services 1946 • Aboriginals 1967 • State Debts 1910 • State Debts 1928
... they do not generate strong NO campaigns.	If the bill authorising a referendum is unopposed in parliament, public funds will not be made available for a NO campaign.	• Aboriginals 1967

■ Table 10.3 – Reasons some referendums are successful.
Source: Stephen King, 2020

- **1967 *Aboriginals*** — altered Section 51(xxvi) and deleted Section 127. It allowed the Commonwealth to make laws for Aboriginal and Torres Strait Islander peoples, and to count them in the census. It is the most successful referendum in Australian history, achieving the highest YES vote of 90.8 per cent;
- **1977 *Casual Senate Vacancies*** — altered Section 15. The 1975 Whitlam Dismissal was, in part, caused by the filling of casual Senate vacancies with Independents, creating a hostile Senate. The change to Section 15 ensures replacement senators are of the same political persuasion as the former senator they replace;
- **1977 *Territorial Voters*** — altered Section 128 by including territory electors as part of the national majority for referendums. They are still not counted in the state majority; and
- **1977 *Retirement of Judges*** — altered Section 72 by setting the age of retirement for federal judges in the High Court and Federal Courts at 70 years.

What makes a successful referendum?

Referendums are more likely to succeed if they are either technical, limited in scope, supported by a moral argument, popular, or unopposed by the major political parties or by the states. Table 10.3 summarises the factors which lead to a successful referendum.

For a discussion of Australia's most successful referendum — *Aboriginals 1967* — see the *Case study: A successful referendum — 1967*. Chapter 16 also provides an in-depth study of the experience of First Nations peoples since white colonisation in 1788.

“The Section 128 referendum process has had a limited impact on the Constitution.”

Why do so many referendums fail?

Electors are inherently cautious when asked to change the fundamental law of the country. There is a reason for caution. Australia is well-governed by comparison with many other countries — including other democracies. Electors are conservative when asked to change the system when the system seems worthy.

Australia is a peaceful, prosperous, politically stable and democratic country. The rule of law is respected. Australians enjoy rights and freedoms. Most Australians understand that the Constitution is at least partly responsible for these positive national characteristics.

Table 10.4, overleaf, summarises the main reasons Australians tend to vote NO for Constitutional change.

The Section 128 referendum process has had a limited impact on the Constitution.

NO because of ...	Explanation
... conservatism.	The NO campaign in the 1999 Republic referendum argued “if it ain’t broke, don’t fix it”. The slogan describes Australians’ reluctance to meddle with the Constitution because of unforeseeable consequences. A NO vote is a safe vote.
... apathy.	Many people are uninterested in politics. If they do not care, they are more likely to vote NO. Compulsory voting — which also applies at referendums — may amplify the effect of apathetic voters on the result.
... distrust.	Section 128 means only federal politicians can initiate a referendum. Australians distrust politicians, especially if it seems they want to increase their power. If people do not trust the motives of those who propose a change, they will vote NO.

■ Table 10.4 – Reasons why Australian electors tend to vote NO in a referendum.

Source: Stephen King, 2020

Informal constitutional change

Changing its words is not the only way to change the Constitution. The meaning of the constitutional text can evolve over time, resulting in substantial alterations to the balance of legislative and financial powers of each level of government. Moreover, its words may contain implications — that is, suggestions — without explicitly stating them. Implications are not specified; they are discovered. The workings of the Constitution can be altered by cooperation between the Commonwealth and states, as discussed in Chapter 9.

This section examines how the Constitution can change *without* altering the text through the referendum process.

High Court interpretation of the Constitution

The High Court has been the single most important agent of constitutional change in Australian history.

Section 76 of the Constitution vests the High Court with jurisdiction to interpret the Constitution. Students are encouraged to review Chapter 7.

The Constitution is a written text. All texts are open to being read or interpreted in different ways. Therefore, an interpretation of the Constitution affects its meaning.

“The High Court has been the single most important agent of constitutional change in Australian history.”

A dispute may arise when the Constitution means different things to different people. The High Court hears legal disputes over the Constitution. Its jurisdiction over the Constitution places the High Court in a unique —

and influential — position because its decisions affect Australia’s system of government, with profound implications for political and legal power.

The High Court’s influence is sometimes controversial because the High Court is an appointed — not elected — institution. There is no way for the people to hold it to account and no way to overturn its interpretations except by referendum.

“An interpretation of the Constitution affects its meaning.”

Constitutional cases arise when parties dispute the meaning of the Constitution. When the High Court decides constitutional cases, it must declare what the words mean. When the High Court reinterprets the meaning of its words, the operation of the Constitution changes to reflect the new meaning.

The High Court cannot interpret the Constitution except through a constitutional case.

Landmark cases are those that have a significant legal or political impact. Many landmark cases have fundamentally altered the way the Constitution operates. It has resulted in constitutional change in two distinct areas:

- the federal **balance of power**; and
- the discovery of **rights** implied — but not specified — in the wording of the Constitution.

Background information: Constitutional powers and rights

Constitutions, and legislative and financial powers

In federations like Australia, constitutions divide legislative and financial powers between two levels of government — national and state. The result is a balance of powers between the national and state governments. Students are encouraged to recall the changes in the federal balance of power discussed in Chapter 9.

Constitutions and rights

Constitutions also protect citizens' rights. Some constitutions specify the rights of citizens. For example, the United States (US) Constitution contains a list of amendments collectively referred to as the Bill of Rights. The Australian Constitution does not contain a bill of rights. Nevertheless, it does specify a small number of rights — which are discussed further in Chapters 15.

Despite not spelling out democratic rights and freedoms, the Australian Constitution does create a liberal democracy — and liberal democracy is a form of government reliant upon citizens having political rights. Because liberal democracy cannot exist without democratic rights, the Constitution must imply they exist. These rights must be 'discovered' because they are not spelled out explicitly by the Australian Constitution.

The High Court and the federal balance of power

Chapter 9 discussed the impact of the High Court on the federal balance of power. Students should also refer to the *Case studies* section of this book for the details of cases that have significantly altered the federal balance of legislative and financial power.



■ Figure 10.3 – The High Court of Australia.
Source: Chensiyuan, *The High Court of Australia*, 2008, CC BY-SA 4.0, <<https://commons.wikimedia.org/w/index.php?curid=4214121>>

Perceptive students will recall that the impact of High Court interpretation of the exclusive and concurrent legislative and financial powers of the Commonwealth has made the Australian federation more coercive by:

- expanding the Commonwealth's lawmaking power;
- expanding the Commonwealth's taxing and spending powers; and
- removing implied protections of state power.

The High Court and the discovery of rights

A right is a freedom or an entitlement to which a citizen has a just claim.

Unit 4 of the Politics and Law course examines rights. Chapter 15 discusses the High Court's role in discovering and adjudicating rights within the Constitution.

An outline of the impact of the High Court on the issue of constitutional rights follows.

“Constitutional rights are the most secure because they are immune from change by the executive or legislative arms of government and are subject only to judicial interpretation.”

The Australian Constitution and rights

One of the functions of a constitution is to define the relationship between citizens and their government. By defining these relationships, constitutions protect the freedoms and entitlements of citizens. Constitutions may:

- prevent governments from limiting individual freedoms; and
- oblige governments to provide certain entitlements.

Law should protect rights. This type of law may be constitutional, statutory or common law. The degree of rights protection varies with each type of law. Constitutional rights are the most secure because they are immune from change by the executive or legislative arms of government and are subject only to judicial interpretation. In common law countries such as Australia, the judiciary has a long history of defending rights, so it will generally interpret the Constitution in a rights-affirming way.

Some constitutions are rights-based. Forged in battle, the drafting of the US Constitution followed victory in the War of Independence (1775–1783). With British colonial power defeated, attention now turned to constitutional measures designed to prevent another rising in its place. The US Constitution contains ten amendments collectively known as the Bill of Rights. The Bill of Rights is a constitutional guarantee that no government shall infringe the liberties of American citizens.

In contrast, Australia gained its independence peacefully from Britain. Uppermost in the minds of Australia's Founding Fathers was the need to create a new national government, divide the powers between it and the states, and solve pre-federation issues concerning interstate trade, defence, immigration and so on. The Constitution does all these things well. However, rights were a low priority at the time. It was considered sufficient to rely on parliament and the common law to protect rights. Consequently, the Constitution is not rights-based. Rights are few and far between in our founding document.

Constitutional rights and the High Court

A constitutional right is a freedom or entitlement expressed in the Constitution.

Specified rights do not form a separate entity within the Australian Constitution as they do in the US Bill of Rights. Instead, they are scattered throughout the body of the document. They include the following:

- Section 41 creates a transitional right to vote at the time of federation;
- Section 80 creates an entitlement to trial by jury in federal — but not state — indictable cases;
- Section 116 prevents parliament from establishing an official religion. It protects freedom of religion;
- Section 117 prevents discrimination against an Australian citizen based on their state of residence;
- Section 92 ensures “trade, commerce and intercourse among the States ... shall be absolutely free”. It protects economic freedom; and
- Section 51(xxxi) ensures that if the Commonwealth takes the property of a person, it must compensate them on “just terms”.

An implied constitutional right is a freedom or entitlement not explicitly expressed, but inferred from the meaning or intention of the Constitution.

See the *Case studies* section of this book for examples of High Court interpretation of specific rights and how the High Court has declared the meaning of these rights — and thus altered the Constitution.

Implied constitutional rights

An implied constitutional right is a freedom or entitlement not explicitly expressed, but inferred from the meaning or intention of the Constitution.

Because implied rights are unspecified, they must be discovered. The discovery of implied rights occurs when the High Court adjudicates the meaning of the Constitution. Judges must ‘read between the lines’ to discover implied rights, and this often makes these decisions controversial.

This chapter concerns the method by which the High Court changes the Constitution. See: *Case Study: How High Court decisions can informally change the Constitution*. Chapter 15 discusses political and other rights.

The power to make the change rests entirely with the state or states wishing to refer their powers to the Commonwealth. The Commonwealth cannot compel a state to refer its powers or force any other state to adopt Commonwealth legislation resulting from another state's referral of power.

Referral of powers

Chapter 9 discusses the referral of powers. Students should refer to Chapter 9, Table 9.1 and the section ‘Referral of powers — Section 51(xxxvii)’.

Recall that Section 51(xxxvii) of the Constitution enables states to voluntarily refer residual or

concurrent powers to the Commonwealth. A referral of power affects only the referring state; all other states retain the power. Section 51(xxxvii) also implies an adopting power, which allows other states to adopt the Commonwealth legislation if they wish to at a later date.

“Cooperative federalism is the vehicle through which recent referrals of power have occurred.”

Section 51(xxxvii) is a mechanism for constitutional change. The power to make the change rests entirely with the state or states wishing to refer their powers to the Commonwealth. The Commonwealth cannot compel a state to refer its powers or force any other state to adopt Commonwealth legislation resulting from another state's referral of power.

Although not often utilised, Section 51(xxxvii) has made it possible for the Commonwealth to enact legislation for which it would otherwise lack a constitutional head of power. It has proven to be a useful mechanism for adapting the Constitution to the needs of the late 20th and early 21st centuries.

Modernising the Constitution through the referral of powers

Section 51(xxxvii) has helped keep Australia's 19th century Constitution fit for 21st century democracy. It is a useful mechanism for modernising the Constitution, especially given the conservative outcomes of the referendum process and the slow and incremental nature of High Court constitutional interpretation. By contrast with these other methods of constitutional change, referrals of power are proactive and often achieved through a political — rather than a legal — process. Cooperative federalism is the vehicle through which recent referrals of power have occurred. See: *Example: Referrals of power allow social, economic and legal modernisation*.

Example: Referrals of power allow social, economic and legal modernisation

Family law

Social change has outpaced the Constitution's handling of family law. The referral of their family law powers by all states — except Western Australia — allowed for nationally consistent and more convenient family

laws. Australians are more mobile now than in the past, and divorce rates are higher too. Additionally, separated families often have members residing in different states. Moreover, the Commonwealth's limited marriage and divorce powers under Section 51(xxi) and 51(xxii) do not cover *de facto* marriages or the children of such marriages — which were covered by state legislation. In the modern era, *de facto* marriages and other diverse forms of family are more common.

The referral of state family law powers by five states between 1986 and 1990 resolved many of these issues and brought the law up to date, making it more consistent and convenient for litigants. It enabled the Commonwealth to create the Family Court of Australia under Section 71 of the Constitution, enabling access to one law covering all forms of marriage and one Family Court regardless of their state of residence.

Incorporation law

The Commonwealth has power over corporations under Section 51(xx). However, the High Court found in *New South Wales v The Commonwealth* (1990) HCA 2; (1990) 169 CLR 482 — called the Incorporation Case (1990) — that the Commonwealth could not legislate for the incorporation process. State law governed the incorporation process and set out the legal procedure enabling organisations — such as businesses or charities — to become corporations. The states in which these organisations were undergoing incorporation had different laws that added confusion, cost and time to the process of incorporation.

Organisations undergoing incorporation in several states simultaneously faced complex legal and financial barriers to incorporation. As the economy grew and more corporations operated across state borders, this problem imposed a drag on the economy.

States referrals of their incorporation powers resolved the issue. With its newly acquired powers, the Commonwealth was able to pass the *Corporations Act 2001*. The new Act simplified the process and made incorporation uniform across the country. It reduced cost, time and inconvenience, allowing businesses to get on with their business.

Consumer credit law

The *Global Financial Crisis* — which began in July 2007 — was caused in part by the collapse of credit around the world when

banks stopped lending money. Following the economic crisis, the states referred their consumer credit regulation powers to the Commonwealth. Regulating consumer credit at the national level allows for better financial coordination and provides equal protection for all Australians regardless of their state of residence. Consumer credit expanded exponentially in the period following the introduction of credit cards in the late 20th century, so national laws made sense in the new financial environment.

Criminal law

On 11 September 2001 *Al Qaeda* attacked New York and Washington DC with hijacked airliners and the 'Global War on Terror' followed. Section 51(xxxvii) enabled rapid and necessary constitutional change in response to modern law enforcement needs. Refer to Chapter 9, *Example: Referral of state criminal law powers for anti-terror laws*.

These four examples illustrate how Section 51(xxxvii) enables constitutional modernisation. State referrals of power can help Australia keep pace with social, economic and legal changes without costly referendums that have limited chance of success.

Commonwealth, national or state law?

Recall that Commonwealth jurisdiction covers the whole of Australia and its territories. An intriguing aspect of Commonwealth laws made under Section 51(xxxvii) is that, strictly speaking, they are not 'federal' laws because they only apply in the referring states and not the whole country.

“So long as the High Court does not strike it down, unconstitutional legislation is lawful. Unchallenged legislation can increase the power of the Commonwealth”

Commonwealth family law is an example of this class of laws because Western Australia has not referred its family law powers. Commonwealth family law applies in all states and territories except Western Australia, so it is not a truly national or federal law.

Former High Court Chief Justice Robert French has described these laws as *State/Federal laws*. They are a unique class of law occupying a legal zone between national laws — like ordinary Commonwealth laws — and state laws.

Unchallenged legislation

Commonwealth legislation must be lawful under the Constitution. If not, then it risks being struck down as *ultra vires* by the High Court.

Commonwealth legislation should meet the following criteria to be on safe constitutional ground:

- the law should use a head of power in the Constitution; or
- if no head of power covers the law, then the Commonwealth must try to avoid it being challenged in the High Court.

Note the second criteria above. Put another way, the Commonwealth Parliament may pass any law it chooses — including potentially unconstitutional laws — provided no party brings a High Court challenge to the law. See: *Background information: Unchallenged legislation, the rule of law and the expansion of Commonwealth power*.

So long as the High Court does not strike it down, unconstitutional legislation is lawful. Unchallenged legislation can increase the power of the Commonwealth by enabling it to enter fields of lawmaking where it has no power.

Background information: Unchallenged legislation, the rule of law and the expansion of Commonwealth power

According to the rule of law, only judicial review by an independent court can determine if a law is unconstitutional. The High Court has original jurisdiction to determine breaches of the Constitution. It is the only court that can declare a statute *ultra vires*.

A case must come before the High Court before it can decide if a law is unconstitutional. The High Court will never have the opportunity to declare a law *ultra vires* if it is unchallenged. A law remains valid unless struck down — even if the Commonwealth lacks the Constitutional power to make the law.

The result is a constitutional change because the Commonwealth is exercising new legislative power.

Who may challenge a law?

In order to bring a case to court, a party must have *locus standi* — called **standing**. To have standing, a party must have a connection to the dispute.

Standing prevents most parties from challenging a Commonwealth law. For example, an average

citizen annoyed by a Commonwealth law would be unlikely to have standing and could not challenge it in the High Court. Standing prevents frivolous litigation.

Standing explains why some unconstitutional law remains unchallenged.

Modernising the Constitution through unchallenged legislation

As with the referral of powers, unchallenged legislation has proven to be a minor yet successful method of keeping Australia's 19th century Constitution up to date.

Example: Unchallenged legislation

Commonwealth Scientific and Industrial Research Organisation

The Commonwealth Scientific and Industrial Research Organisation (CSIRO) is the nation's pre-eminent scientific and technology institution. CSIRO has had astounding successes. For example, it developed the technology used in every Wi-Fi-connected device in the world. Its work includes climate science, oceanography, soils and a host of other areas with a direct connection to the real-world needs of Australians. CSIRO has an international reputation and has added value to Australian innovation.

The *Science and Industry Research Act 1949* established CSIRO. There is no constitutional head of power vesting the Commonwealth Parliament with legislative power to pass this law.

CSIRO is a good and necessary institution; few would dispute the need for its continued existence. In any case, even if some party disliked CSIRO, they would probably lack standing to challenge the Act.

The *Science and Industry Research Act 1949* has never been challenged and therefore continues to be valid.



■ Figure 10.4 – CSIRO was established in 1949.

Source: Bidgee, *Commonwealth Scientific and Industrial Research Organisation (CSIRO) Corporate Headquarters*, 2009, CC BY-SA 3.0, <<https://commons.wikimedia.org/w/index.php?curid=6080941>>



■ Figure 10.5 – Official launch of the Snowy Mountains Hydro-electric Project, 1949.

Source: The Department of Information, National Archives of Australia, *Official opening of the Snowy Mountains hydro project at Adaminaby*, 1949, Public Domain, <<https://commons.wikimedia.org/w/index.php?curid=15876342>>

The Snowy River Scheme

The Snowy River Scheme aimed to achieve economic and population growth following World War 2. It is the largest engineering project in Australia's history.

The Snowy River Scheme endeavoured to provide abundant cheap electricity for industry and stimulate growth in post-World War 2 Australia. It also employed tens of thousands of displaced European migrants who came to Australia to work on the scheme. Migration boosted population, and government spending and industrialisation boosted the post-war economy. Construction of the Snowy River Scheme took place from 1949 to 1974. It has benefited Australia continuously since, with recent proposals for a Snowy 2.0 plan to extend the scheme as a pumped-hydro storage system for renewable energy.

The Commonwealth lacked specific constitutional authority for the scheme. Instead, it passed the *Snowy Mountains Hydro-Electric Power Act 1949* using the defence power in Section 51(vi). The defence power is likely invalid since the project was not directly related to defence and Australia was not at war in 1949. Only the states have standing in this instance, and none exercised their rights to challenge. Instead, the states — which have constitutional power over land, rivers and energy — passed legislation complementing the Commonwealth Snowy River Scheme.

The Act has never been challenged and remains valid.

Cross-vesting judicial powers

The Commonwealth's *Jurisdiction of Courts (Cross-vesting) Act 1987* is another example of unchallenged legislation. It reduces the cost and inconvenience to parties using the justice system. It is a sensible law. However, it has no grounding in the constitution.

Cross-vesting also works the other way. A state can pass laws that cross-vest state jurisdiction in federal courts. An example is the cross-vesting of state company law jurisdiction in the Federal Court. As a result of *New South Wales v the Commonwealth* (1990) HCA 2-169 CLR 482 states were required to legislate for the formation of corporations. The states had to vest the Federal Court with state jurisprudence to allow the Commonwealth to have effective judicial control over corporations' law. However, these state laws have not survived legal challenge.

Re Wakim; Ex parte McNally (1999) HCA 27 was the High Court case which struck down the state cross-vesting laws. In this case, four defendants had been found negligent and liable for damages in company law cases by the Federal Court using cross-vested state power. They

challenged the validity of the state laws which vested state jurisdiction in the Federal Court. The substance of the claim was that the Federal Court did not have the jurisdiction to find them negligent under company law because the state cross-vesting laws were invalid. The High Court agreed. The decision struck down the state cross-vesting laws.

Wakim did not challenge the Commonwealth's *Jurisdiction of Courts (Cross-vesting) Act 1987* that cross-vests federal jurisdiction in state courts, and thus the federal law remains valid. See Chapter 7 of this book for more information about cross-vesting federal judicial power in state courts.

Unchallenged legislation has had only a minor impact on the federal balance of power.

Summary

- Australia is a well-governed, stable and internationally well regarded modern liberal democracy. These achievements are due, in part, to the Constitution which forms the basis of our system of government.
- Constitutions need to balance stability on one hand and flexibility on the other. This balance is essential in order to preserve limits to power while allowing the system to adjust to new demands placed on government by social, economic, technological and legal change.
- The Constitution has formal and informal mechanisms that facilitate change.
- Formal change through referendums has proven less successful than the Founding Fathers had perhaps hoped, with only eight formal changes since federation.
- Informal methods of constitutional change such as High Court interpretation, referral of powers by the states to the Commonwealth and unchallenged legislation have had a greater impact and enabled the Constitution to remain relevant to the contemporary demands of good government.

Exam practice questions

Short answer

- 1a) Explain the term 'referendum' as it applies to the Commonwealth Constitution (Australia).
- 1b) Explain the significance of specified rights in the Australian political and legal system.
- 1c) Discuss **one** argument for and **one** argument against the proposition that 'formal constitutional change is necessary'.
- 2a) Explain the purpose of Section 76 of the Commonwealth Constitution (Australia).
- 2b) Distinguish between formal and informal constitutional change.
- 2c) Discuss the extent to which **one** High Court decision has had a significant impact on the discovery of rights.
- 3a) Define the term 'constitution'.
- 3b) Explain the process of constitutional change established under Section 128 of the Commonwealth Constitution (Australia).
- 3c) Outline what is meant by 'unchallenged legislation' and discuss its impact on the Australian political and legal system.
- 4a) With reference to the Commonwealth Constitution (Australia), explain the term 'referral of powers'.
- 4b) Outline **three** reasons for the failure of constitutional referendums.
- 4c) Discuss **one** argument for and **one** argument against the proposition that 'the High Court has been the most significant conduit of constitutional change in Australia'.

Source analysis

Use the court Case study: Discovering an implied right – The implied freedom of communication to answer the following questions:

- 5a) Explain what is meant by an 'implied right'.
- 5b) With reference to the source, explain in your own words how Sections 7 and 24 of the Commonwealth Constitution (Australia) have been interpreted by the High Court in such a way as to create implied rights.
- 5c) Discuss **one** advantage and **one** disadvantage of the High Court's ability to give meaning to the Constitution.
- 5d) With reference to a proposal to alter the Commonwealth Constitution (Australia), evaluate the extent to which the proposal is likely to be successful.

Essay

- 6) 'Referendums are the only formal means of constitutional change in Australia and have therefore had the greatest impact'. Evaluate this claim.
- 7) Although it has proven difficult to amend the Commonwealth Constitution (Australia) in the past, there remains a need for further change'. Assess this claim with reference to **one** current reform proposal to change the Constitution.

Investigation

There are both formal and informal methods of constitutional change in Australia.

8a) Provide a summary of the methods of constitutional change by completing the table below:

Method of constitutional change	Formal or informal?	Description of impact, with reference to examples
The referendum process		
High Court interpretation		
The referral of powers		
Unchallenged legislation		

8b) Rank the methods of constitutional change above according to their impact from the most significant to the least significant.

In groups, examine a proposal to change the Commonwealth Constitution (Australia).

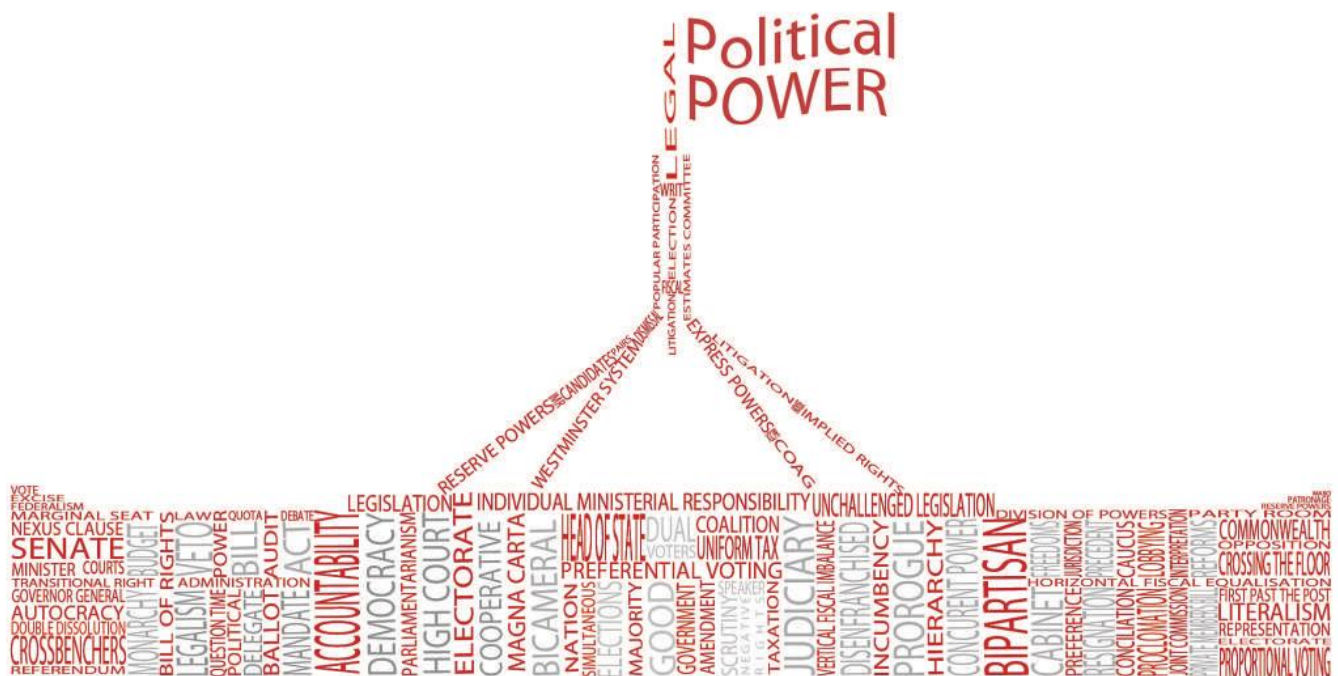
9a) Select one of the following proposals:

- the move to become a republic;
- reference to Indigenous Australians in the Commonwealth Constitution (Australia);
- recognition of local government in the Commonwealth Constitution (Australia);
- Commonwealth Constitution (Australia) Section 44

9b) Work as a group to collate information on the following points:

- the specific changes of the proposal;
- arguments for and against the proposal;
- the likelihood of the current government initiating a referendum; and
- the characteristics that would need to exist for the proposal to be successful at a referendum, making reference to previous successful and unsuccessful referendums.

9c) Present your group's findings to the class using a presentation format of your choice.



Case studies

Case study: Attorney General William Barr

Checks and balances — Impact of social media

Relevant syllabus points:

- **Essential to the understanding of political and legal power is the knowledge of responsible government, representative government, separation of powers, division of powers and Westminster conventions.**
- **Legislative, executive and judicial powers with reference to the Commonwealth Constitution (Australia) and with comparison to one non-Westminster political and legal system.**
- **The ways in which Australia and one other country can both uphold and/or undermine democratic principles, with reference to:**
 - **political representation**
 - **popular participation**
 - **the rule of law**
 - **judicial independence**
 - **natural justice**

Keywords: Separation of powers, checks and balances, limitations on power, judicial independence, rule of law

William Barr was sworn in as Attorney General (AG) of the United States (US) by President Donald Trump on the 14 February 2019 following his nomination by the President and subsequent confirmation by the Senate. Barr had previously served as AG from 1991 to 1993 in the George H W Bush administration. As AG, Barr has power in representing the government in all legal matters. Barr is the head of the Department of Justice, the Chief Legal Counsel to the President, and is a member of the Cabinet. The AG has no fixed tenure of office, but serves at the discretion of the President. The President can therefore remove the AG at any time. The AG can also be impeached and tried by Congress.

AG Barr was invited to attend and give evidence before a House Committee conducting an investigation into the Roger Stone case.

On 20 January 2019, Roger Stone — an ally and confidante of President Trump — was impeached for abuse of power, but was acquitted by the

Senate. However, on 25 January 2019, Stone was indicted by Special Counsel Robert Mueller for impeding the Congressional investigation into Russian interference in the 2016 US election. He was charged with:

- lying to Congress about his contact with Wikileaks;
- obstruction of justice in a House investigation into Russian interference in the 2016 US Presidential election; and
- witness tampering, amounting to seven counts in total.

The jury trial began on 6 November 2019, with Justice Amy Jackson presiding. On 15 November 2019, a jury convicted Stone on all seven counts. In accordance with federal sentencing guidelines, the Department of Justice prosecuting team recommended a sentence of 7–9 years' imprisonment.

At around midnight on 10 February 2020, Trump tweeted: "This is a horrible and very unfair situation. The real crimes were on the other side, as nothing happens to them. Cannot allow this miscarriage of justice! [...] Everything having to do with this fraudulent investigation is badly tainted and, in my opinion, should be thrown out".¹

The following day, senior officers within the Department of Justice recommended that Stone receive a lighter sentence.

Judge Amy Jackson denied petition for a new trial for Stone, sentencing him to 40 months' imprisonment in a federal jail and fining him US \$20,000. Stone was due to begin his incarceration at a federal prison in Georgia in July 2020.

Four of the Justice Department prosecutors on the Stone case withdrew from the case on the 12 February after the Justice Department overruled the sentencing recommendation made by one of its own prosecuting teams. One of the four resigned from the Justice Department in protest.

A statement signed by 2,000 former Department

¹ Trump, Donald, Tweet, 11 February 2020, <<https://twitter.com/realdonaldtrump/status/1227122206783811585?lang=en>>; and Joseph, Dawn, 'Unfettered DoJ prosecutors pose grave danger to republic', *Washington radar* 18 February 2020, <<https://www.washingtonradar.com/unfettered-doj-prosecutors-pose-grave-danger-republic/>>.

of Justice officials from both sides of politics called for Barr to resign as AG on the grounds of his behaviour in the Stone case. The statement was posted on the Department of Justice Alumni website on the 16 February 2020.

In his own defence, AG Barr stated in February 2020 in relation to President Trump's tweeting on legal matters, that "to have public statements and tweets made about the department ... about pending cases in the department, and about judges ... make[s] it impossible for me to do my job".²

President Trump responded on Twitter that he had not asked the AG to "do anything in a criminal case," but argued that, as President, he had "the legal right to do so" and had "so far chosen not to!"³

As a result of the Stone case, the House Judiciary Committee Chairman, Jerry Nadler, began an inquiry into AG Barr and the Justice Department, demanding briefings, documents and interviews with 15 officials, as the Judiciary Committee tries to determine whether there was "improper political interference in federal law enforcement."

According to former Supreme Court Justice Anthony Kennedy, "the separation of powers and checks and balances are not automatic mechanisms. They depend upon a commitment to civility, open communication and good faith on all sides".⁴

In July 2020, President Trump commuted Stone's sentence just before he was to report to a federal prison to serve a 40-month term. "Roger Stone has already suffered greatly," Trump said. "He was treated very unfairly, as were many others in this case. Roger Stone is now a free man!"⁵

The statement did not assert that Stone was innocent of the false statements and obstruction counts, only that he should not have been pursued because prosecutors ultimately filed no charges of an underlying conspiracy between Donald Trump's campaign and Russia.⁶

Application:

The separation of powers is a doctrine intrinsic to democracy which ensures that ruling power is divided into three branches of government, the legislature, the executive and the judiciary, based upon the principle of *trias politica*. This doctrine evolved out of the theory of Montesquieu that to promote liberty, these three powers must be separate and act independently.⁷ The separation of powers imposes checks and balances to prevent the concentration of power.

However, these checks and balances can be usurped for political reasons. AG Barr put pressure on prosecutors to impose a lighter sentence on Stone as a result of his relationship with the President. This also undermines the rule of law and erodes public confidence in the justice system. President Trump then used his power to commute Stone's sentence days before he was due to begin his prison term.

Although the US has a robust separation of powers and checks and balances in place, these can be undermined by those in power.

2 Gregorian, Dareh, 'AG Barr says Trump tweets "make it impossible for me to do my job"', *NBC news*, 14 February 2020, <<https://www.nbcnews.com/politics/donald-trump/ag-barr-says-trump-tweets-make-it-impossible-me-do-n1136726>>; and Flaherty, Anne, Barr blasts Trump's tweets on Stone case: Impossible for me to do my job', *ABC news*, 14 February 2020, <<https://abcnews.go.com/Politics/barr-blasts-trumps-tweets-stone-case-impossible-job/story?id=68963276>>.

3 Helmore, Edward, 'Trump claims he has a legal right to intervene in criminal cases', *The guardian*, 15 February 2020, <<https://www.theguardian.com/us-news/2020/feb/14/trump-claims-legal-right-intervene-criminal-cases-william-barr-plea-not-tweet>>; and Watson, Kathryn, 'Trump responds to Barr saying that tweets "make it impossible for me to do my job"', *CBS news*, 14 February 2020, <<https://www.cbsnews.com/news/william-barr-president-trump-tweets-department-of-justice-impossible-to-do-my-job/>>.

4 Supreme Court Justice Anthony Kennedy, cited in Peabody, Bruce, 'Separation of powers: An invitation to struggle', *The conversation*, 28 January 2019, <<https://theconversation.com/separation-of-powers-an-invitation-to-struggle-110476>>.

5 Baker, Peter, Haberman, Maggie and LaFraniere, Sharon, 'Trump commutes sentence of Roger Stone in case he long denounced', *New York times*, 10 July 2020, <<https://www.nytimes.com/2020/07/10/us/politics/trump-roger-stone-clemency.html>>.

6 Baker, Haberman and LaFraniere, "Trump commutes sentence of Roger Stone in case he long denounced".

7 National Conference of State Legislatures, *Separation of Powers—An Overview*, <<https://www.ncsl.org/research/about-state-legislatures/separation-of-powers-an-overview.aspx>>.

Case study: Representation and legislation – Wentworth and Medevac

Home Affairs Legislation Amendment (Miscellaneous Measures) Act 2019

Relevant syllabus points:

- **Functions of the Commonwealth Parliament in theory and in practice, including Section 7, 24, 51, 53 and the decline of parliament thesis**
- **Lawmaking process in parliament and the courts, with reference to the influence of**
 - individuals
 - political parties
 - pressure groups
- **the accountability of the Commonwealth Parliament**
 - through elections for the House of Representatives and the Senate
 - through the House of Representatives and the Senate Privileges Committees
 - within the procedures and processes of the parliament
 - through judicial review
- **the accountability of the Executive and public servants**
 - through collective and individual ministerial responsibility
 - through Senate Estimates and at least one other committee of the Commonwealth Parliament
 - through the Commonwealth Auditor-General and the Administrative Appeals Tribunal (AAT)
 - through judicial review
- **The ways in which Australia and one other country can both uphold and/or undermine democratic principles, with reference to**
 - political representation
 - popular participation
 - the rule of law
 - judicial independence
 - natural justice

Keywords: Medevac Bill, representation, individual influences lawmaking, accountability of executive

Malcolm Turnbull resigned from parliament immediately after he lost the prime ministership in August 2018. His resignation created a

vacancy in the Sydney electorate of Wentworth. A by-election was necessary to fill this vacancy. Wentworth is a wealthy harbourside electorate. Its constituents are typically Liberal voting. Indeed, the electorate had been held by the Liberal Party or its predecessors since federation. Many Wentworth electors were upset about how their previous member — former Prime Minister Turnbull — had been treated by his party. Additionally, they were concerned about the Coalition's offshore detention policy for asylum seekers and refugees. There had been cases of self-harm and a string of severe physical and mental health issues amongst the detainees.

Professor Kerry Phelps nominated as an Independent candidate in the by-election. Phelps is a medical doctor, former head of the Australian Medical Association and an advocate for better medical treatment for asylum seekers and refugees. The Liberal Party nominated David Sharma — a former diplomat — as its Wentworth candidate. Phelps won the 20 October Wentworth by-election and took her seat in the House of Representatives on 26 November 2018.

By electing Phelps, the electors of Wentworth had chosen a representative and legislator who could use the balance of power in the House of Representatives to hold the parliament to account in its legislative role.

On 27 November Julia Banks (Liberal, Chisholm) announced she was resigning from the Liberal Party and would sit on the crossbench as an Independent alongside Phelps and other Independents until the end of her term. Banks had become disillusioned by the conduct of her party colleagues during the Turnbull affair. Phelps' victory and Banks' resignation cost the Morrison Government its majority, forcing it to govern as a minority government relying on the support of non-Liberal MPs to stay in office and pass bills and motions. More importantly, the government could no longer count on winning gag and guillotine motions or defeating other motions moved on the floor of the House of Representatives.

As the delegate/trustee of her Wentworth constituents, Phelps introduced a private member's bill called the Migration Amendment (Urgent Medical Treatment) Bill 2018 (Medevac Bill) on 3 December 2018. Her private member's bill would allow gravely ill asylum seekers and refugees held on Manus Island or Nauru to apply for medical evacuation to Australia if

Papuan or Nauruan facilities could not provide adequate care. The proposed law would require two independent Australian doctors to approve an application for medical evacuation. A medical approval would compel the Home Affairs Minister to bring the sick person to Australia. The minority government opposed Phelps' Medevac Bill and was able to convince other Independents to vote with the government in the House of Representatives to prevent the bill proceeding beyond its second reading.

Meanwhile, in the final sitting week of 2018 the Opposition and other senators used Phelps' private member's bill as the inspiration for amendments to the government's Home Affairs Legislation Amendment (Miscellaneous Measures) Bill 2018, which replicated the Phelps' bill and would enshrine Medevac in law. A bill passed by the House of Representatives and amended by the Senate must return to the House of Representatives for amendments to be agreed upon. When the Home Affairs Bill returned to the House of Representatives, the government opposed it. However, since the bill first passed that house the balance of power in the lower house had shifted against the government. An amended government bill passed the House of Representatives against the wishes of the executive. The passage of the Home Affairs Bill made history. It was the first time in 80 years a government had lost a legislative vote in the House of Representatives.

Application:

When the House of Representatives approved the Senate's amendments to the Home Affairs Legislation Amendment (Miscellaneous Measures) Bill 2018 the parliament was seen to respond to the concerns of electors in Wentworth — and all other electorates represented by MPs who voted for the bill. In this way, electors in a by-election had held the parliament to account in its legislative role by bringing about a change in the balance of legislators willing to support a change in the law.

This case study illustrates how the parliament carries out its representative and legislative functions. The circumstances were unusual because the by-election created a minority government. Nevertheless, the example shows how an MP can — as a delegate or trustee — represent their constituents' concerns and translate that representation into legislation. The case study also demonstrates how parliament may function in the absence of a dominating executive.

Following the 2019 federal election, the Morrison Government was returned with a majority in the House of Representatives. This allowed them to repeal the Medevac law through the Migration Amendment (Repairing Medical Transfers) Bill 2019.

Case study: 2019 Australian general election

Syllabus points:

- **Functions of the Commonwealth Parliament in theory and in practice, including Sections 7, 24, 51 and 53, and the decline of parliament thesis**
- **Roles and powers of the Prime Minister, Cabinet and the ministry**
- **Accountability of the Commonwealth Parliament through elections for the House of Representatives and the Senate**

Keywords: general election, Prime Minister, Leader of the Opposition, long-term, medium-term, short-term and proximate factors, presidential-style election campaign, Queensland, United Australia Party (UAP), Pauline Hanson's One Nation (PHON), Stop Adani convoy, social media, House of Representatives, Senate

Introduction

The May 2019 general election elected the 46th Commonwealth Parliament.

On 11 April, Prime Minister Scott Morrison called upon Governor-General Sir Peter Cosgrove 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 + four territory seats) up for re-election.

Section 24 of the *Commonwealth of Australia Constitution Act 1900* (the Constitution) limits the terms of Australian parliaments to three years maximum. The Prime Minister has the power to call an election before the expiry of the three years. This power is an advantage the Prime Minister has 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 — within his party — of his signature National Energy Guarantee (NEG) policy. Shortly afterwards he was challenged for the Liberal leadership by Home Affairs Minister Peter Dutton MP. 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 is 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 Coalition Government ready for an early 2019 election.

After being deposed, Turnbull resigned from parliament, causing a by-election in his seat of Wentworth. Independent, Professor Kerryn Phelps won the October 2018 Wentworth by-election by a small margin. Disgruntled Liberal voters punished the party for the Turnbull affair, a warning of what might be expected in the general election. One of Phelps' by-election proposals was a change to the law to enable the medical evacuation to Australia of sick asylum seekers and refugees from overseas detention on Nauru and Manus Island. The loss of Wentworth put the Morrison Government into a minority, forcing it to rely on Independents to provide confidence and supply on the floor of the House of Representatives. Shortly afterwards, Liberal MP Julia Banks resigned from the Liberal Party and joined the growing Independent crossbench, weakening the government still further.

When — in the first sitting week of 2019 — the House approved a Senate-amended bill to include 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 Morrison minority government. As the government opposed the law, the passage of the Medevac Bill seemed to suggest the government had lost control of the parliament. Furthermore, the Coalition Government's popularity had been declining since Tony Abbott's 2014 budget.

Given the history of the government and its predicament in early 2019, its re-election did not seem likely.

The Australian Labor Party Opposition

After the Australian Labor Party (ALP) deposed Kevin Rudd in 2010, Australia experienced a series of short-term Prime Ministers each of whom was deposed by their respective party. In an attempt to prevent further leadership instability, in 2013 the ALP changed its rules for selecting its leader. Bill Shorten had served six years as Labor Opposition Leader beginning in 2013, and by 2019 presented himself and the ALP as being able to deliver stable government.

In that time, the ALP had developed a comprehensive policy platform and a united leadership team — in contrast to the Coalition. The Opposition was also able to use its strength in the House of Representatives to full advantage against the weak Turnbull and Morrison Governments.

Since the early days of the Abbott Government, the ALP had consistently outperformed the Coalition in opinion polls. This factor encouraged the ALP and dismayed the Coalition. However, Shorten had never beaten either Turnbull or Morrison in the opinion polls on the question of preferred Prime Minister. Shorten's 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 Shorten's low approval ratings.

It was expected that the ALP would have a strong chance of the winning the 2019 election with its own medium-term history of stability and policy development, combined with the predicament of the Morrison Government.

Factors influencing Australian elections in general

For most of Australia's history elections have been determined by long-term, medium-term, short-term and proximate factors:

- long-term factors include:
 - the tendency of electors to adopt the voting patterns of their family or social class;
 - the decline of support for the two major parties and the increasing importance of minor parties and, more recently, Independents;
- medium-term factors include:
 - the stability of the government;
 - the quality of its leadership and economic performance; and
 - significant events within the lifetime of a government;

- short-term factors are those that influence elections during the campaign itself; and
- proximate factors are those with a very short-term impact that can change the dynamics of an election in days. They have emerged since the transformation of communications and news sources by the digital revolution.

Factors influencing the 2019 general election

It was generally thought 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, coupled with the stability of the Opposition were medium-term factors. Big topics such as climate change and tax reform were significant issues over the previous three years. As always, the economy — particularly wage stagnation and the behaviour of the banks — were factors. Another was the Adani coal mine in Queensland, which had divided the community and the ALP. The influence of preference deals, leadership performance and the impact of the inevitable negative political advertising delivered through traditional and social media were the short-term factors expected to affect the result.

Few expected the medium-term factors to be so insignificant. Surprising nearly everyone, the 2019 general election was almost wholly dominated by short-term and proximate factors.

Medium-term factors had almost no impact

It has long been claimed that ‘disunity is death’ in politics. The 2019 election has invalidated that claim.

The government had struggled 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 moved by Pauline Hanson’s One Nation Party (PHON). 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. In the past, such chaos over the medium-term would more than likely have been fatal to a government.

In contrast, the ALP had presented a stable and united leadership team and a comprehensive

policy program to the electorate for several years before the election. The 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.

Turnbull was the target of Labor’s strategy, so when Morrison replaced him, the strategy was derailed. Morrison proved more politically astute than Turnbull, being able to effectively communicate by using straight-talking language. In this way Morrison turned the focus onto Labor’s tax and spend program rather than the Coalition’s medium-term performance. Shorten’s unpopularity was another medium-term factor in Labor’s loss.

Short-term factors were critical

Scott Morrison has a background in advertising. He once worked in New Zealand on its famous ‘100% Pure New Zealand’ campaign before returning to Australia and becoming Managing Director of Tourism Australia from 2004 to 2006. He turned his marketing and advertising skills to the task of selling himself as a Prime Minister, rather than the Coalition 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 their party. The strategy was necessary in 2019 because the Liberal Party ‘brand’ was thought to be damaged by its recent history. Instead of trying to 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 the 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 he was seen sharing drinks with ordinary Australians in local hotels 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, Shorten 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 'retirees' tax', and its negative gearing reform became a 'housing and rent tax'. Added to this was a social media scare campaign run by unofficial sources in relation to death taxes, despite such taxes never being a Labor policy. Morrison was able to paint the Labor Party as a threat to incomes, wealth and the economy because it would implement high taxes across the board.

Morrison out-campaigned Shorten. The presidential-style campaign — a style that has come to dominate Australian elections — 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.

Queensland is Australia's most decentralised state with more clearly defined distinctions between its city and regional electors than in other jurisdictions. It has 30 seats in the House of Representatives, making it the third most significant state in the House of Representatives. Labor needed to perform well in Queensland to win the election. It had to win both Brisbane-based progressive city electorates and more conservative regional electorates. The difficulty for both major parties is winning both these constituencies.

The Liberal Party struck a controversial preference deal with Clive Palmer's United Australia Party (UAP) during the campaign. It was feared the UAP deal would hurt the Liberal Party in the same way a similar deal with Pauline Hanson's One Nation Party (PHON) had damaged the Western Australian Liberal Party's chances of re-election in 2017.

The proposed Adani Carmichael coal mine in Queensland proved to be a critical factor in the election. The mine was problematic for the Labor Party because of Queensland's two constituencies — progressive urban and conservative regional. Shorten could not support it 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 election campaign. The Stop Adani convoy originated in the southern states and made its way into the heartland of Queensland coal mining, arriving in the coal-rich town of Clermont in April 2019. There was much hostility between the residents and the southern city-based activists.⁸ In the absence of an ALP declaration of support for the mine, the convoy galvanised support for the UAP and PHON. Both minor parties were formed in and represented regional Queensland more than any other part of Australia. The deal with the UAP funneled its 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, Palmer's UAP failed to win a seat in either house. However, UAP preferences contributed to the suppression of the Labor vote and helped the Coalition win critical seats in Queensland.⁹

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 that state, but as with Queensland, the big mining state fell in behind the Coalition.

Proximate factors were significant

Unauthorised 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 – House of Representatives

The Morrison Government was returned to office. The Coalition won 77 seats, giving it a two seat majority in the House of Representatives. Morrison was able to form a majority government.

8 Stone, Lucy, 'Stop Adani convoy begins day-long protest in Clermont', *Brisbane times*, 28 April 2019, <<https://www.brisbanetimes.com.au/national/queensland/stop-adani-convoy-begins-day-long-protest-in-clermont-20190428-p51hvo.html>>; and Burt, Jemma and McGhee, Rachel, 'Anti-Adani protesters felt threatened by locals in Queensland coal mining town of Clermont', *ABC news*, 27 April 2019, <<https://www.abc.net.au/news/2019-04-27/adani-carmichael-mine-greens-clermont-convoy-qld/11051390>>.

9 Newlands, Maxine, et al, 'State of the states: Queensland and Tasmania win it for the Coalition', *The conversation*, 21 May 2019, <<https://theconversation.com/state-of-the-states-queensland-and-tasmania-win-it-for-the-coalition-117398>>.

On the surface, not a great deal seemed to have changed since 2016 when Turnbull formed a one seat majority government. However, the authority of the Prime Minister was substantially enhanced. By contrast, in 2016 Turnbull had, in fact, lost 13 of the Abbott Government's 14 seat majority, and as Prime Minister he was diminished by the perception that he had squandered the Coalition's strength. By comparison, Morrison had won the 'unwinnable election' against all expectations. His stature as a leader was much stronger than Turnbull's.

In the House of Representatives eight seats changed hands. 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. The ALP gained Gilmore in New South Wales. The Liberals lost the New South Wales 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 a by-election in 1994.¹⁰

The ALP won 68 seats, making it the second-largest party in the House of Representatives.

The Greens retained Melbourne, and three 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 in a 2018 by-election caused by the Section 44 citizenship crisis. It was a Liberal seat and it was unlikely that Labor could hold onto it in a general election. Herbert was Australia's most marginal seat, 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 were held by the ALP. Both seats received significant attention from both the Coalition and Labor parties in the election campaign. Bass was promised more than \$220 million in spending commitments by the Coalition, while Braddon got commitments of 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 gaining this seat was based on the crushing defeat of the state

Liberal Party in the recent state election and the retirement of prominent sitting Liberal member and minister, Kelly O'Dwyer MP. Higgins' vote swung to the ALP, but not enough. The Liberal Party retained it.

In short, the expected swing to the Labor Party did not materialise. In reality, the unexpected Coalition losses in 2016 and the loss of seats in by-elections during the term of the 45th Parliament were corrected in 2019.

Results – Senate

The Senate is not critical to who forms the government, but it can hold an elected government in check. Thus, who holds power in the Senate is an essential factor in how successful a government can be.

The 2019 general election followed a double dissolution election in 2016. In a double dissolution election the quota is halved as all 76 seats are up for re-election. This makes it easier for minor and micro parties and Independents to get elected. The Senate in the 45th Parliament was very diverse, with a large crossbench sharing the balance of power. This sort of Senate is difficult for a government as they will be obliged to negotiate bills they want passed in the upper house. The 2019 general election resulted in a 'normalisation' of the Senate. Since the 2019 general election there have been a number of changes to the seats in the Senate. This has altered the balance of power. In January 2020 Senator Cory Bernardi (Australian Conservatives, SA) resigned. At the time of his election in 2016, Bernardi was a member of the Liberal Party. His resignation resulted in an increase to 36 seats for the government. In August 2020 Senator Rex Patrick (Centre Alliance, SA) announced that he had resigned from Centre Alliance and would sit as an Independent. Patrick filled the vacancy left by Nick Xenophon when he resigned from the Senate in 2017.

Application:

Although the 2019 election was considered unwinnable for Scott Morrison and the Coalition, the government emerged with increased representation in both houses of parliament. The government's election campaign was leader-centric. Morrison presented himself as likeable figure, with a strong track record in parliament. This highlights the role and powers of the Prime Minister. It was Morrison and his focused campaign that led the coalition to victory.

Bill Shorten and the ALP Opposition presented themselves as a viable alternative government

¹⁰ Australian Electoral Commission, *House of Representatives, divisional results*, 11 July 2019, <<https://results.aec.gov.au/24310/Website/HouseDivisionalResults-24310.htm>>.

with comprehensive and detailed policies. This is one of the two key roles of the Opposition and shadow ministry. However, Shorten could not overcome his unpopularity or the 'Kill Bill' strategy utilised by the coalition.

During the election campaign, the coalition presented very few policies to the Australian people. Instead, they focused on the ALP policy platform. This suggests that the Morrison Government's 'will of the majority' mandate may be rebuffed by the crossbench senator's that claim the 'balance of power' mandate.

The results from the 2019 general election highlights that members of parliament are ultimately accountable to the Australian people. There were numerous examples of seats changing hands. The loss of Tony Abbott's seat of Warringah to Zali Steggall stresses that members of parliament must represent the interests of their electors or face electoral defeat. Although the government has been returned with an increased number of seats in the Senate, it will still need to negotiate its bills with the crossbench.

Case study: Marriage equality legislation

Relevant syllabus points:

- **Lawmaking process in parliament and the courts, with reference to the influence of**
 - individuals
 - political parties
 - pressure groups
- **the accountability of the Commonwealth Parliament**
 - through elections for the House of Representatives and the Senate
 - through the House of Representatives and Senate Privileges Committees
 - within the procedures and processes of the parliament
 - through judicial review
- **the ways in which Australia and one other country can both uphold and/or undermine democratic principles, with reference to**
 - political representation
 - popular participation
 - the rule of law
 - judicial independence
 - natural justice

Keywords: same-sex marriage, Australian Marriage Equality, Senator Dean Smith, private Senator's bill

In 2004 the Howard government, supported by the Australian Labor Party (ALP) Opposition, amended the *Marriage Act 1961* to specify that marriage could only be between a man and a woman. After that time Labor moved to supporting same sex marriage while a number of Coalition politicians also expressed their

support for same sex-marriage. The political shift in favour of same-sex marriage was attributed to the weakening political influence of social conservatives including the Australian Christian Lobby. Between September 2004 and October 2017 there were 22 unsuccessful attempts in the Commonwealth Parliament to legalise or recognise same sex marriage under federal law. In 2011 the ALP became the first of Australia's major parties to allow its members a conscience vote on the issue of same-sex marriage, with the Liberal Party changing its stance under the leadership of Prime Minister Malcolm Turnbull in 2017.

The Liberal government attempted to pass the Plebiscite (Same-Sex Marriage) Bill in 2016. However, it was opposed by the Opposition, Australian Greens and the Nick Xenophon Team, and was defeated in the Senate in November 2016. They opposed it on the grounds that it would cost a lot of money to hold a plebiscite on an issue that should be resolved by a vote in parliament. It was reintroduced into the Senate, but rejected a second time in August 2017. In response, Finance Minister Mathias Cormann and Treasurer Scott Morrison directed the Australian Bureau of Statistics (ABS) to conduct a voluntary survey of all Australians on the electoral roll as to their views on whether the law should be changed to allow couples of the same sex to marry in Australia.

Australian Marriage Equality (AME) — formed in 2004 — is an advocacy group operated by volunteers. AME was supported by 2,200 other organisations, including 851 corporations such as Foxtel, Amazon, Apple, McDonalds and Qantas, as well as sporting groups such as the Australian Football League, Cricket Australia and Netball Australia, to name a few. The Yes campaign was also supported by *GetUp!*,

various members of the Commonwealth Parliament, and individuals across Australia.¹¹

Various strategies were employed by AME, including rallies across Australia with tens of thousands of people attending, social media, radio, TV, magazine and newspaper ads and stories. Door knocking covered over 102,000 premises, and over 1 million phone calls were made. Rainbows and the word 'Yes' were painted on buildings throughout Australia. Approximately 15,600 people across Australia volunteered for the campaign.

The number of Australians who participated in the voluntary postal survey was approximately 12.7 million.

On 15 November 2017 the results of the survey were announced with 61.6 per cent of respondents voting 'Yes'. In response to the results, Liberal Senator Dean Smith (Western Australia) introduced a private Senator's bill — the Marriage Amendment (Definition and

Religious Freedoms) Bill 2017. This marriage equality bill passed through both houses, received Royal Assent and became law on 8 December 2017.

Application:

The marriage equality movement illustrates the important role that pressure groups and individual Australians can play in influencing lawmaking in parliament. AME and others campaigned for Australian voters to support marriage equality in the postal survey. The actions of various pressure groups, organisations and Australian people demonstrated how popular participation is upheld in Australia. Approximately 12.7 million individual Australian voters participated by casting a 'Yes' or 'No' vote in the voluntary postal survey. Senator Dean Smith introduced a private Senator's bill in response to the postal survey results. The vast majority of members of the Australian parliament acted as delegates or trustees in casting their vote to support the passage of the marriage equality bill.

Case study: Jacqui Lambie

Relevant syllabus points:

- **Contemporary issue — the last three years — relating to political power**
- **Political mandates in theory and in practice, including competing mandates**
- **Lawmaking process in parliament and the courts, with reference to the influence of**
 - Individuals
 - political parties
 - pressure groups
- **the accountability of the Commonwealth Parliament**
 - through elections for the House of Representatives and the Senate
 - through the House of Representatives and Senate Privileges Committees
 - within the procedures and processes of the parliament
 - through judicial review

Key words: Jacqui Lambie, contemporary issue of political power, mandates, lawmaking, Section 44 of the Constitution.

Jacqui Lambie was first elected to parliament as a Senator for Tasmania in 2013. She was elected as a member of the Palmer United Party (PUP). By November 2014, she had split from PUP due to disagreements with the party leadership, and sat as an Independent. She formed her own party — the Jacqui Lambie Network (JLN) — in May 2015, and was re-elected under her own name in the 2016 double dissolution election.

In 2017 the High Court of Australia (High Court) declared that Lambie had been ineligible to be elected to parliament as she had been in breach of the dual citizenship provisions in section 44 of the *Commonwealth of Australia Constitution Act 1900* (the Constitution). After renouncing her foreign citizenship and almost two years out of Parliament, she ran for the Senate in the 2019 election. Lambie was once again elected to represent Tasmania.

Since first being elected to parliament, Lambie has been part of a Senate crossbench that has held the balance of power in a Senate where successive governments have not held a majority, as demonstrated by the following:

- after the 2013 election, the Coalition Government had 33 seats — needing six

¹¹ Further information on this campaign can be found at the following web sites: <<https://voteyes.org.au/>>; <https://nationbuilder.com/australian_marriage_equality>; and <<https://www.australianmarriageequality.org/>>.

for a majority— and PUP had two seats in a crossbench of 18 Senators;

- after the 2016 election, the Coalition Government had 30 seats — needing nine for a majority — and Lambie had one seat in a crossbench of 20 Senators; and
- after the 2019 election, the Coalition Government has 36 seats — needing three for a majority — and Lambie has one seat in a crossbench of 15 Senators.

Lambie, therefore, holds a crucial Senate vote in the 46th Parliament, where the Greens and Centre Alliance are less likely to support the government, making the government reliant on Pauline Hanson's One Nation (PHON) and Lambie to pass their legislation.

Lambie has been able to use this position to exercise significant political power as she holds a balance of power mandate in the Senate. Both as an individual and as leader of her own minor political party, she has had a significant influence on lawmaking in the parliament.

She is able to determine whether or not government legislation passes if one extra vote is required to reach a majority. She is also able to negotiate amendments to legislation to benefit her constituents or to fit with her agenda.

Following are some examples of where Lambie has used her mandate to influence lawmaking.

1. The government needed Lambie's vote to pass its income tax cuts package in July 2019. In return for supporting it in the Senate, Lambie asked the government to forgive Tasmania's \$157 million public housing debt it owed the Commonwealth. According to Lambie, "Tasmania is paying 50c in every dollar of our state housing budget back to the federal government in interest and debt repayments. That means we are building half as many homes, helping half as many people".¹²
2. Lambie's was the final vote the government needed to repeal the *Home Affairs Legislation Amendment (Miscellaneous Measures) Act 2019* (the Medevac Bill). See: *Case study: Representation and legislation — Wentworth and Medevac*. Lambie supported the repeal Bill in December 2019, after striking a deal with the government

and receiving 'classified briefings about the Government's policies on border protection [...] and resettlement'.¹³ Both Lambie and the Government have refused to publicly release the details of this deal, for 'national security concerns'. Astute students will note that this poses an issue for the transparency of the executive's actions.

3. The Coalition Government was planning to expand its Cashless Welfare Card scheme in late 2019 from a limited number of trial sites to a wider range of sites across the Northern Territory. Under the scheme — which was piloted in various sites from 2016 — up to 80 per cent of recipients' welfare income is quarantined in a special bank card that can be used only at certain vendors, and cannot be used to gamble or buy alcohol. The government needed Lambie's vote to expand the scheme, but after visiting most trial sites, Lambie was unconvinced that the 'necessary supporting infrastructure' was in place, including 'rehabilitation and vocational training'.¹⁴

Application:

The case of Jacqui Lambie illustrates how both an individual and a minor political party can influence the lawmaking process in parliament.

Lambie is also an excellent example of a crossbench Senator who holds a balance of power mandate and can exercise significant political power, disproportionate to her single seat in the Senate. Students may remember that because of malapportionment, Tasmanian Senators represent only a small proportion of the total Australian population, so there is a question about whether such Senators should be able to block a government's will of the majority mandate to implement their agenda.

Lambie can also be used as an example of a contemporary issue concerning political power as she has been able to leverage her position and her balance of power to influence the content and direction of significant pieces of government legislation.

12 Macmillan, Jade, 'Jacqui Lambie wants more for Tasmanians before she supports Government tax plan', *ABC news*, 3 July 2019, <<https://www.abc.net.au/news/2019-07-03/jacqui-lambie-wants-social-housing-support-for-tax-cut-vote/11275326>>.

13 Finance Minister Mathias Cormann, cited in Conifer, Dan, 'Decoding the secret medevac negotiations between Jacqui Lambie and the Government', *ABC news*, 5 December 2019, <Decoding the secret medevac negotiations between Jacqui Lambie and the Government>.

14 Remeikis, Amy 'Coalition's bid to expand cashless welfare card yet to win over Jacqui Lambie', *The guardian*, 7 November 2019, <<https://www.theguardian.com/australia-news/2019/nov/07/coalitions-bid-to-expand-cashless-welfare-card-yet-to-win-over-jacqui-lambie>>.

Case study: Privileges committees holding MPs to account

Relevant syllabus Point:

- the accountability of the Commonwealth Parliament
 - through elections for the House of Representatives and the Senate
 - through the House of Representatives and the Senate Privileges Committees
 - within the procedures and processes of the parliament
 - through judicial review

Keywords: privileges committees, backbencher, parliamentary privilege

The case of ALP backbencher Craig Thomson — a member of the 43rd Parliament (August 2010 to September 2013) — is a recent example of a breach of parliamentary privilege.

Before his election to the seat of Dobell (NSW) in 2007, Thomson had been the national secretary of the Health Services Union (HSU). It was alleged that during his time with the HSU Thomson had misused the HSU's official credit card to purchase hotel accommodation and escort services. He was investigated by Fair Work Australia (FWA) over a period of three years. The FWA findings were tabled in the Senate on 7 May 2012. On 21 May, Thomson made a statement to the House of Representatives professing his innocence. He claimed that members of the HSU conspired to "set him up".¹⁵ In his speech he named

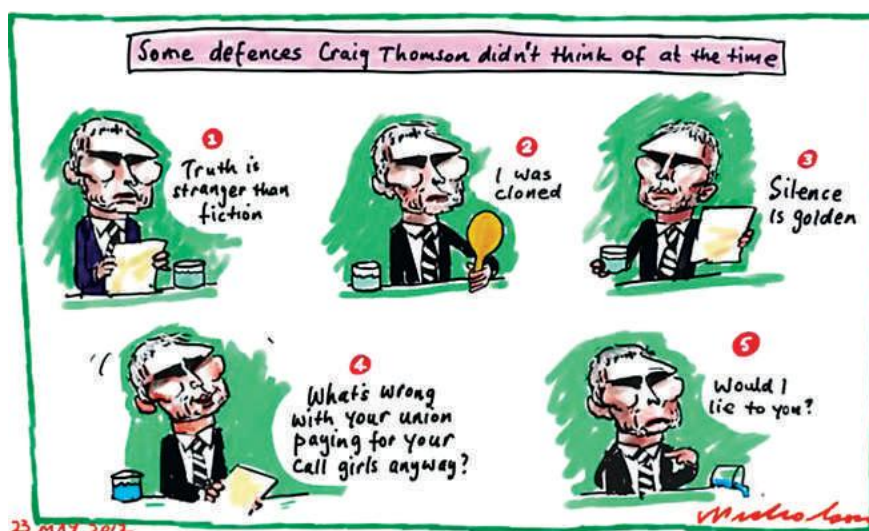
HSU members under parliamentary privilege, meaning they could not take legal action to clear their names. It was his 21 May speech that breached parliamentary privilege.

Thomson was eventually prosecuted and found guilty of fraudulent use of the HSU credit card. The Commonwealth Parliament voted a motion of regret and apologised to the individuals Thomson named in his speech.

An inquiry by the privileges committee of the 43rd Parliament lapsed due to the dissolution of parliament and the 2013 election. Thomson lost his seat at this election. It was not until 6 April 2016 that the privileges committee of the 44th Parliament made a decision about the matter. The committee noted the difficult circumstances experienced by Thomson as a result of the prolonged period of investigation and decided that an appropriate penalty would be for the House of Representatives to reprimand him. He was no longer an MP when the house acted.

Application:

It is the role of the Privileges Committees in each house to check on the behavior of members of parliament and it is important that these committees are independent. It is interesting to note that during Thomson's time as an MP he was, himself, a member of the House of Representatives privileges committee investigating him. Thomson was a 'judge in his own case' — breaking a fundamental principle of due process that the adjudicator must be independent. His case shows that privileges committees may suffer from a lack of independence and, therefore, not do the job they were originally set up to do — to hold members of parliament to account for their behavior.



■ Figure CS1 – Craig Thomson tries to explain himself to the House of Representatives.
Source: Nicholson, Peter, *Good defences Craig Thomson didn't think of in time, 2012*, author's permission, <www.nicholsoncartoons.com.au>

¹⁵ Statement, Member for Dobell, House of Representatives, Hansard, 21 May 2012, <https://australianpolitics.com/downloads/alp/12-05-21_craig-thomson-statement-to-house.pdf>.

Hugh Mahon MP (Labor, Kalgoorlie, WA) is the only member of the House of Representatives ever expelled from parliament. He had made anti-British comments at the funeral of an Irish nationalist who died after being on a hunger strike. In 1920 then Prime Minister Billy Hughes successfully moved for Mahon's expulsion from the House of Representatives on the grounds of sedition,

disloyalty to the British Empire and breaking his oath of allegiance to the King. Mahon contested the by-election brought about by his expulsion, but failed in his bid to be re-elected.¹⁶

Section 8 of the *Parliamentary Privileges Act 1987* now prevents either house from expelling

members from the parliament. The reason for this change is that expelling members may be used as a political weapon to alter the balance of power within parliament. It acts to constrain the power of privileges committees by preventing them from acting in a partisan way that might bring down a government.

Case study: Prime Minister John Howard

Relevant syllabus points:

- *Functions of the Commonwealth Parliament in theory and in practice, including Sections 7, 24, 51 and 53, and the decline of parliament thesis*
- *Roles and powers of the Prime Minister, Cabinet and the ministry*
- *Political mandates in theory and in practice, including competing mandates*
- *federalism in Australia with reference to*
 - constitutional powers of the State and Commonwealth parliaments, including exclusive, concurrent and residual powers, Section 51, 52, 90, 107 and 109
 - Financial powers of the Commonwealth Parliament, including taxation power, tied or special purpose grants, including Sections 51(ii), 87, 90, 92 and 96
 - Change in the balance of power since federation, with reference to
 - i. Financial powers, including vertical fiscal imbalance and horizontal fiscal equalisation, the Grants Commission
 - ii. Referral of powers, Section 51(xxxvii)
 - iii. The Council of Australian Governments (COAG)
 - iv. National Federation Reform Council (NFRC) and the National Cabinet (replaced COAG June 2020)
 - v. Cooperative federalism as opposed to coercive federalism
 - vi. High Court of Australia constitutional interpretation, including external affairs power Section 51 (xxix), corporations power Section 51 (xx), and taxation powers

- **Formal and informal methods of constitutional change and their impact**
 - referendums, including Section 128
 - High Court of Australia decisions
 - referral of powers
 - unchallenged legislation

Keywords: mandates, cooperative federalism, work place agreements, GST, republic referendum, WorkChoices.

John Howard entered parliament as the Member for Bennelong in May 1974. He took his first portfolio as Minister for Business and Consumer Affairs in the Coalition government of Malcolm Fraser and Doug Anthony from December 1975 to July 1977. He was Minister for Special Trade Negotiations from July 1977 to December 1977. Howard was then Treasurer from December 1977 until the Fraser government lost office in 1983.¹⁷

Howard led the Opposition from 1985 to 1989, and again from 1995. At the federal election in 1996 the Liberal–National Party coalition under Howard was swept into power with an enormous majority in the House of Representatives. While leader, Howard won four general elections: 1996, 1998, 2001 and 2004. After the 2004 election, his government also gained a majority in the Senate — the first time since 1981. He is the longest serving prime minister in Australian history, after Sir Robert Menzies.

Only three weeks after Howard took office, a gunman murdered 35 people at Port Arthur, Tasmania. This prompted a controversial government decision to limit individual's rights to gun ownership and to buy back guns from existing owners. Howard's national government, however, secured the cooperation of the state and territory governments to pass uniform gun control legislation.

As Prime Minister, John Howard led a government with a wide reform agenda and

¹⁶ Gibbney, H J, 'Mahon, Hugh (1857–1931)', in Australian dictionary of biography, 1986, <<http://adb.anu.edu.au/biography/mahon-hugh-7460>>.

¹⁷ This case study is based on information obtained from: National Museum of Australia, *John Howard*, <<https://www.nma.gov.au/explore/features/prime-ministers/john-howard>>; and Encyclopaedia Britannica, John Howard, Prime Minister of Australia, <<https://www.britannica.com/biography/John-Winston-Howard>>.

held a strong position on domestic and regional security, initiated by the sale of Telstra, the restructuring of industrial relations and taxation reform with the introduction of a goods and services tax. In international relations the government supported the independence of Timor-Leste, beginning with support for the UN Sponsored referendum in 1999. After the terror attacks on the US on 11 September 2001, the government supported the 'war on terror' including participating in the US led invasion of Iraq in 2003.

Government policies implemented by the Howard Government include:

- introduction of the '10 Point Plan' in response to the High Court's Wik decision;
- abolition of the Aboriginal and Torres Strait Islander Commission (ATSIC);
- introduction of workplace agreements and an attempt to eliminate compulsory trade unionism;
- the 'work for the dole' scheme;
- a national workplace relations system — WorkChoices in 2006;
- the failed Republic referendum in 1999;
- partial sale of Telstra, the money from which was used for environmental protection;
- establishment of the National Water Commission in 2006 and the National Water Security plan in 2007;
- major taxation reform with the introduction of a tax on consumption — the Goods and Services tax (GST) which began on 1 July 2000;
- maintenance of a strict immigration policy with a ban on boat refugees;
- a focus on domestic and regional security;
- a free trade agreement with the US; and
- military and police assistance to Timor-Leste, Solomon Islands and Tonga.

The rise of Pauline Hanson's One Nation Party (PHON) tested his authority, as did national debates on immigration quotas and race relations. He was reelected in 1998 by a narrow margin.

In 2006 Howard introduced several controversial labour relations reforms, including the abolition of unfair dismissal laws in workplaces with up to 100 employees. That year Howard also suffered one of the biggest defeats of his prime ministership when he was forced to withdraw

proposed laws that would have extended the offshore processing of asylum seekers.

A general election was called by Howard in October 2007 and took place the following month. His bid for a fifth term as prime minister was unsuccessful. The Liberal-National Coalition Government was defeated by the Labor Party led by Kevin Rudd. In addition, Howard became only the second sitting Australian prime minister to lose his seat in parliament. Shortly after the election, Howard was succeeded as Liberal Party leader by Brendan Nelson.

Application:

The increasing leader-centred nature of the office of the Prime Minister has impacted the way the authority of a prime minister is measured by both the media and electorate. Past Prime Ministers — such as Robert Menzies and John Howard — enjoyed a strong measure of authority simply by being the Prime Minister. In the past, institutional authority insulated Prime Ministers from being evaluated on the basis of personality, and cemented their position in the party and cabinet more solidly.

Howard had an effective leadership and communication style. He had a capacity to work with cabinet and backbench colleagues, and he had a gift for talking to the Australian people and connecting with them directly, developing an entirely new class of Liberal voters composed of traditional ALP supporters, dubbed 'Howard's battlers'. He was the second most successful prime minister in Australian history, after Robert Menzies (Liberal Party of Australia), with 13 years in office.

During Howard's final term as Prime Minister — with the assistance of a 'friendly Senate' — the government was able to push through its controversial WorkChoices legislation. Although a rarity in modern Australian politics, the Howard government's control of the Senate validates the decline of parliament thesis. However, during the 2007 election campaign Rudd and the ALP campaigned strongly on the repeal of WorkChoices. This demonstrates the role of the Opposition and its 'right to oppose' mandate. Upon forming government, the ALP was able to deliver on their election promise.

Prime ministers who came after Howard have not fared as well. Rudd was judged harshly when he abandoned climate change policy, as was Gillard over the carbon tax. Abbott failed to communicate an understanding of modern Australia and Turnbull was judged to be lacking authority and be ineffective in achieving policy goals.

Morrison — on the other hand — is yet to be truly tested. He unexpectedly won the 2019 election using a presidential style of campaign when the polls were predicting a win for Labor, but lost considerable prestige with his poor handling of the bushfires emergency. However, during the COVID-19 emergency he has shown considerable leadership capacity, achieving

greater cooperation between the Commonwealth and state governments than ever before. The March 2020 introduction of National Cabinet and the National Federation Reform Council have created a level of cooperation that could not have been envisaged in federal/state relations prior to 2019, but by August 2020 ‘cracks’ were beginning to appear in the relationship.

Case study: A tale of three oppositions

Relevant syllabus Point:

- **Roles and powers of the Opposition and the shadow ministry at the Commonwealth level**

Keywords: Tony Abbott, Bill Shorten, Anthony Albanese, climate change policy, carbon tax, minority government, captain’s call, ‘mediscare’, polling

The Abbott Opposition to the Rudd and Gillard Governments (2007–2013) and the Shorten Opposition to the Abbott, Turnbull and Morrison Governments (2013–2019) provide excellent examples of the roles of the Opposition in Australia at the federal level. Unlike its predecessors, the Albanese Opposition (2019–) has been operating in a completely untested environment, where the COVID-19 pandemic has brought about the closing of the federal parliament and the introduction of a bi-partisan collaborative National Cabinet.

Tony Abbott in Opposition

Tony Abbott successfully opposed the ALP Rudd (majority) and Gillard/Rudd (minority) Governments of 2007 to 2013. The Shorten Opposition used different strategies and was, arguably, less successful.

Kevin Rudd won the 2007 general election promising to introduce a climate change policy known as the Carbon Pollution Reduction Scheme (CPRS). The CPRS was his government’s most significant election promise. As the new Liberal Opposition leader, Malcolm Turnbull supported the CPRS. Rudd also promised to be ‘fiscally conservative’ and not spend money heavily.

Soon after taking office, the Rudd government was hit by the 2008 Global Financial Crisis (GFC). On the advice of Treasury, his government spent billions of dollars to stimulate the economy. One stimulus program — the home insulation scheme — led to the electrocution of four ill-trained installers. The electrocution tragedy and the high cost of other poorly managed government programs were effectively criticised by the Abbott Opposition.

In 2009 Abbott ousted the pro-CPRS Malcolm Turnbull and became Liberal Party Opposition leader. He then withdrew Opposition support for the CPRS. Rudd was then not able to get the CPRS through the Senate. Rudd abandoned the idea of the CPRS after the Copenhagen Climate Conference failed to result in international action on climate change. Abbott successfully attacked Rudd for failing to follow through on his principal policy. Abbott also attacked the government’s Resource Super Profits Tax (RSPT) — a ‘mining tax’ that proved very unpopular.

With Rudd’s popularity in rapid decline, Deputy Prime Minister Julia Gillard ousted Rudd as leader of the ALP and Prime Minister on 24 June 2010 claiming his government had lost its way. Gillard assumed the prime ministership and immediately called an election. The 2010 election resulted in a hung parliament, followed by 17 days of uncertainty during which Gillard and Abbott competed to form a government. Independent MPs and the Greens finally supported Gillard, who then formed a minority government after accepting a Green’s demand for a price on carbon dioxide emissions. Abbott continued to lead the Opposition.

Before the election Gillard had stated that her government would not introduce a carbon tax. However, during television interviews, Gillard conceded that the three-year fixed price on carbon was, indeed, a ‘tax’. Abbott used the Prime Minister’s ‘carbon tax’ admission to declare that Gillard had broken an election promise. He relentlessly pursued the issue of the carbon tax. A similar issue developed over a revised Mining Resources Rent Tax (MRRT) — a tax on profits from mining non-renewable resources. The heavily criticised and poorly designed MRRT was replaced with the Resource Super Profit Tax — only affecting very large companies when their profits reached more than \$75 million annually. However, the Resource Super Profit Tax failed to generate any revenue.

At this time, ALP backbencher, Craig Thomson (Dobell, NSW) faced the threat of conviction

and removal from parliament over misuse of his previous employer's funds. Gillard needed Thomson's vote to stay in office. Her reliance on an MP of alleged questionable character undermined her government and gave Abbott more ammunition to criticise the Gillard Government.

In another blow to the Gillard Government, in 2011 the High Court ruled as unlawful the government's proposed 'Malaysia Solution' — an arrangement to exchange asylum seekers in detention in Australia with those waiting in Malaysia for resettlement. The Abbott Opposition — along with the Greens — then used their combined legislative power to block government amendments to the *Migration Act 1958* that would have resolved the issue.

Rudd — who had remained an MP after being deposed as Prime Minister — remained an aggrieved and vengeful enemy within the ranks of the party. Making him Minister for Foreign Affairs and Trade — a desirable portfolio — failed to placate him. His divisive behaviour in Cabinet weakened an already fragile government. With polls predicting a landslide electoral defeat for Gillard, the ALP replaced her with former Prime Minister Kevin Rudd on 26 June 2013. Abbott now further exploited the divisions within the government.

Rudd used his short second term as Prime Minister attempting to repair the government before the election. It was too little, too late.

Abbott won a decisive 14 seat victory in the September 2013 election and formed government, becoming Australia's 28th Prime Minister.

Abbott brought down three Prime Ministers — Kevin Rudd, Julia Gillard, and Kevin Rudd a second time. During the terms of ALP governments between 2007 and 2013, the Abbott Opposition was instrumental in holding three governments to account for breaches of promises, errors of judgement, policy maladministration, political division and other issues.

The Abbott Opposition was highly successful in terms of 'holding government to account'. It ran an effective negative campaign using slogans extensively to draw attention to the government's failings. However, it was less successful in 'being a viable alternative government'. It promoted its future agenda with three-word slogans — 'axe the tax'; 'stop the boats' — but did not reveal detailed policies before the election.

Bill Shorten in Opposition

Bill Shorten became Opposition Leader after the defeat of the Rudd Government in 2013. He rebuilt the ALP following its difficult time in government. The Shorten Opposition effectively held the Abbott and Turnbull Governments to account on issues of leadership and policy.

Following his election victory in 2013, Tony Abbott, it can be argued, failed to transition from an Opposition Leader to a Prime Minister. He continued his 'oppositional' style of leadership, did not consult his Cabinet and ran a highly leader-centered government.

The Abbott Government (2013–2015) introduced a controversial budget in 2014. Having made promises not to increase taxes or reduce funding for the ABC, the Abbott Government proposed to do these things. The Shorten Opposition lacked power in the House of Representatives to prevent the 2014 budget bills passing. However, it combined with other parties in the Senate to block significant parts of the budget, including a controversial \$7 Medicare co-payment for patients visiting a doctor. Using Senate power was the Shorten Opposition's political strategy.

Abbott made a series of decisions he described as 'captain's calls' — that is, the right of the Prime Minister alone to decide. His captain's calls proved to be costly errors. In one captain's call, for example, he reintroduced Knights and Dames into the Australian system of honours. As a staunch monarchist, his attitude to the monarchy was out of step with what most Australians would tolerate. The Shorten Opposition leapt on Abbott's decisions and leadership style. The Prime Minister and his Government lost 30 consecutive polls, prompting a leadership challenge.

Malcolm Turnbull defeated Abbott in a Liberal Party leadership ballot to become party leader and Prime Minister. Turnbull enjoyed very high approval ratings in the polls. Shorten had been gearing up for an election against the unpopular Abbott and was wrong-footed when suddenly faced with a popular Turnbull.

The Opposition had twice previously blocked a government bill in three months, providing Turnbull with a Section 57 'trigger' for a double dissolution election. An election was called for July 2016.

Perhaps the most significant difference between the Shorten and Abbott Oppositions was the development by the ALP of detailed policy while in Opposition. In this respect, the Shorten Opposition outclassed the Abbott Opposition as a viable alternative government by laying out a

detailed program before the 2016 election. To fight the 'negative' Abbott, the so-called '100 Positive Policies' formed the plan for a future Labor government.

Turnbull won the 2016 double dissolution election. However, the Shorten Opposition had reduced the government's 14 seat majority to a single seat and came close to winning. Moreover, the Senate — elected by a lower quota, which was a consequence of a double dissolution election — proved hard for the government to manage. Securing an upper house majority would prove challenging for the government in such a diverse and unwieldy chamber. The Shorten Opposition exploited the government's parliamentary weaknesses by refusing pairs and testing the government's majority at every opportunity. On one occasion shortly after the election, the Opposition 'sprung a trap' by instructing its MPs to remain in Parliament House until late on its final sitting day. Several government backbenchers and ministers had left early to return home. Late in the day, Opposition members unexpectedly returned to the lower house. The Opposition took control of the House of Representatives, inflicting three vote losses on the government. It was the first time a government had lost control of the House in over 50 years. The government urgently recalled its MPs and regained control of the House of Representatives. During this episode, the Speaker, Tony Smith — a Liberal — demonstrated his impartiality by declaring he would not use his casting vote to create a majority that did not exist on the floor of the House of Representatives. The public had witnessed the government's tenuous grip on power.

Shorten kept up the pressure on Turnbull and his government. However, it was ideological divisions within the Coalition which fatally weakened Turnbull. Scott Morrison replaced him in a Liberal Party leadership ballot. Once again, Shorten and the Opposition were wrong-footed close to an election. They had been preparing for an election against Turnbull and would now have to face Morrison. The Shorten Opposition had prepared another comprehensive policy platform to present its credentials as a viable alternative government. Morrison, however, turned the ALP's policies into an effective weapon in a fear campaign and unexpectedly won the 2019 general election.

An Opposition has two roles — to hold the government to account and to be a viable alternative government. The Abbott and Shorten Oppositions provide useful insights into these roles. Abbott's relentless focus on the failings of government was more successful than

Shorten's attempts to present a viable alternative government. Focussing on government failings is a negative approach, whereas developing policy in order to be a viable alternative government is a positive strategy. It seems that a highly critical and adversarial approach is the most rewarding for an Opposition in contemporary Australia.

Anthony Albanese in Opposition

When Bill Shorten failed in his bid to win the 2019 federal election, he stepped down as leader of the party and was replaced by Anthony Albanese. Albanese had only been in the role of Leader of the Opposition for nine months when the COVID-19 pandemic was declared.

COVID-19 has seen an expansion of executive power. The Morrison Government has engaged in massive spending through JobKeeper, JobSeeker and home building programs. It is also constitutionally responsible for sectors such as aged care. There have been a large number of deaths in the aged care sector due to COVID-19. Scrutiny and accountability are essential during a pandemic, but the circumstances earlier in 2020 — with parliament in recess — initially made it difficult for the Opposition to properly scrutinize the government over its handling of these matters.

The establishment of the Senate Select Committee on COVID-19 was an early step for the Albanese Opposition in performing its scrutiny role. Opposition Senator Katy Gallagher (ACT), chairs the committee. It has effectively held ministers, public servants and the National COVID Commission, appointed by Morrison to account for their responses to the pandemic.

As the pandemic has worn on and failures of executive policy have become apparent, the spirit of bipartisanship has been waning. The changing political climate provided an opportunity for the Opposition to step up its critique of the government.

The Albanese Opposition targeted the Morrison Government's decision to wind down economic support for the economy. JobKeeper and JobSeeker were due to expire in September 2020. The government modified and extended these programs until March 2021 under pressure from the Opposition and pressure groups representing business.

COVID-19 has greatly impacted aged care homes, especially in Victoria and New South Wales. The response of the Commonwealth controlled sector has been inadequate because of a lack of staffing, training and infection control. The Opposition has sought to hold the government accountable for these failures.

The Opposition targeted Senator Richard Colbeck — the Minister for Aged Care — over failures in the aged care portfolio. Under questioning at a Senate Select Committee hearing, Minister Colbeck could not answer questions about the number of COVID-19 related deaths in aged care facilities. He later apologised for not having this information to hand. As Minister, Richard Colbeck is responsible for any maladministration in his portfolio. Albanese has called for Colbeck's resignation.

In a speech to the National Press Club, in laying out an alternative vision Albanese has suggested how a future Labor government would handle aged care. He said "the pandemic is a challenge, but also an opportunity for a reset, to imagine a better future for all Australians, and set about creating one".¹⁸ He added that "that means looking after the aged care residents and the pensioners of today, and those whose retirement might be decades away but who will depend upon our superannuation system".¹⁹

As the COVID-19 crisis has played out over 2020, the Albanese Opposition has become

increasingly active in holding the Morrison Government to account and has begun the first steps in laying out an alternative vision for a future Labor government.

Application:

Recent Oppositions provide a case study in:

- holding government to account (Abbott Opposition) — successful; and
- being a viable alternative government (Shorten Opposition) — unsuccessful.

The experience of the Abbott and Shorten Oppositions suggests a negative focus on identifying government weaknesses and holding it to account is more successful than a positive focus on detailed preparation for forming a viable alternative government.

The Albanese Opposition has shown a capacity to put aside political differences and to cooperate with the Morrison Government to address the issues raised by the COVID-19 pandemic. Now that the pandemic appears to be waning the Opposition has returned to a more traditional role in holding the government to account but it is still too soon to make a real assessment of the effectiveness of the Albanese Opposition.

Case study: 'No Jab, No Pay' campaign

Relevant syllabus point:

- **Lawmaking process in parliament and the courts, with reference to the influence of:**
 - individuals
 - political parties
 - pressure groups

Keywords: Australian Medical Association, pressure group, immunisation, COVID-19, telehealth

The Australian Medical Association (AMA) is a professional association for Australian doctors and medical students. One of its stated aims is:

*leading the health policy debate by developing and promoting alternative policies to those government policies that the AMA considers poorly targeted or ill-informed; responding to issues in the health debate through the provision of a wide range of expert resources; and commissioning and conducting research on health issues.*²⁰

In 2015 the AMA made a submission to the Senate Community Affairs Legislation Committee inquiry into the Social Services Legislation Amendment (No Jab, No Pay) Bill 2015 supporting the introduction of the legislation. A summary of their arguments included:

The AMA supports efforts to increase immunisation rates among children. The benefits of routine childhood immunisation extends from vaccinated children through to the broader community. The AMA believes that every effort should be made to put an end to vaccine preventable disease and death in Australia. As a result, immunisation rates must remain high, across all areas of the country.

The Social Services Legislation Amendment (No Jab, No Pay) Bill 2015 removes an exception that allowed parents to continue accessing a number of Government payments that were intended to be dependent on children being up to date with their immunisations. As a result, many parents may reconsider their decision to not immunise their child. Hopefully many of these parents will change their stance,

¹⁸ Albanese addresses National Press Club, Sky news Australia, 27 August 2020, <https://www.skynews.com.au/details/_6184887534001>.

¹⁹ Albanese addresses National Press Club, Sky news Australia, 27 August 2020.

²⁰ Australian Medical Association, *About the AMA*, <<https://web.archive.org/web/20140703002605/https://ama.com.au/about>>.

and decide to provide their child with the benefits of immunisation. However, we are aware that some parents are unlikely to change their position. It is vital that there is continued monitoring of childhood immunisation data in order to consider the effectiveness of this measure. The Government must also remain alert to the possibility of unintended consequences, including higher rates of children not being immunised in areas associated with higher incomes, and disadvantaged children having reduced access to childcare and preschool.

*Any savings generated from the Bill should be directed towards research and other activities that continue to boost childhood immunisation rates.*²¹

The Social Services Legislation Amendment (No Jab, No Pay) Bill was passed on 23 November 2015 and came into effect on 1 January 2016. The legislation only allows parents of children — designated as people younger than 20 — who are fully immunised to receive the Child Care Benefit, Child Care Rebate and Family Tax Benefit (Part A).

Application:

The AMA is a very powerful pressure group which has the 'ear' of government. The 'No Jab, No Pay' campaign is just one example of the AMA working with government with the aim of improving community health. A more recent example concerns COVID-19. The AMA successfully proposed the introduction of telehealth items early in 2020 as part of a comprehensive strategy to tackle COVID-19 and has worked behind the scenes for them to be extended beyond their original 30 September 2020 expiry date.²²

Telehealth consultations with doctors and other health professionals have been very popular with the Australian population. As early as April 2020, more than 4.3 million health and medical services had been delivered to a total of more than three million patients through the telehealth items introduced by the Australian Government for the COVID-19 pandemic.²³ The use of telehealth — instead of face to face consultations — has helped to stop the spread of the virus, protecting both patients and frontline health professionals, and saving lives.

Case study: Constitutional reform proposal

Relevant syllabus point:

- **At least one reform proposal to change the Commonwealth Constitution (Australia), such as**
 - the move to become a republic
 - reference to Indigenous Australians in the Commonwealth Constitution (Australia)
 - recognition of local government in the Commonwealth Constitution (Australia)
 - Commonwealth Constitution (Australia) Section 44

Keywords: Constitution (including section 96), reform proposal, referendum, bipartisanship, local government

Relevant sections of the Constitution:

Section 128 — Mode of altering the Constitution;
Section 96 — Financial assistance to States

Section 128 of the Constitution requires any proposal to amend the Constitution must first take the form of a bill submitted to the

Commonwealth Parliament. The bill must then be presented to the Australian people in the form of a referendum. In 2010 the Gillard minority government agreed to hold a referendum to recognise local government in the Constitution. However, a lack of bipartisanship and public support resulted in the proposed amendment not actually being put to the people.

The Commonwealth Parliament passed the *Constitution Alteration (Local Government) 2013 Act* in June 2013. The referendum sought to amend the Constitution to give 'financial recognition' to local government. It would have amended section 96 of the Constitution to add the phrase 'or to any local government body formed by a law of a State'.²⁴

This referendum was the third proposal to recognise local government in the Australian Constitution. In 1974, a proposal similar to that

²¹ Australian Medical Association, *AMA submission to Senate Community Affairs Legislation Committee inquiry into the Social Services Legislation Amendment (No Jab, No Pay) Bill 2015*, 16 October, 2015, <<https://ama.com.au/system/tdf/documents/AMA-Submission-on-Immunisation-No-Jab-No-Pay-Legislation.pdf?file=1&type=node&id=43152>>.

²² Australian Medical Association, *Government agrees to AMA proposal for MBS telehealth extension*, 24 September 2020, <<https://ama.com.au/gp-network-news/government-agrees-ama-proposal-mbs-telehealth-extension>>.

²³ Australian Medical Association, *Government agrees to AMA proposal for MBS telehealth extension*.

²⁴ Spooner, Diane, *Budget 2011–12: Constitutional recognition of local government*, Parliamentary Library, Parliament of Australia, <https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/BudgetReview201112/LocalGov>.

of 2013 — based upon the idea of establishing a direct financial relationship between the Commonwealth and local government — was rejected. Approximately 46.85 per cent of voters supported the proposal, which was carried only in NSW. Furthermore, in 1988 there was a proposal to recognise local governments in the Constitution so as to ensure that they would be democratically elected. This proposal fared less well than the 1974 proposal, with only 33.61 per cent of Australian voters in favour, and no majority in any state.

An argument in favour of the proposed amendment was that due to recent High Court decisions in Pape (2009) and Williams (2012), the constitutional validity of funding by the Commonwealth's direct payments to local government would now be resolved, ensuring greater efficiency. Effectively, the proposal would have given the Commonwealth the power to directly fund local governments, rather than having to provide funding indirectly through the states. Furthermore, recognising local government in the Constitution would address the current absence of any reference to Australia's third level of government. However, those opposed to the proposal argued that the executive of the Commonwealth would impose terms and conditions upon local governments to spend money in a certain way, bypassing the states in an attempt to implement its own policies, and thereby exacerbating the centralising tendencies of the Commonwealth over the states.

It can be argued that a strong reason for the *Local Government Constitution Alteration Act's* failure to result in an amendment to the Constitution was a lack of bipartisan support. Initially, the Opposition parties supported the amendment, with Opposition Leader Tony Abbott indicating his in-principle support. However, as the process progressed, the Opposition's support began to diminish. Abbott insinuated to voters that if they did not thoroughly comprehend the change, then they should simply vote 'No'. In 1984 the Opposition Liberal Party campaigned against both referendum questions put by the government. The lack of bipartisan support — in conjunction with disputes regarding the peremptory decision to allocate unequal amounts of public funding to the 'Yes' and 'No' campaigns — led to the proposal being unsuccessful.

The 1967 referendum regarding Aboriginal Australians illustrates that bipartisan support is integral to the success of a constitutional reform proposal. The 1967 proposal received support from both the government and the Opposition.

Support from both of the major parties enabled the Commonwealth to fund a supportive campaign to be put before the population. Indeed, as there was no opposing body, the Commonwealth could direct a significant amount of funding towards the 'Yes' campaign. To the extent that bipartisan support was a major contributor to the success of the 1967 referendum, the absence of such bipartisanship in the case of the 2013 referendum led to its defeat before it could even be put to the Australian people.

A defining characteristic of successful referendums throughout Australian history has been the inclusion of conferred benefits to the states. The amendment of the Constitution requires the support of a majority of voters in a majority of Australian states. A referendum is therefore much more likely to succeed if it benefits both a state's population and its government. The 2013 referendum proposal sought an amendment to section 96 of the Constitution to allow the Commonwealth to bypass state governments in making specific purpose payments (SPPs) directly to local governments. However, the Commonwealth can already fund local governments indirectly through the states. Although 65 per cent of voters nationally — together with a majority of states — initially supported the proposal, the support of the states could not be secured as time went on. It could not be shown that empowering the Commonwealth to make conditional grants to local government would serve to increase or improve local services whilst enhancing the accountability of local government. Voters are more likely to support a proposal if it appears to be of positive benefit to all citizens, rather than having the effect of just increasing the powers of the Commonwealth.

The timing of the federal election also reduced the chances of the proposal's success. The date of the 2013 federal election was brought forward in September, thus not allowing sufficient time for the constitutional requirement that a proposed alteration may only be submitted to the people two months after its passage through parliament. The timing of a referendum plays a major role in determining its success. The 1977 referendum, for example, enabled electors living in the Australian territories to vote in national referendums. The timing of this referendum was favourable to supporters of the amendment due to the absence of political tension surrounding a federal election campaign.

Application:

Since Federation, only eight of the 44 proposals put to the Australian people in a referendum

have been successful. The last successful referendum occurred in 1977. To succeed, a referendum must be supported not only by a majority of Australians, but also by a majority of voters in a majority of states. This double majority requirement has proven very difficult to achieve.

The failure of the 2013 reform proposal on local government reinforces the importance of bipartisanship, political leadership and engaging the public about the reform, if a proposal is to be successful. Furthermore, the lessons learnt from successful past referendums need to be heeded if a future attempt at constitutional reform for recognition of local government in the Australian Constitution is to prove a success.

Case study: Speaker of the House of Representatives

Relevant syllabus points:

- **functions of the Commonwealth Parliament in theory and in practice, including Sections 7, 24, 51, 53, and the decline of parliament thesis**
- **the accountability of the Commonwealth Parliament**
 - through elections for the House of Representatives and the Senate
 - through the House of Representatives and Senate Privileges Committees
 - within the procedures and processes of the Parliament
 - through judicial review

Relevant sections of the Constitution:

Section 35 – election of Speaker

Keywords: Harry Jenkins, Peter Slipper, Anna Burke, Bronwyn Bishop, Tony Smith, Medevac Bill, Standing Orders, Speaker, Opposition, Standing Order 94A

Harry Jenkins (Speaker 2008-2011) was first elected to the House of Representatives in 1986 for the seat of Scullin (Vic). He was a much respected Speaker, occupying the chair from the time the Rudd government took office. In November 2011, he stunned parliament by resigning as Speaker on the grounds of wanting to engage more with the policy process. Peter Slipper replaced him as Speaker (2011–2012), but was controversial in the role. Slipper was first elected to parliament for the seat of Fisher (Qld) in 1986. He was a Liberal MP who had fallen out with his party. He was elected Speaker by the House of Representatives — against the wishes of the Liberal Opposition — and resigned from the Liberal Party the next day. The Gillard government was a minority government. Having Jenkins' vote back on the floor strengthened the government, and the loss of Slipper's vote weakened the Abbott Opposition. Now an Independent MP, Slipper was a genuinely

independent Speaker. However, he was brought undone by harassment and fraud allegations resulting in court proceedings. He resigned the Speakership in October 2012.

Anna Burke was elected to the House of Representatives in 1998 for the seat of Chisholm (Vic). She was Deputy Speaker under Peter Slipper and assumed the office after Slipper's resignation. As Speaker during 2012–2013, Burke carried out her duties impartially, despite being a partisan ALP MP.

Bronwyn Bishop was elected to the House of Representatives for the seat of Mackellar (NSW) in 1994 and was elected by the House to the position of Speaker on 12 November 2013, replacing Anna Burke. In her time as Speaker, Bishop set a record for the greatest number of MPs ejected from parliament in one day — 17 Labor members and one Liberal during question time on 27 November 2014.²⁵ Over the course of her term of 130 sitting days as Speaker, she ejected 400 MPs under Standing Order 94A. Of those, 393 were Labor members and seven were Coalition MPs.²⁶ Bishop resigned as Speaker on 10 August 2015. She is noted for the expenses scandal that plagued the latter part of her parliamentary career after it was revealed that she had charged taxpayers \$5,000 for a helicopter charter from Melbourne to Geelong for a Liberal Party fundraiser in November 2014.²⁷

Tony Smith was elected to the House of Representatives for the seat of Casey (Vic) in 2001 and was elected by the House to the role of Speaker on 10 August 2015, a position

25 Lundy, Rob, 'That's it, you're out': disorderly conduct in the House of Representatives from 1901 to 2016, Parliamentary Library, Parliament of Australia, 2016, <https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/rp1617/DisorderlyConduct#_ftnref84>.

26 Anderson, Stephanie, 'Bronwyn Bishop: 'Sin binning' record breaker', *SBS news*, 7 August 2015, <<https://www.sbs.com.au/news/bronwyn-bishop-sin-binning-record-breaker>>.

27 Hurst, Daniel, 'Bronwyn Bishop agrees to pay back cost of \$5,000 helicopter trip', *The guardian*, 16 July 2015, <<https://www.theguardian.com/australia-news/2015/jul/16/bronwyn-bishop-agrees-to-pay-back-cost-of-5000-helicopter-trip>>.



■ Figure CS2 — Peter Slipper was a controversial choice for Speaker.
Source: Parliament@Work, *Portrait of Peter Slipper*, CC BY-SA 3.0, <<https://commons.wikimedia.org/w/index.php?curid=48339532>>

that he continues to hold in late 2020.²⁸ Tony Smith made history in 2019 when he was re-elected as Speaker unopposed by the House of Representatives for the third time. He is only the second Speaker to have achieved this feat, the last being Sir Frederick William Holder — the first Speaker of the House — who sat in the Speaker's chair from 1901 until 1909.²⁹

In a 2017 speech, Smith noted that due to the very close numbers in the 45th Parliament, his exercise of the Speaker's casting vote would be in accordance with the principles inherited from the United Kingdom's House of Commons. He stated 'the principles could mean that on a crucial piece of legislation, when it comes to a final vote and it is tied, I would vote to defeat the bill as it is not supported by a majority'.³⁰

On Smith's re-election as Speaker on 2 July 2019, he was congratulated by both Prime Minister Scott Morrison and Leader of the Opposition Anthony Albanese. The Prime Minister stated that "the normal passions and the heat of the debate that occurs in this place you accept and you celebrate, but at the same time you temper us in those times when, of course, there is overreach".³¹ Anthony Albanese praised Smith, stating he was "as fair and impartial a Speaker on either side of politics as I've seen in my more than two decades in this House ...The fact that you've been nominated by the government side

and seconded by the opposition side is to your credit".³²

During the passing of the *Home Affairs Legislation Amendment (Miscellaneous Measures) Act 2019* (Medevac Bill), Attorney-General Christian Porter shared legal advice with Speaker Smith on the Bill's potential constitutional issues. Attached to this advice was a letter from the Attorney-General stating that it was provided on a confidential basis and that he "would appreciate you not circulating it further". In a statement to the House on 12 February 2019, the Speaker stated that "I have advised the Attorney-General that, as Speaker, it's important I ensure in this instance all material available to me is also available to all members of the House. As a consequence, I've also decided to table the Solicitor-General's opinion".³³

Application:

This case study illustrates the significant power that the Speaker can wield over the floor of the House of Representatives. Parliament is Australia's highest forum for the debate of issues, and it is the role of Speaker to ensure Standing Orders are upheld during these debates. However, it is also important that the Speaker always acts fairly and impartially, which will ensure that the ability of the House of Representatives in upholding the four functions of parliament is not hindered by partisan politics. As Smith noted on his re-election as Speaker in 2019:

*It's the arena where the battle of ideas and ideals take place. It's right that it should be vigorous and passionate and robust...But, of course, it is important that the arguments—vigorous, passionate and robust as they are—are carried out in a dignified way... I've always sought as Speaker to try to get the balance right and to be as fair and predictable as I can be.*³⁴

In fulfilling their accountability role in the House of Representatives, the Speaker's most notable power is that under SO94(a), through which they can direct a disorderly Member of the House of Representatives (MP) to leave the chamber for one hour. In holding MPs accountable, the

28 Parliament of Australia, 'Hon Tony Smith MP', <https://www.aph.gov.au/Senators_and_Members/Parliamentarian?MPID=00APG>.

29 'Questions on Notice: Once, twice, three times a Speaker', *About the House news*, Parliament of Australia, 9 August 2019, <https://www.aph.gov.au/About_Parliament/House_of_Representatives/About_the_House_News/News/Three_times_a_Speaker>.

30 The Hon Tony Smith MP, Speaker of the House of Representatives, *Speech to the 48th Annual Conference of Presiding Officers and Clerks*, 5 July 2017, <<https://www.parliament.nsw.gov.au/news/Documents/Paper%20presented%20by%20the%20Hon.%20Tony%20Smith%20MP%20-%20Speaker%20-%20House%20of%20Reps%20-%20The%20Australian%20Speakership.pdf>>.

31 Scott Morrison MP, Prime Minister, House of Representatives, Hansard, 2 July 2017, p 7, <https://www.aph.gov.au/Parliamentary_Business/Hansard/Hansard_Display?bid=chamber/hansardr/33c1fd11-10a4-44ad-9ff8-e52f8b1f3bd4&sid=0012>.

32 Anthony Albanese MP, Leader of the Opposition, House of Representatives, Hansard, 2 July 2017, p 8, <https://www.aph.gov.au/Parliamentary_Business/Hansard/Hansard_Display?bid=chamber/hansardr/33c1fd11-10a4-44ad-9ff8-e52f8b1f3bd4&sid=0012>.

33 Tony Smith, MP, Speaker of the House of Representatives, 'Statement by the Speaker', Hansard, 12 February 2019, p 64, <https://www.aph.gov.au/Parliamentary_Business/Hansard/Hansard_Display?bid=chamber/hansardr/07129367-a45a-448c-b34c-f10d11b0374a&sid=0000>.

34 Tony Smith, MP, Speaker of the House of Representatives, Hansard, 2 July 2019, p 12, <https://www.aph.gov.au/Parliamentary_Business/Hansard/Hansard_Display?bid=chamber/hansardr/33c1fd11-10a4-44ad-9ff8-e52f8b1f3bd4&sid=0012>.

Speaker must therefore ensure they act in an impartial manner to avoid any perception of bias towards their own party, which could undermine

the effectiveness of this accountability mechanism.

Case study: The sports rorts affair

Relevant syllabus point:

- **The accountability of the executive and public servants**
 - through collective and individual ministerial responsibility
 - through Senate Estimates and at least one other committee of the Commonwealth Parliament
 - through the Commonwealth Auditor-General and the Administrative Appeals Tribunal (AAT)
 - through judicial review

Keywords: Auditor-General, marginal electorates, Coalition, 'pork barrelling', individual ministerial responsibility, senate standing committee

As Minister for Sport, Senator Bridget McKenzie breached ministerial standards. McKenzie was Sports Minister in the first Morrison ministry (2018–2019) and deputy leader of the Nationals. In the months before the 2019 general election, McKenzie used ministerial power to award grants to sports clubs located in marginal electorates. In doing so, she used her powers to override the recommendations of Sport Australia, the independent government agency responsible for deciding which clubs should receive grants.

The Auditor-General discovered the misappropriated grants and referred the matter to parliament. The Opposition applied pressure through question time and parliamentary committees. The Opposition alleged McKenzie made the grants to influence the outcome of the 2019 federal election by spending public money in marginal electorates. McKenzie denied any wrongdoing. The Coalition parties defended her in parliament. Later it emerged that McKenzie had approved a grant to a gun club of which she was a member.

Using public money for political advantage is an example of political corruption. 'Pork barrelling' is the term used for spending public funds to gain a political advantage in marginal electorates. Minister McKenzie was accused of pork barrelling to influence the election. Moreover, the Auditor-General also found that the use of ministerial discretion may have been unlawful in the case of the McKenzie grants.

Parliament applied sufficient pressure to cause the Prime Minister to ask his Chief of Staff, Philip Gaetjens — the head of the Department of Prime Minister and Cabinet — to investigate.

The Gaetjens' investigation found Minister McKenzie had not listed her club membership with the Senate Standing Committee of Senators Interests — an accountability requirement to avoid conflicts of interest. Her failure to notify parliament of her conflict of interest breached ministerial standards. It was for this less serious allegation — and not the serious matter of political corruption — that McKenzie resigned from the ministry.

Application:

The sports rorts affair demonstrates several aspects of individual ministerial responsibility in practice:

- parliament cannot overcome executive control of the House of Representatives to force a minister to resign;
- nevertheless, parliament can apply significant pressure to ministers;
- ministers are, in practice, accountable to their Prime Minister; and
- Prime Ministers use their power to control the circumstances of a minister's departure. The Prime Minister aims to neutralise a negative political issue at the least political cost.

Case study: Senate Estimates Committee

Relevant Syllabus point:

- **The accountability of the executive and public servants**
 - through collective and individual ministerial responsibility
 - through Senate Estimates and at least one other committee of the Commonwealth parliament
 - through the Commonwealth Auditor General and the Administrative Appeals Tribunal (AAT)
 - through judicial review

Keywords: Senate Estimates Committee, Senate Select Committee, COVID-19, Helloworld

Fifty years ago, the Senate voted to set up a system of committees to scrutinise government legislation, activity and spending. The executive's actions would be examined by the committee and perform an integral role in the parliamentary scrutiny of the government. The Senate Estimates Committee is made up, usually, of three government, two opposition and one crossbench members of parliament. It has the ability to summon witnesses from both the parliament and the public service and to disclose any and all information relating to the activities of the executive government. The Senate Estimates Committee also gives non-government committee members the opportunity to instigate questioning on matters of concern. According to a former committee member, Senator John Faulkner, this committee is "the most effective mechanism for parliamentary accountability in our system of government".³⁵

The Senate Estimates Committees provide individual Senators — especially non-government Senators — with an unparalleled opportunity to gather information on the operations of government. They have the power to send for persons or papers, which means that they can demand that individual officials and documents are made available.

Although the modern process is still nominally a financial accountability measure, Senate Estimates Committees rarely confine themselves to budget questions and have been allowed to include anything related to government's operations and financial position. Although

public servants do not advocate or defend policy issues, they can be expected to explain how policies are being implemented or the factual issues related to policy advice.

Due to the fact that all actions of government rely on expenditure, the Senate Estimates Committee has morphed from a financial accountability mechanism into an investigative inquisitorial body that scrutinises the actions of the government.

The Abbott Government

Commencing in 2013, the Abbott Government managed to avoid Estimates scrutiny into the activities of the Department of Immigration and Border Force. These agencies had been given the power to intercept asylum seeker boats travelling from Indonesia and were instructed to tow them back into Indonesian waters. All matters connected with these manoeuvres were declared 'operational matters' related to national security. The government claimed that divulging operational matters to an Estimates hearing would be detrimental to Australia's national security. Subsequently, all so-called 'on-water matters' were classified secret. It is the government that decides what it can classify in this manner, enabling it to 'cloak' some of its more controversial activities.

The Senate Estimates Committee by convention cannot compel ministers from the lower house to appear before them, but those invited to attend can choose to do so voluntarily. Scott Morrison, then Immigration Minister, did appear before Estimates in 2014 to answer questions about 'boat turnbacks.'

The Turnbull Government

In early 2016 Larry Marshall, Chief Executive of the CSIRO — a Commonwealth agency — was questioned by a Senate Estimates Committee hearing in relation to his decision to cut 350 jobs, including scientists from the agency's climate change modelling section. Also, one of the CSIRO's laboratories ear-marked for closure had been responsible for the manufacture of special lens coatings used in the breakthrough discovery of gravitational waves, a significant scientific discovery of recent times. The Estimates hearing was concerned that climate change modelling would be an essential CSIRO resource as Australia sought to adapt to climate change in the future and that the loss of world class scientific skills would damage Australia's scientific capabilities and international

³⁵ Faulkner, John, *The Senate: Blessing or bane, Papers on Parliament No. 50, Parliament of Australia, March 2010*, <https://www.aph.gov.au/About_Parliament/Senate/Powers_practice_n_procedures/~/~link.aspx?id=5EFA18242123496FBB90795882992522&z=z>.

reputation into the future. The inquiry generated much debate in the media and raised the issue to one of national concern. However, nothing positive came out of the inquiry. CSIRO funding cuts and capping of staff continued.

In another example, former ABC Managing Director Mark Scott had to defend the government funded broadcaster against accusations that its program *Q & A* had made a mistake in allowing a Muslim man, Zaky Mallah, in the audience to express radical views during a live broadcast in June 2015. As with the CSIRO example, the issue was raised and debated in a public hearing, exposing the workings of government funded agencies to scrutiny by the parliament. The ABC Board reviewed *Q & A* and the ABC received a formal warning. Scott apologised over the comments, but defended the broadcaster.

The examples above on the CSIRO and the ABC illustrate that although Senate Estimates Committee hearings may not be able to reverse government decisions, they can bring significant scrutiny to bear, and force a government and its departments and agencies to defend and justify decisions and actions or make changes if deemed appropriate.

Another example is the Helloworld issue of 2017, which involved the Australian Ambassador to the US, Joe Hockey and Minister for Finance Mathias Cormann.

Labor's Senate leader and Foreign Affairs spokesperson, Senator Penny Wong questioned Department of Foreign Affairs and Trade officials over Ambassador Hockey's request to set up a meeting between Australian embassy staff and Qantas Business Travel, a subsidiary of the company Helloworld and a business in which Hockey had more than \$1 million shareholding. The meeting with Qantas Business Travel was held in April 2017 and Hockey only disclosed his interest in Helloworld in May 2017.

The government's tendency to only disclose information it chooses diminishes the effectiveness of the Senate Estimates Committee as a method of holding the executive to account. Ministers of recent times have been unable to 'recall off the top of their head' or 'find information in their binder' to answer questions from the Senate Estimates Committee members. Labor Senator Penny Wong stated 'stonewalling' by senior bureaucrats "diminished accountability".³⁶ This represents a reluctance to disclose information to the committee.

The Morrison Government

The Senate Select Committee on COVID-19 — chaired by Katy Gallagher MP — requested Treasurer Josh Frydenberg appear before the committee and explain what Senator Wong had described as the "\$60 billion black hole in the economic credibility" of the Morrison government revealed in the budget costing of the JobKeeper program. The Treasurer refused to appear before the committee. However, Finance Minister Mathias Cormann appeared, taking 125 questions on notice over a period of seven hours, rather than answering immediately.³⁷ This allowed the Minister and his officials the time to think about their response.

A further example of the tendency to take questions on notice rather than answering directly, occurred in March 2020 when Senator Jordon Steele-John questioned the National Disability Insurance Agency Chief Executive Officer, and the Social Services Minister, Senator Anne Ruston on the Goal Attainment Framework.

Regardless of the inquisitorial powers of the Senate Estimates Committee and the outcome of the committee's inquiries, it has no power to enforce sanctions. This was the case when — in October 2019 — a senior Department of Defence official, Stephen Pearson, awarded and signed off on a \$400,000 Defence IT contract to Sinapse using a 'limited' tender process. At this time Pearson's son was employed by Sinapse on a part-time casual basis. While Pearson admitted to Senator Wong that his actions could have been seen as a conflict of interest, the only outcome for Pearson was encouragement to update his conflict of interest documentation.

More recently, Labor Senator Anthony Chisholm used the Senate Estimates Committee to investigate Minister for Sport, Bridget McKenzie and the Sports Grants Program, focussing on the allocation of funds and timing of the announcement of the sports grants. During the inquiry, Senator Wong questioned Senator Mathias Cormann as to whether McKenzie (see below) had backdated her official approval of \$39 million in sports funding 'prior to the government going into caretaker mode'.³⁸ The matter was brought to the attention of the Australian National Audit Office (ANAO) by Auditor-General Grant Hehir in January

³⁶ Curtis, Katina, 'Secrecy and obfuscation dominate hearings', *Canberra times*, 23 October 2019, <<https://www.canberratimes.com.au/story/6454183/secrecy-and-obfuscation-dominate-hearings/>>.

³⁷ Brinsden, Colin, 'Labor calls for inquiry into \$60 billion JobKeeper blunder', *7 news*, 24 May 2020, <<https://7news.com.au/politics/jobkeeper-error-still-dogging-government-c-1055672>>.

³⁸ Lawson, Kirsten, 'Government denies backdating sports grants approval to bring funding in before caretaker period', *Canberra times*, 2 March 2020, <<https://www.canberratimes.com.au/story/6657064/government-denies-backdating-sports-grants-approval/>>.

2020. The ANAO showed that the government had approved grants in marginal or politically targeted seats during the caretaker mode. McKenzie resigned from Cabinet on 2 February 2020, which was prior to her giving evidence at the Senate Estimate Committee hearing about a conflict of interest over the allocation of grants to two gun clubs, one of which she was a member.

There is now a separate Senate Select Committee inquiry into the timing of her disclosure to Scott Morrison in regard to the process of allocating grants. The Select Committee's final report was due on 24 March 2020, but has been extended until 8 December 2020 due to the COVID-19 pandemic.

Application:

The strength of the Senate Estimates Committees is that it is a forum for robust discussion and questioning to make visible various aspects of the operations of the executive, in the hope of increasing the transparency process of governing. Nevertheless, the committee can also be argued to serve the interests of the various actors, either politically or electorally. This was evident when Morrison accused Labor of political maneuvering when it asked the Treasurer — a member of the House of Representatives — to appear before the Senate Estimates Committee to discuss the \$60 million hole in the JobKeeper budget. Such an invitation is not usual practice for the committee.

In 2020 the Senate Standing Committee for the Scrutiny of Delegated Legislation is focusing on delegated legislation made in response to the COVID-19 crisis. As of 22 May 2020, 148 'legislative instruments' — that is, pieces of delegated legislation — have been made. Of these instruments, 23.6 per cent are exempt from disallowance by the Senate. The committee has identified a need to examine the disallowance exemptions of delegated legislation. It is concerned about the broad discretionary powers given to ministers under the Coronavirus Economic Response Package Omnibus (Measures No2) Bill 2020 — the 'primary' legislation.

The committee will also examine so-called 'Henry VIII clauses'. These clauses — written into the primary statute — allow the executive to change the operation of the primary legislation without the approval of parliament. The High Court has found that Henry VIII clauses do not undermine the separation of powers because parliament retains the power to change the primary statute. Nevertheless, the committee is concerned that Henry VIII clauses require strict parliamentary oversight due to the risk that the executive is able to effectively amend statute. The committee specifically drew the attention of the Senate and its legislation committees to five pieces of delegated legislation made between 27 March and 22 April 2020 which together authorise \$60.6 million in government spending on a variety of grants and programs.

Case study: A successful referendum — 1967³⁹

Relevant syllabus points:

- **Formal and informal methods of constitutional change and their impact**
 - referendums, including Section 128
 - High Court of Australia decisions
 - Referral of powers
 - Unchallenged legislation
- **The changing experience of a particular group with respect to their political and legal rights in Australia**

Keywords: referendum, pressure groups, 'Yes' campaign, bipartisan support.

Saturday, 27 May 2017 marked the 50th anniversary of the 1967 Referendum in which Australians voted overwhelmingly to amend the Constitution to allow the Commonwealth

to make laws for Aboriginal people and include them in the census.⁴⁰

The referendum put the following question to the Australian people:

Do you approve the proposed law for the alteration of the Constitution entitled 'An Act to alter the Constitution so as to omit certain words relating to the people of the Aboriginal race in any state so that Aboriginals are to be counted in reckoning the population'?

The proposed law (Constitution Alteration (Aboriginals) 1967) sought to give the Commonwealth Parliament power to make laws with respect to Aboriginal people wherever they lived in Australia. It also sought to make it possible to include Aboriginal people in national

³⁹ This case study is based on a paper prepared by Mathew Thomas for the Parliament of Australia.

⁴⁰ Thomas, Mathew, *The 1967 Referendum*, FlagPost, Parliamentary Library, Parliament of Australia, 2017, <https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/FlagPost/2017/May/The_1967_Referendum>.

State	Enrolled	Votes	For Votes	%	Against Votes	%	Informal
New South Wales	2 315 828	2 166 507	1 949 036	91.46	182 010	8.54	35 461
Victoria	1 734 476	1 630 594	1 525 026	94.68	85 611	5.32	19 957
Queensland	904 808	848 728	748 612	89.21	90 587	10.79	9 529
South Australia	590 275	560 844	473 440	86.26	75 383	13.74	12 021
Western Australia	437 609	405 666	319 823	80.95	75 282	19.05	10 561
Tasmania	199 589	189 245	167 176	90.21	18 134	9.79	3 935
Total for Commonwealth	6 182 585	5 801 584	5 183 113	90.77	527 007	9.23	91 464

■ Table CS1 — Results of the 1967 Referendum vote

Source: Mathew Thomas, *The 1967 Referendum*, FlagPost, Parliamentary Library, 2017.

censuses. The amendment deleted part of section 51 (xxvi) of the Constitution and repealed section 127.

Turnout for the referendum was almost 94 per cent, and the result was a strong 'Yes' vote, with a significant majority in all six states and an overall majority of almost 91 per cent. The results of the referendum vote are set out in Table CS1 above.

The referendum also put a separate question on a proposed law seeking to remove the connection in the Constitution between the number of members of the House of Representatives and the number of senators; this question was not carried.

For a discussion of the previous and explicit exclusion of Aboriginal people by sections 51 (xxvi) and 127 of the Constitution, see: *The Origin of Commonwealth Involvement in Indigenous Affairs and the 1967 Referendum*.⁴¹ However, the effect of this exclusion was the implementation by the states of policies that could broadly be termed 'assimilationist', and laws that resulted in Aboriginal peoples' dispossession, oppression and alienation.

See Chapter 16 of this book for an outline of the campaign leading up to the referendum.

In 1967 in response to a Federal Council for the Advancement of Aborigines and Torres Strait Islanders (FCAATSI) petition calling for a referendum on sections 51 and 127 of the Constitution, the Holt Coalition Government introduced the Constitution Alteration (Aboriginals) Bill 1967 to the Parliament. The legislation was passed unanimously.

Because no parliamentarian had voted against the proposals relating to Aboriginal people — it had bipartisan support — the Government only

prepared a 'Yes' case for the referendum. The campaign for a 'Yes' vote gained widespread support among the Australian public and this was reflected in the final vote.

The significance of the referendum has, however, been somewhat obscured by a number of popular myths. These include that:

- it was whole-heartedly supported by both sides of politics;
- it conferred the vote;
- it secured equal wages;
- it secured access to full citizenship for Aboriginal Australians; and
- it ended legal discrimination.

None of this was the case. The Menzies Government had not been enthusiastic about altering Section 51(xxvi) and the Holt Government's motives were mixed. The repeal of the discriminatory state legislation, clarification of the Aboriginal right to vote, securing of equal wages and access to full citizenship entitlements involved a process which had begun earlier and was independent of the 1967 referendum. Moreover, the referendum did not automatically make the Commonwealth more involved and little changed for five years.

The referendum, however, did provide a head of power for some significant Commonwealth legislation. Although the referendum's practical significance was limited, its symbolic significance was considerable. The referendum led to a decade of change which began in the early 1960s and ended in the early 1970s. The referendum was also important because it raised the expectations of Aboriginal and non-Aboriginal people regarding Aboriginal rights and welfare. It signalled a general shift in the way that Australian governments approached Aboriginal issues, away from assimilationist policies towards policies based around self-

⁴¹ Gardiner-Garden, John, *The Origin of Commonwealth Involvement in Indigenous Affairs and the 1967 Referendum*, Background Paper 11, Parliamentary Library, Parliament of Australia, 1996–97, <https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/Publications_Archive/Background_Papers/bp9697/97bp11#ORIGIN>.

determination, reconciliation and, more recently, 'closing the gap'.⁴²

Application:

The 1967 referendum:

- altered Section 51 (xxvi) to allow the Commonwealth to make laws for Aboriginal and Torres Strait Islander peoples and deleted Section 127 to enable the counting of Aborigines and Torres Strait Islanders in the census;
- was supported by both major political parties — a Coalition government was in office, but the Whitlam ALP Opposition was supportive;
- was unopposed by the states;
- did not need public funds to support a No campaign because there was no political contest between the major parties or organised groups; and
- achieved over 90 per cent of the national Yes vote, passing in all six states. It is the highest Yes vote of any referendum in Australian history.

Case study: Australia's treatment of asylum seekers and refugees

Relevant syllabus points:

- **The ways human rights are protected in Australia, including in the Constitution, common law, statutory rights, and charters of rights, such as the Charter of Human Rights and Responsibilities Act 2006 (Vic) and the Human Rights Act 2004 (ACT)**
- **The status of international covenants, protocols and treaties in protecting human rights in Australia**

Keywords: asylum seekers, refugees, international conventions, Medevac, offshore detention

Since 2001, Australian governments have implemented harsh policies designed to deter asylum seekers from making dangerous sea journeys in unseaworthy boats from Indonesia to Australia. Thousands have died attempting this journey. They risk their lives to seek safety from war and persecution.

Australia is a signatory to the *UN Convention Relating to the Status of Refugees 1951* (the *Refugee Convention*). The Convention is ratified and legislated in parts of the *Migration Act 1958*. Australia is therefore bound by international law on refugees.

Recent and contemporary Australian asylum seeker and refugee policies include the following:

- offshore detention on Nauru and Manus Island, Papua New Guinea (PNG) of asylum seekers arriving by boat;
- offshore resettlement of asylum seekers arriving by boat — Cambodia and PNG have been two destination countries for those assessed as genuine refugees;
- no refugee arriving by boat will ever be allowed to settle in Australia. The US agreed to accept genuine refugees detained on Nauru and Manus Island in late 2016, and some have since moved to the US for resettlement;
- interception of boats at sea by the Royal Australian Navy and customs patrol vessels;
- towing boats back to their country of departure — almost always Indonesia — if it is safe to do so;
- enhanced processing of refugee claims at sea on Navy ships followed by returns of unsuccessful claimants to countries of departure;
- Temporary Protection Visas (TPVs) offering a temporary settlement in Australia for refugees;
- a failed policy to swap 800 asylum seekers arriving by boat in Australia for 4000 confirmed refugees in Malaysia — that is, the 'Malaysia Solution';
- Medevac laws passed in 2019 to force the government to carry out medical evacuations of seriously ill asylum seekers and refugees from offshore detentions centres to Australia for medical treatment; and
- the repeal of Medevac laws after the 2019 general election.

The Howard Government's *Pacific Solution* implemented some of the above. The Rudd, Gillard, Abbott, Turnbull and Morrison Governments implemented others. Some of these policies are no longer part of the current government's approach.

⁴² Gardiner-Garden, John, *The Origin of Commonwealth Involvement in Indigenous Affairs and the 1967 Referendum*, Background Paper 11, Parliamentary Library, Parliament of Australia, 1996–97.

The UN and other countries have criticised Australia's policies. They say they are in breach of human rights. The release of the so-called Nauru Files in mid-2016 drew further attention to the possible abuse of asylum seekers' rights in Nauru.

Seeking asylum and refuge in other countries is a human right under the *Universal Declaration of Human Rights (UDHR)* and the *Refugee Convention*.

The conditions in the Nauru and Manus Island detention camps were deplorable. There were reports of rape and abuse.⁴³ Many detainees suffered mental health issues because of despair and a sense of hopelessness. Even those found to be genuine refugees are not allowed resettlement in Australia. Other countries are usually unwilling to resettle them, at least until the US offered to do so in November 2016.

Asylum seekers returned to other countries by Australia — particularly to Vietnam and Sri Lanka — have reportedly been interrogated by their governments.⁴⁴ At least one Afghan returned to Afghanistan has been beaten by the Taliban.⁴⁵

The High Court ruled the Malaysia Solution breached the *Migration Act 1958*. The UN sent Special Rapporteurs to Nauru and Manus Island who made damning reports to the UN High Commissioner for Refugees (UNHCR). Australian governments have ignored these reports.

The suppression of freedom of speech and press freedom related to offshore detention camps has become a practice of recent Australian governments. The Abbott and Turnbull Governments banned journalists from travelling to and reporting on offshore detention camps. Doctors, camp employees and other care providers face prosecution if they speak out about the camps. Doctors protested by refusing to release asylum seeker children from Australian hospitals. They claimed their professional oath prevented them sending children back to situations which cause harm.



■ Figure CS3 — The United Nations has condemned Australia's treatment of asylum seekers on numerous occasions.
Source: Takver, *Refugee Action protest 27 July 2013 Melbourne, 2013*, CC BY-SA 2.0, <<https://commons.wikimedia.org/w/index.php?curid=60005012>>

Deterring people from attempting the dangerous sea journey and thereby saving lives is the justification for these harsh policies. They have indeed stopped the dangerous sea journeys. Australian governments argue that these policies are protecting the right to life for those who might attempt the sea journey to Australia.

Australia faces a moral dilemma because of conflicting rights. The choice is to resettle refugees who arrived by boat, knowing that others will try — and die doing so; or make an example of detained people to send a brutal message to others: “don’t get on a boat to Australia; you’ll never be allowed to enter the country”.

Knowingly allowing deaths to occur is immoral. People are ‘ends in themselves’. Therefore, using people for other ends is also immoral. Australia has been on the horns of this dilemma for at least two decades.

A regional solution involving South East Asian and Australasian countries through which asylum seekers transit on their way to Australia seems to be the only solution that can meet human rights criteria. Up to now, no such solution exists.

Application:

Australia's treatment of asylum seekers and refugees illustrates the vulnerability of human rights under a system of parliamentarianism. Although Australia is a signatory to the *UN Convention Relating to the Status of Refugees 1951* and parts of the convention has been enshrined in the *Migration Act 1958*, recent governments have enforced policies that are condemned by international organisations such as the United Nations and Amnesty International.

43 Farrell, Paul, Evershed, Nick and Davidson, Helen, ‘The Nauru files: A cache of 2000 leaked reports reveal the scale of abuse of children in Australian offshore detention’, *The guardian*, 10 August 2016, <<https://www.theguardian.com/australia-news/2016/aug/10/the-nauru-files-2000-leaked-reports-reveal-scale-of-abuse-of-children-in-australian-offshore-detention>>.

44 Aston, Heath, ‘Fears returned Vietnamese asylum seekers are being grilled in police detention’, *Sydney morning herald*, 23 April 2015, <<http://www.smh.com.au/federal-politics/political-news/fears-returned-vietnamese-asylum-seekers-are-being-grilled-in-police-detention-20150423-1mrxyb.html>>.

45 Maley, William, ‘Australia’s folly returns Afghan Hazaras to torture and death’, *The conversation*, 15 October 2014, <<https://theconversation.com/australias-folly-returns-afghan-hazaras-to-torture-and-death-32939>>.

The offshore detention and resettlement policies violate refugee and asylum seekers human rights. However, they continue to be implemented. This highlights that even when enshrined in law,

international covenants, protocols and treaties can be limited by a government and the policies they have chosen to pursue.

Case study: Is American democracy being undermined?

Relevant syllabus point:

- **The ways in which Australia and one other country can both uphold and/or undermine democratic principles, with reference to**
 - Political representation
 - Popular participation
 - The rule of-law
 - Judicial independence
 - Natural justice

The US will elect its next President in November 2020. The events of 2020 have disrupted the normal presidential election process. The COVID-19 pandemic, in particular, has been a significant disruptor. How has the President responded to the political disruptions caused by COVID-19?

‘It’s the economy, stupid’ was former President Bill Clinton’s response to questions about what matters in presidential elections. Before the pandemic, the US economy was strong, which would — according to Bill Clinton’s observation — give Donald Trump a strong chance at winning a second term in November.

Polling suggests President Trump may lose the election. Evidence shows that the Trump Administration has disastrously managed the COVID-19 pandemic emergency. The country has had the highest infection rates in the world and over 170,000 deaths by August 2020. Trump — a Republican Party president — was initially unaffected by the failure of his government to manage the crisis because the pandemic struck hardest in urbanised states held by the Democratic Party. The populations of Democrat governed states were never strongly supportive of him.

Now the pandemic has reached the Republican Party heartland in mid-western rural states. It is now seriously affecting Trump’s electoral base. Moreover, the lockdowns necessary to contain infections have devastated the US economy. The combination of COVID-19 ravaging the Republican heartland and the collapse of the US economy has turned the electoral polling towards Trump’s rival, Joe Biden.

COVID-19 has also prevented Trump from staging successful political rallies as he did in 2016. Also, the massive party pre-election gatherings — that is, the Republican and Democratic Party National Conventions — used to mobilise and enthuse voters have also been cancelled. They have moved online and are likely to have less impact on voting behaviour than usual. Of significant importance is that the election itself may be severely affected by voters fearful of COVID-19 staying home and not voting.

An alternative to voting in person is mail-in ballots. Mail-in ballots would enhance the political participation of voters and help achieve more robust political representation — both vital democratic principles. Under the US system, states organise the electoral processes for national elections — that is, the presidential and congressional elections. Democratic Party controlled states are enthusiastically organising mail-in ballots. Their supporters are more likely to stay at home because of COVID-19. Meanwhile, Republicans fear that mail-in voting will strongly favour the Democratic Party.

Trump opposes mail-in ballots, claiming they are open to electoral fraud. Democrats accuse him of trying to undermine the US Postal Service (USPS) so that it will be unable to handle the high workloads caused by mail-in ballots.



■ Figure CS4 — The suppression of press freedom meant that the situation on Nauru and Manus Island were ignored by many on mainland Australia.

Source: Matt Golding, *Out of sight and out of their minds*, 2016, author’s permission, <www.threefingers.com.au>

As President, Trump has the executive power to appoint the US Postmaster General. He has appointed a Trump supporter, Louis DeJoy, to head the USPS. Other USPS senior officials have been replaced. DeJoy has frozen employment, banned workers' overtime and is alleged to have ordered the removal of mail sorting equipment. These moves will undermine the capacity of the USPS to handle mail-in ballots.

Democrats claim this is a Trump strategy to suppress the vote. Former President, Barack Obama said it was an attempt to "kneecap the USPS".⁴⁶ Independent Senator Bernie Sanders called it a "crisis for American democracy".⁴⁷

Under immense political pressure, DeJoy has suspended proposed changes until after the November election.

Trump may lose the election, but use the chaos caused by the pandemic and problems with mail-in ballots to cast doubt on the election results.

If he loses, Trump will not leave office until the inauguration of the next President. The 20th Amendment to the US Constitution sets the 'transition period' from an outgoing President to his or her successor. The transition period commences on the first Tuesday after 1 November — Election Day — and ends at noon on 20 January the following year — Inauguration Day.

After an election loss, Trump will have until 20 January to hold office. If he chooses, he may use this time to sow doubt about the results of the election. If that is his chosen course of action, it will likely divide the country and undermine the legitimacy of the incoming president.

Application:

The US is a liberal democracy. The strength of its democracy is a function of how it upholds or undermines the principles of democracy. Political representation and popular participation are two critical principles of democracy. The pandemic may suppress voter turn-out on election day and reduce political participation. Fewer voters reduce the representativeness of the president. Mail-in ballots are a solution, enabling voters to cast their ballots safely. It will enhance participation and representativeness. Undermining the USPS's capacity to handle the high volumes of mail at election time may be a strategy to suppress the vote. It may also provide Trump with a way to cast doubt on the result by alleging electoral fraud. It will undermine popular participation and deny suppressed voters' political representation. Article 1, Section 8 of the US Constitution enshrines the USPS in constitutional law. The USPS is, thus, an institution above politics and enjoys high levels of public trust. By politicising the USPS, Trump may be undermining an institution essential to Americans' faith in their system of laws and government. Undermining the electoral processes and casting doubt on the results undermines public confidence in democracy. It undermines popular participation and political representation directly. It may also undermine the rule of law. The rule of law depends on public faith in political and legal institutions like elections and the Constitution.

46 Ankel, Sophie, 'Barack Obama accuses Trump of attempting to 'actively kneecap' the US Postal Service to suppress mail-in votes', *Business insider*, 15 August 2020, <<https://www.businessinsider.com.au/obama-accused-trump-trying-to-actively-kneecap-the-postal-service-2020-8?r=US&IR=T>>.

47 Luscombe, Richard 'Bernie Sanders says Trump's attacks on mail-in voting a "crisis for US democracy"', *The guardian*, 17 August 2020, <<https://www.theguardian.com/us-news/2020/aug/16/bernie-sanders-trump-attacks-mail-in-voting-crisis-for-us-democracy>>.

Case study: Response to COVID-19

Relevant syllabus points:

- Roles and powers of the Prime Minister, Cabinet and the ministry
- Political mandates in theory and in practice, including competing mandates
- Lawmaking process in parliament and the courts, with reference to the influence of
 - Individuals
 - Political parties
 - Pressure groups
- Functions of the Commonwealth Parliament in theory and in practice, including Sections 7, 24, 51, 53 and the decline of parliament thesis
- Roles and powers of the opposition and the shadow ministry at the Commonwealth level
- Federalism in Australia with reference to
 - Constitutional powers of state and Commonwealth parliaments, including exclusive, concurrent and residual powers, Sections 51, 52, 90, 107 and 109
 - Financial powers of the Commonwealth Parliament, including taxation power, tied or special purpose grants, including Sections 51 (ii), 87, 90, 92 and 96
 - Change in the federal balance of power since Federation, with reference to
 - financial powers, including vertical fiscal imbalance and horizontal fiscal equalisation, the Grants commission
 - referral of powers Section 51(xxxvii)
 - the Council of Australian Governments (COAG)
 - National Federation Reform Council (NFRC) and National Cabinet (replaced COAG June 2020)
 - cooperative federalism as opposed to coercive federalism
 - High Court constitutional interpretation, including external affairs power Section 51 (xxix), corporations power Section 51 (xx), and taxation powers
- The accountability of the executive and public servants
 - through collective and individual ministerial responsibility
 - through Senate Estimates and at least one other committee of the Commonwealth Parliament
 - through the Commonwealth Auditor General and the Administrative Appeals Tribunal (AAT)
 - through judicial review

Prime Minister Scott Morrison is the face of his government. His personal success is critical for the success of the Coalition government he leads. The Prime Minister's performance during the bushfire crisis of early 2020 damaged both him and his government. Learning from that crisis, Morrison restored public confidence in his leadership and government through much more decisive leadership during the COVID-19 crisis.

Morrison has significant institutional power. As head of Cabinet, he sets the agenda of the government and has more information and policy influence than any other minister. Cabinet government is collective government, but Morrison's prominence as the face of government gives him almost 'presidential' power — especially in a crisis when people look to strong leadership. Prime Minister Morrison has exploited that power to drive the national response to COVID-19 and persuade other influential stakeholders — like state premiers — to mostly fall in line with federal policy.

Nevertheless, in a federal system dealing with a health crisis, the prime minister is weakened by the ability of premiers to act independently in the fields of public health, school education, business licensing and public gatherings. State autonomy in making decisions around health has been a feature of the COVID-19 crisis.

Cabinet closed Australia's borders to travellers from China — the epicentre of the pandemic — after the World Health Organisation (WHO) declared in March that COVID-19 was a global pandemic. As the virus spread internationally, the government closed the border to all overseas travellers except Australian citizens returning home. The power over borders is a Commonwealth power specified in Section 51(xxvii) — immigration and emigration. It is 'exclusive by its nature'.

Prime Minister Morrison used his power and influence to create a forum — the National Cabinet — to coordinate federal and state resources and capabilities to fight COVID-19. The Commonwealth lacks powers to close businesses, implement strict public health measures and police social distancing and quarantine regulations. States possess these powers.

The Coronavirus Economic Response Package Omnibus Bill 2020 replaced Newstart with JobSeeker and included a coronavirus supplement that doubled unemployment benefits for six months. Centrelink — the Commonwealth's welfare department — paid JobSeeker recipients the enhanced rate to get money into the economy quickly and support people who had lost jobs.

Cabinet prepared and introduced the Coronavirus Economic Response Package (Payments and Benefits) Bill 2020 to legislate its new policy — called JobKeeper — to pay \$1,500 per fortnight to employees who had lost jobs due to the shutdown of the economy. JobKeeper payments would be made by the Australian Tax Office (ATO) to employers using ATO data. JobKeeper put the economy into hibernation, keeping eligible employees and employers connected to enable a rapid post-crisis recovery.

Without parliament sitting, the Opposition lacked the formal means to scrutinise the government. Question time, motions of no confidence, committee work and other parliamentary procedures and processes could not operate. The Senate established a special select committee to scrutinise the government's response to COVID-19. It sat during the crisis, including when parliament was not sitting. However, it could only scrutinise the government's COVID-19 responses — not other government actions. The committee called Finance Minister, Senator Mathias Cormann (WA) to answer questions about the Treasury's \$60 billion miscalculation of the cost of JobKeeper. It also called Neville Power — chair of the government's National COVID-19 Coordination Commission — and Philip Gaetjens — Secretary of the Department of the Prime Minister and Cabinet — to answer questions about the Commission's recommendations for a gas-led economic recovery plan and the Commission members' conflicts of interest. The Labor Opposition requested the Auditor-General conduct rolling reviews of the governments COVID-19 spending.

The Treasury Laws Amendment (Your Superannuation, Your Choice) Bill 2019 amended superannuation laws so that people could withdraw up to \$20,000 from their superannuation savings, reducing the need for government support and injecting money into the economy.

Cabinet took expert medical advice from the Australian Health Protection Principal Committee (AHPPC), comprised of all federal, state and territory Chief Health Officers. The AHPPC advises Cabinet on all health related matters. Cabinet implemented the advice in collaboration with state governments.

Cabinet created the National COVID-19 Coordination Commission. Cabinet chose the members of the Commission. Most have a business or corporate background. Neville Power, a former mining executive, chairs the Commission. It also includes Greg Combet, former Secretary of the Australian Council of Trade Unions (ACTU) and Labor minister in the Gillard Government. The COVID-19 Coordination Commission advises Cabinet on all non-health related matters. It reports directly to the Department of Prime Minister and Cabinet.

Cabinet organised special repatriation flights to bring home Australians trapped overseas, especially from South America.

The Prime Minister and Cabinet control Australia's foreign policy. Morrison used his international standing as the Australian Prime Minister to call for an independent investigation into the origin of COVID-19, a call that was supported by the EU and other countries, but opposed by China.

Parliament's 2020 sitting schedule was suspended. The Prime Minister recalled parliament only when he needed it to pass government bills. In this way, the government avoided much of the scrutiny the executive would usually receive. The Senate Standing Committee for the Scrutiny of Delegated Legislation met regularly by teleconference to maintain parliamentary oversight of government regulations during the COVID-19 crisis.

Governments claim a mandate to govern. Mandates usually apply to specific election promises made by the party that forms the government. By electing them, governments claim the electorate endorses their promised policies. Governments use mandates to persuade the opposition and Senate crossbench to accept and pass government bills. In the COVID-19 case, the Morrison Government has not claimed a specific 'pandemic mandate',

but its authority to govern — and introduce quite extreme measures — has been broadly respected by the Opposition, Senate crossbench and pressure groups such as the ACTU. Bipartisanship featured prominently in the early response to the crisis and indicated an acceptance of the government's authority. For example, the Labor Party would typically oppose a Coalition policy weakening workers' rights. Nevertheless, it supported the Coronavirus Economic Response Package (Payments and Benefits) Bill 2020, which weakened worker's rights. The Coalition's ideological opponents have agreed to the temporary legislative and policy changes necessary to implement JobKeeper quickly, respecting the government's authority to respond to the crisis.

The Morrison Government's mandate comes from its control of the House of Representatives. The government bases many of its decisions on the advice of recognised medical experts — which depoliticises the policies and gives its decisions scientific credibility. Its economic decisions — such as the temporary increase to JobSeeker and introducing JobKeeper — are supported by the Opposition, partly because they mirror the Rudd Labor Government's policy during the Global Financial Crisis and partly because the programs are a 'big government' response that agrees with Labor's ideology.

There has been little respect for the government's mandate where its policies conflict with Labor ideology in other areas. For example, Labor criticised the HomeBuilder program — which grants \$25,000 to individuals if they spend \$150,000 building or renovating a home — because it would target wealthier Australians. Wealthy Australians are the Liberal Party's natural constituency. Labor also criticised the withdrawal of JobKeeper payments from childcare businesses and workers. It claimed it would adversely affect women employed in childcare and women who need childcare to return to work after the lockdowns. Together, HomeBuilder and the early withdrawal of support for childcare was interpreted by the Coalition's opponents — the Labor Party and the ACTU — as supporting the male-dominated construction industry and penalising the female-dominated childcare industry and working women generally.

The Morrison Government faces opposition to some of its policies within its party room. Conservative 'small government' Liberal and Nationals members of parliament had wanted the big-spending programs to expire or reduce by September — as promised. Under pressure

from progressive members of the Liberal Party, business and the Opposition, the government agreed to extend JobKeeper at a reduced rate until the end of March 2021.

The operations of parliament were affected by the pandemic. Social distancing regulations meant that not all of its 151 MPs and 76 senators could gather in its two chambers to represent Australians, debate, legislate and hold the government to account. Parliament can function with a quorum of members. A quorum is one-fifth of its members. Therefore, with 31 MPs in the House and 19 senators in the Senate — appropriately distanced around the chambers — the Parliament was able to function.

The Coronavirus Economic Response Package (Payments and Benefits) Bill 2020 is an example of political parties influencing lawmaking in parliament. It was introduced in the House of Representatives after consultation with the ACTU. The bill was needed to implement the government's massive JobKeeper program. It was a government bill drafted by the Coalition Cabinet and introduced by a Coalition minister. Government bills are almost guaranteed to pass the lower house because the government controls the majority of votes in that chamber.

The ACTU is a pressure group representing working people. By modifying one bill and causing another to be withdrawn, the ACTU influenced lawmaking in the parliament. The ACTU and the Liberal Party have long been ideological enemies. The Coalition even had an anti-union bill — the Ensuring Integrity Bill 2019 — in the Senate when the COVID-19 pandemic struck. Existing legal protection of workers' rights in the *Fair Work Act 2009* were going to be an obstacle to JobKeeper. The Coalition's Coronavirus Bill would weaken workers' rights by amending the *Fair Work Act* to enable JobKeeper. The ACTU opposed this approach and wanted the government to change individual industrial awards — an arduous and time consuming process, but one that would leave workers' rights in place. The Minister for Industrial Relations, Christian Porter rejected the ACTU's demands, but was persuaded by the ACTU's General Secretary, Sally McManus to accept a time limit on the changes to the *Fair Work Act*. In the end, the amended bill — which included the ACTU's time limit and other suggestions — was passed. Moreover, the government withdrew the anti-union Ensuring Integrity Bill 2019 as an act of goodwill reflecting the ACTU's positive influence in the drafting of its coronavirus legislation.

There is a strong argument that the COVID-19 crisis contributed to the decline of parliament — in 2020 at least. Governments control the Standing Orders and sitting schedule of parliament. The Morrison Government controversially suspended parliament during the crisis, undermining its capacity to scrutinise government and its ability to debate urgent issues. It could not provide adequate representation for Australians affected by COVID-19 or the earlier bushfires crisis. The government pushed other matters off the national agenda by preventing parliament's capacity to debate issues of public importance.

Much of the government's response to COVID-19 needed authorisation by parliament. Parliament debated, scrutinised and voted on government bills. Money bills were required to access public money and issue government debt to fund JobSeeker, JobKeeper and other programs. Weekly meetings between Morrison and Opposition Leader, Anthony Albanese were put in place, but lacked the formality and power of parliamentary procedures. The Select Committee on COVID-19 — chaired by Senator Katy Gallagher (Labor, ACT) investigated government responses to COVID-19. It invited public submissions and reported to parliament on 30 June 2020. The Senate Standing Committee for the scrutiny of Delegated Legislation operated by teleconferencing. The opposition asked the Auditor-General — an officer of the parliament reporting to the Public Accounts Committee — to conduct a rolling review of government spending during the COVID-19 crisis. With parliament operating on a reduced sitting schedule and with only a quorum of members, the opportunities for debate were limited.

This situation made it difficult for parliament to represent electorate interests. Most members of parliament remained in their electorates listening to issues raised by their constituents and relaying them back to parliamentary committees through teleconference.

Only at times of minority government — for example, Gillard (2010–2013) and Morrison (2018–2019) — are Oppositions in a position to exercise significant power. At other times, they are mostly overwhelmed by the government's dominance of the House of Representatives, and limited to procedural and media attacks on the government. It is challenging for Oppositions to present themselves as a viable alternative government when they lack the resources to develop policies. The Senate offers more significant opportunities for the opposition to carry out its role of holding the government to account.

By September 2020 the spirit of cooperation within the federal parliament was diminishing with a return to more partisan behaviour by the Opposition and push back from some state premiers in National Cabinet.

At this time Victoria was only just emerging from a two-month lockdown brought about by a second wave of COVID-19. In response to the high number of infections in Victoria several states maintained 'hard borders' with very little traffic permitted into their states. The federal government applied pressure on states like Western Australia and Queensland to relax their border policy in order to allow interstate travel and trade, but they were not willing to oblige. The introduction and maintenance of hard borders has been a rare example of state governments dictating nationally significant policies against the wishes of the federal government.

In September 2020 further conflict arose between federal and state governments in dealing with the large number of Australian citizens stranded overseas and wanting to return to Australia. States such as Western Australia and Queensland have been reluctant to allow a greater number of citizens to return due to the high risk of possible new infections and the cost of managing the quarantine regulations.

In a desperate plea for help to return home, former soldier Stephen Spencer — who has been living and working in the UAE since 2015 as a physical training advisor to the UAE military had this to say: "Of all the things that have depreciated during the COVID-19 pandemic none have lost more value than an Australian passport. Once the envy of the world it has now become a curse, denying anyone who owns one the most basic human rights. The right to return to their home country".⁴⁸

Spencer believes that "Australia has effectively dumped responsibility for its overseas citizens on whatever country they happen to be stuck in".⁴⁹ He also said of his own family's situation, "Once our visas expire we are effectively refugees with no legal rights to live anywhere and a home country that has abandoned us".⁵⁰ He called on the Australia government to take greater action to more quickly bring home the 20,000 Australians stranded overseas.

In his letter to the *West Australian* on 22 September 2020, Stephen Spencer said he knew there had to be discussion of logistics, but "to deny so many people fundamental human

48 Spencer, Stephen, *The West Australian*, 22 September 2020, p 48.

49 Spencer, Stephen, *The West Australian*, 22 September 2020, p 48.

50 Spencer, Stephen, *The West Australian*, 22 September 2020, p 48.

rights in the hope of political point scoring is callous at best and proof politicians would much rather win a popularity contest than a morality test".⁵¹ It remains to be seen if his impassioned plea will demonstrate the ability of an individual to impact government policy.

Application:

Morrison's decisive leadership during the COVID-19 crisis demonstrates the important role of a Prime Minister in leading the nation during a world pandemic. As head of the Cabinet, Morrison has been able to utilise expert advice from various arenas to forge a focussed path to deal with COVID-19.

Due to Australia's federal model and division of powers, Morrison has had to work closely with the state and territory leaders. Areas of exclusive power such as immigration allowed the Commonwealth to restrict travel with China. However, residual powers such as health, education and public gatherings required the cooperation of the states and territories.

Morrison created a National Cabinet to establish a more coordinated response to COVID-19. The National Cabinet is responsible for endorsing and coordinating national actions required to deal with COVID-19. The National Cabinet has seen both levels of government, and leaders from both sides of politics come together for the good of Australia and is an excellent example of cooperative federalism. The powers of Prime Minister Scott Morrison have, however, been limited by the states, particularly Western Australia and Queensland. Western Australia's hard border closure and reluctance to allow a larger number of citizens to return due to fears of greater infection numbers demonstrate that our federal system can limit the powers of the Prime Minister.

The passage of the Coronavirus Economic Response Package Bills showcases the legislative function of parliament and how quickly crises can be attended to with bipartisan support. It also demonstrates how political parties influence lawmaking in parliament. However, the suspension of parliament by the Morrison Government has undermined other key functions of parliament, including representation, debate and scrutiny.

The Senate Select Committee on COVID-19 was established to inquire into the government's response to the COVID-19 pandemic. Although parliament had been suspended, this committee was able to function to check the government and is an example of executive accountability.

The roles and powers of the opposition have been reduced as a result of parliament's suspension. The ALP opposition have been unable to fully hold the government to account due to an inability to utilise question time and motions of no confidence against the Morrison Government. However, the Opposition has utilised the Senate Select Committee on COVID-19 to question Treasury's miscalculations of the cost of JobKeeper.

The Morrison Government has pushed its authority to govern mandate throughout the COVID-19 pandemic. Bipartisanship — particularly in the early days of the crisis — has allowed much of the government's response to occur. However, in areas in which the Opposition disagrees — such as the withdrawal of JobKeeper payments to the childcare industry — there has been strong criticism of the Morrison Government.

⁵¹ Spencer, Stephen, *The West Australian*, 22 September 2020, p 48.

Case study: Witness K

Relevant syllabus points:

- **the accountability of the courts**
 - through the appeals process
 - through parliamentary scrutiny and legislation
 - through transparent processes and public confidence
 - through the censure and removal of judges, including Section 72
- **the ways in which Australia and one other country can both uphold and/or undermine democratic principles, with reference to**
 - political representation
 - popular participation
 - the rule of law
 - judicial independence
 - natural justice

Keywords: Timor-Leste, gas fields, ASIS, Bernard Collaery, Witness K, 'whistleblower', Andrew Wilkie, AFP

Australia assisted Timor-Leste (the Democratic Republic of Timor-Leste, also called East Timor) gain its independence from Indonesia in 2002. Australia was a significant benefactor, helping establish the new nation through aid and advice. Part of the aid Australia gave was renovating Timorese Government buildings and offices in 2004. In the early 2000s, Australia negotiated a treaty with Timor-Leste over gas fields in the Timor Sea, a resource-rich sea between the two countries.

Australia sought the lion's share of the Timor Sea by arguing the location of the international sea boundary between the two countries. During the office renovations in 2004, the Australian Secret Intelligence Service (ASIS), allegedly placed listening devices illegally in the cabinet room of the Timor-Leste Government. ASIS was then able to eavesdrop on the Cabinet debates of Timorese ministers.

Foreign Minister Alexander Downer had responsibility for both the sea boundary treaty negotiations and ASIS. If the minister had access to Timorese Cabinet discussions, it would give Australia and Downer an unfair advantage in the negotiations. Moreover, Australian officials with knowledge of Timorese Government debates may use such knowledge for commercial gain if they used that information to help resource companies.

Neither Downer nor the Australian Government have confirmed nor denied the ASIS bugging. An ASIS agent who knew about the illegal bugging complained through official channels and was given access to an ASIS approved lawyer — Bernard Collaery. The ASIS agent became known as Witness K. Witness K accused Downer and other senior public officials of lobbying for Woodside Petroleum, an Australian company with interests in the Timor Sea.

The Timorese discovered the listening devices. They sought legal redress through an international tribunal. Collaery intended to call Witness K as a witness at the international hearings. In December 2013, ASIO and the AFP raided the homes of Witness K and Collaery. They seized documents and confiscated Witness K's passport, preventing him testifying at the international tribunal at The Hague.

Witness K and Collaery were secretly charged under Article 39 of the *Intelligence Services Act 2001*, which forbids the revealing of information about ASIS. Independent federal MP Andrew Wilkie (Clarke, Tas) revealed the secret prosecutions under parliamentary privilege in 2018. Wilkie is a former soldier and intelligence officer who turned whistleblower before entering parliament in 2010. He published the *Axis of Deceit*, a book detailing his experiences of political and intelligence untruths in the lead up to the invasion of Iraq in 2003.

He has used his parliamentary position as a platform to highlight the legal issues surrounding the treatment of Witness K and Collaery. Wilkie asserts the "real criminals [are] the people who ordered the illegal bugging".⁵² He has asked the Australian Federal Police (AFP) to investigate the bugging and was supported by Senators Rex Patrick, Nick McKim and Tim Storer. Wilkie said "We wish the police to conduct an investigation to look at who's involved, who the senior officials are, who the government ministers were, noting all of this has been done in secret ... no one is above the law".⁵³

So far, the AFP have ignored Wilkie and the three senators' request. They have not investigated the alleged illegal bugging and have not laid charges against ASIS or any public officials

⁵² Andrew Wilkie MP, Federation Chamber, House of Representatives, Hansard, 28 June 2018, p 6886. See, also: Doran, Mathew, 'East Timor bugging: Politicians call for AFP to investigate Australian spies' role in 2004 operation', *ABC news*, 12 July 2018, <<https://www.abc.net.au/news/2018-07-12/politicians-call-for-afp-to-investigate-east-timor-bugging/9986908>>.

⁵³ Andrew Wilkie MP, Federation Chamber, House of Representatives, Hansard, 28 June 2018, p 6886.

responsible for the bugging operation. There has been no accountability for those responsible for allegedly breaking the law.

There has been significant outrage from civil liberties groups, lawyers, judges and academics regarding the prosecutions of Witness K and Collaery. They have claimed that these whistleblowers are being punished, yet the illegal actions of the Australian government have been ignored. Witness K pleaded guilty to the charges.

In June 2020 the ACT Supreme Court ruled that significant parts of Collaery's trial will be held in secret. Attorney-General Christian Porter argued for this because ASIS is a secret organisation and are closely related to national security.

Application:

Justice must not only be done, it must be seen to be done. Secret charges and trials undermine public confidence in the courts because the processes of justice — such as due process and fairness — cannot be seen and therefore, cannot be trusted.

Public confidence in the courts is an aspect of accountability. The courts are the only unelected branch of government. The public has no direct role in holding courts accountable.

However, courts are judged by the public for how they uphold essential legal principles and rights. A loss of public confidence in the courts is serious because citizens must have faith in the administration of justice.

The rule of law is a democratic principle. It is the sum of several other principles, including equality before the law and open justice. The Witness K case illustrates challenges to the rule of law — ASIS appears to have broken the law, yet there are no police investigations or charges. Senior public officials who may have known about — and possibly authorised — illegal ASIS activities have not been investigated or charged. Meanwhile, Witness K and his lawyer, Bernard Collaery have been prosecuted in secret and parts of Collaery's trial may be secret. Witness K will plead guilty. Without a police investigation and prosecution, others who have allegedly broken the law will not face justice. Thus, there is inequality before the law and justice will be neither open nor transparent.

By secretly charging and prosecuting Witness K and Collaery, and not holding ASIS and public officials legally accountable for illegal activities, the Australian Government may be undermining the rule of law.

Case study: Robodebt

Relevant syllabus points:

- **The accountability of the Executive and public servants**
 - through collective and individual ministerial responsibility
 - through Senate Estimates and at least one other committee of the Commonwealth Parliament
 - through the Commonwealth Auditor General and the Administrative Appeals Tribunal (AAT)
 - through judicial review

Keywords: automated welfare debt recovery (Robodebt), algorithms, Centrelink, Australian Administrative Tribunal, accountability

The Coalition government has agreed to refund money collected under its unlawful automated welfare debt recovery scheme, called Robodebt. The government will refund \$721 million to welfare recipients who had illegal debts raised against them.

Robodebt was a Turnbull era policy, continued by the Morrison Government and designed to recover overpayments of welfare. Robodebt was an automated debt recovery system. It used algorithms to search and match data from various Commonwealth government databases. The aim was to discover Centrelink clients' undeclared income.

Robodebt ended in November 2019 after the Federal Court found the scheme unlawful in *Amato v Commonwealth of Australia* (2019) VID611/2019.

Most welfare is income tested. Income earned by Centrelink clients can reduce their welfare entitlement. Some Centrelink clients may deliberately underdeclare income, so their Centrelink payments are unaffected — to do so is an offence. Others underdeclare unintentionally — which is not an offence, but still results in overpayments. On discovering a welfare recipient's undeclared income, Robodebt calculated the overpayment and Centrelink raised a debt against them.

Robodebt matched Centrelink's welfare database with income data held by the Australian Taxation Office. The Robodebt system automatically calculated an overpayment when it discovered an income discrepancy. Centrelink employed temporary staff to issue debt notices to welfare recipients. The process was highly automated and had minimal human oversight. Designed to be cost-efficient, Robodebt cost little to operate yet aimed to recover an estimated \$3 billion in debts.

An 'income averaging' algorithm calculated overpayments instead of using specific income earning periods. It meant a welfare recipient's entitlement might have reduced further by income averaging compared to period-specific income calculation. For example, a high income over a fortnight — perhaps when a person had a casual job or extra hours — may have cut entitlement to zero for one payment. However, when averaged out, the same income may have reduced entitlement by more than one payment — disadvantaging the recipient. The law specifies that income affects entitlement only during the period in which it is earned. Therefore, the Robodebt income averaging method may have been illegal.

Welfare recipients were issued debt notices by temporary staff hired by Centrelink. Private debt collectors were hired by the government to chase debtors who had not repaid debts. To challenge a debt, recipients had to produce payslips and other documents — sometimes from years before — which reversed the onus of proof. There were many complaints. From 2016, the Robodebt scheme came under greater scrutiny in parliament as media reported on the inaccuracy of overpayment calculations and harsh enforcement. Labor and the Greens questioned the program in parliament and Senate committees.

The government settled a 2016 case brought by Victorian Legal Aid concerning how debts were raised. Following this decision, the government only raised debts using evidence from payslips, instead of relying entirely on an algorithm. However, the onus of proof remained with the recipient, not the government — who was the accuser. Minister for Government Services Stuart Robert MP refused to apologise for the scheme's faults and Robodebt continued.

The Administrative Appeals Tribunal (AAT) warned three times in 2017 that Robodebt was legally doubtful. The government did not heed these warnings.

The Senate held two inquiries into Robodebt, finding in one case that the scheme was a factor in the death of a welfare recipient. Three hundred and seventy-three thousand Australians were affected by Robodebt.

Finally, a class action was launched by legal firm Slater and Gordon and supported by the Federal Labor Opposition. The class action contains four thousand plaintiffs. *Amato v Commonwealth of Australia* [2019] applied only to the original plaintiff, Deanna Amato. The class action seeks the same compensation for others affected. It also alleges Commonwealth negligence. With over 373,000 Australians caught in the Robodebt net, the cost to the Commonwealth if damages in addition to refunds are paid is potentially very high.

The Federal Court ruled the income averaging method illegal. Robodebt has ceased and 470,000 debts generated by the system waived. Morrison apologised for any harm the scheme caused. Opposition spokesman for government services, Bill Shorten claimed the scheme caused suicides. Those who repaid illegal debts will be refunded — a total amount of \$721 million. The government announced it will still pursue outstanding debts but will use legal methods to calculate overpayments.

Deanna Amato said "It feels amazing. You can feel so small and helpless next to the Government, but I am so glad that the unfair and ultimately unlawful aspects of this system have been brought to light".⁵⁴

Application:

The Robodebt scheme highlights the accountability of the executive through various mechanisms.

Judicial review: The Federal Court reviewed the legality of an executive policy — Robodebt — and found it unlawful. The rule of law means government policies and decisions must comply with the law. Test cases such as *Amato v Commonwealth of Australia* [2019] enable government policy to be judged lawful or unlawful by a court. The decision of the court is legally binding. Courts can only rule on legality, not merit.

The AAT reviews government administrative decisions — in this case, decisions made by an algorithm. It can look at the merit of a decision, as well as its legality. The AAT could only warn of Robodebt's potential illegality; it could not make a legally binding ruling.

⁵⁴ Deanna Amato, cited in Medhora, Shalailah, 'Federal Court rules robodebt "unlawful" in significant court case', *Triple J Hack*, 27 November 2019.

Individual ministerial responsibility: Minister Stuart Robert has been questioned repeatedly by Labor in question time over the Robodebt issue.

A parliamentary committee: The Senate investigated Robodebt in two separate inquiries. The Senate Community Affairs References Committee is currently inquiring into the matter. It's reporting date has been extended to 2 December 2020.

Case study: Justice Dyson Heydon

Relevant syllabus points:

- **the accountability of the courts**
 - through the appeals process
 - through parliamentary scrutiny and legislation
 - through transparent processes and public confidence
 - through the censure and removal of judges, including Section 72

Keywords: High Court, sexual harassment, Chief Justice Susan Kiefel, Attorney General Christian Porter, ACT police, transparency, procedural fairness, separation of powers

Prime Minister John Howard appointed Dyson Heydon to the High Court in 2003. He served until his mandatory retirement at 70 years of age in 2013. Justice Heydon heard several of the High Court's landmark cases during that time, including *Plaintiff M70/2011 v Minister for Immigration and Citizenship* [2011] HCA 32 — the Malaysia Solution case; and *Williams v the Commonwealth* [2012] HCA 23. He was the lone dissenter on these landmark cases, marking him out as a conservative and legalist judge. In 2014 he was appointed by Prime Minister Tony Abbott to head the Royal Commission into Trade Union Governance and Corruption. He had a distinguished judicial career.

Five of Dyson Heydon's former judge's associates, and another who worked for another High Court judge made allegations of sexual harassment against him. Following the allegations, Chief Justice Susan Kiefel set up an *internal administrative inquiry* and appointed Dr Vivienne Thom to carry it out. Dr Thom has held several positions including Commissioner of Patents, CEO of the Royal Australian Mint, Deputy Commonwealth Ombudsman and Inspector-General of Security and Intelligence. In recent times, Dr Thom has consulted in matters relating to integrity and governance in public administration. She is a highly accomplished governance professional — and, importantly for accountability — she is outside the judiciary.

In late June, the investigation reported. Chief Justice Kiefel announced the findings that Justice Heydon had sexually harassed the female judge's associates. She said the findings were "of extreme concern" and immediately strengthened the High Court's sexual harassment policy. She spoke with the six judges associates and said that she "valued their insights and suggestions for change".⁵⁵

The Attorney-General, Christian Porter — who is the Cabinet-rank minister responsible for the judiciary — said the investigation was a matter for the High Court.

Justice Heydon has denied the allegations and apologised to the six complainants for anything he may have done that caused hurt. Some have criticised the Thom inquiry for not hearing from Justice Heydon himself.

Three women plan to take civil action against the former judge. The ACT Director of Public Prosecutions was also considering a criminal prosecution. If these actions proceed, a court will make a judgement on the former judge's conduct.

Application:

The Justice Dyson Heydon case study demonstrates opportunities for accountability of the courts.

Through parliamentary scrutiny and legislation: Judges are subject to laws made by parliament. Each state and territory jurisdiction have laws prohibiting sexual harassment. The ACT DPP may prosecute Heydon under the ACT's law because the alleged offending occurred in the ACT. A civil action may also hold judges accountable for civil wrongs.

Through transparent processes: Both criminal and civil trials have strict procedures and rules of evidence that hold courts to account.

⁵⁵ Doran, Mathew, 'High Court statement reveals investigation findings of sexual harassment, denied by former High Court judge Dyson Heydon', *ABC news*, 22 June 2020, <<https://www.abc.net.au/news/2020-06-22/former-high-court-judge-sexually-harassed-several-associates/1238123>>.

Through the appeal process: A failure to uphold trial procedure may lead to an appeal because a trial was not fair.

Transparent processes build public confidence: Internal inquiries are inherently weaker in terms of transparency. Nevertheless, Dr Thom's lack of connection to the judiciary helped ensure a measure of independence despite her investigation being an internal inquiry set up by the High Court into one of its former judges. Some have accused the Thoms inquiry of lacking due process because it did not hear from Justice Heydon — he declined to give his version of the events.

Natural justice and due process — also called procedural fairness — usually require an accused to have an opportunity to answer the charges made against them. However, the Thoms inquiry was not a judicial review; it was an administrative investigation. It was inquisitorial and designed to determine if the High Court's sexual harassment processes were at fault. Finding a solution was not its purpose. It has not charged or found Justice Heydon guilty or liable.

The Chief Justice in each jurisdiction — federal, state and territory — is responsible for upholding transparent processes and holding the judicial officers in their court hierarchy to account. Susan Kiefel CJ performs this role for the High Court.

The strict separation of powers protects the independence of the judiciary. It means that Attorney-General Christian Porter cannot intervene in the High Court's cases or its administrative processes.

Case studies – the courts

Constitutional Cases

The following case studies are presented in reverse chronological order, beginning with the most recent.

Case study: Love and Thoms

Love v Commonwealth of Australia; Thoms v Commonwealth of Australia [2020] HCA 3

Ruling: 4:3 11th February 2020

Relevant Syllabus points:

- **Lawmaking processes in parliament and the courts, with reference to the influence of**
 - Individuals
- **At least one contemporary issue — last three years — relating to legal power**
- **Roles and powers of the High Court of Australia (High Court), including Sections 71, 72, 73, 75 and 76 with reference to at least one common law decision and at least one constitutional decision**
- **Formal and informal methods of constitutional change and their impact**
 - High Court decisions

Keywords: individuals influence on lawmaking; accountability of the executive; experience of a group; contemporary legal issue

Brendan Thoms was born in New Zealand and Daniel Love was born in Papua New Guinea. They had both lived in Australia for most of their lives on permanent resident visas, but had not taken the steps to become citizens of Australia. Both Thoms and Love had Aboriginal heritage — with one parent that was Australian — as well as having children that were Australian citizens. In addition to this, Brendan Thoms is a native title holder.

Section 51 lists many of the legislative and financial powers of the Commonwealth Parliament. Section 51(xix) is the legislative head of power for Australian nationality, citizenship and migration law, referred to as the 'aliens' power. In nationality and citizenship law, people are either citizen or alien (non-citizen). This is a binary definition — that is, being one excludes the other — there is no third alternative. Aliens may legally reside in Australia under various visas.

Daniel Love and Brendan Thoms were both convicted of assault occasioning bodily harm and sentenced to 12 months and 18 months imprisonment respectively. Section 51(xix) authorises the *Migration Act 1958* to deport foreigners from Australia that are of character concern. As a result of their terms of imprisonment, Thoms and Love failed the character test. This resulted in their visas being cancelled and them being placed in detention pending deportation.

Thoms and Love challenged the validity of their deportation in the High Court of Australia. The High Court was required to determine whether an Aboriginal Australian

- with at least one parent who is an Australian;
- who was born outside of Australia, but has spent only brief periods away from Australia; and
- is not an Australian citizen

is an 'alien' under Section 51(xix) of the Commonwealth Constitution.

Thoms and Love both argued that this was an inaccurate application of the alien power, as the concept of Aboriginality is inconsistent with the concept of alien. It was also argued that the tripartite test — confirmed in the *Mabo* decision — to define Aboriginality should be applied. Under the tripartite test, a person can be classified as Aboriginal if they:

- are of Aboriginal descent;
- identify as an Aboriginal person and;
- are accepted by other people of the Aboriginal community.

It was also argued that the Commonwealth lacked the power to deport Aboriginal non-citizens as Aboriginal people have a special cultural, historical and spiritual connection to the land of Australia for 50,000 years. Aboriginal people, therefore, did not fall under the aliens category of Section 51(xix).

The Commonwealth argued that the Commonwealth Constitution leaves it for

parliament to determine who is classified as alien. Since Thoms and Love were not Australian citizens, they were necessarily aliens and, therefore, the Commonwealth had the jurisdiction to deport them under Section 51(xix) of the Commonwealth Constitution. In addition, the Commonwealth argued that there is no classification of ‘non-citizen, non-alien’, thus validating their deportation.

In a majority 4:3 decision handed down on 11 February 2020 the High Court ruled that Thoms and Love were not within reach of the Section 51(xix) aliens power. The majority Justices found that parliament cannot classify Aboriginals as alien as the ordinary definition of alien is incompatible with being a First Nations person. Common law recognises the unique connection of Aboriginal peoples with Australian lands and waters and, therefore, Aboriginal Australians cannot fall within the definition of an alien as used in the Commonwealth Constitution. This essentially creates a new category — a ‘belonger’, someone who is neither a citizen nor an alien and is owed protection by the Crown.

The majority also held that the tripartite test can put Aboriginal Australians beyond the reach of the aliens power. Based on this, Thoms — a recognised member of the Gunggari people — was not subject to Section 51(xix). However, they were unable to reach a decision as to whether Love was an alien. His case will be determined by the Federal Court.

Application:

The decision of *Thoms and Love v The Commonwealth of Australia* is a landmark contemporary constitutional decision of the

■ Figure CSC.1 — The High Court cases involving Thoms and Love arose as a result of neither man having Australian citizenship.
Source: Alison Harris, 2020



High Court. The High Court distinguished between the constitutional meaning of ‘alien’ and Parliament’s power to determine ‘citizenship’ via statute. This has reinforced that only the High Court can determine the meaning of constitutional terms. Thoms and Love are two individuals who have successfully influenced lawmaking in the courts.

Home Affairs Minister Peter Dutton and the powers of the Department of Home Affairs have been limited by the decision. They are now prevented from deporting Aboriginal Australians who are not citizens and who have had their visas cancelled on character grounds via the Section 51(xix) aliens power if they meet the tripartite test. This is an example of accountability of the executive through judicial review.

The decision by the majority of High Court Justices has extended the legal rights of Aboriginal Australians who are non-citizens. As the seven Justices each gave separate decisions, the broader implications and possible impact on other cases remains to be seen.

Case study: *Clubb v Edwards; Preston v Avery*

Clubb v Edwards; Preston v Avery [2019] HCA 11

Ruling: 10th April 2019

Relevant syllabus points:

- lawmaking process in parliament and the courts, with reference to the influence of
 - individuals
 - political parties
 - pressure groups
- roles and powers of the High Court of Australia, including Sections 71, 72, 73, 75 and 76, with reference to at least one common law decision and at least one constitutional decision
- the ways in which Australia and one other country can both uphold and/or undermine democratic principles, with reference to:
 - political representation
 - popular participation
 - the rule of law
 - judicial independence
 - natural justice
- legislative, executive and judicial powers with reference to the Commonwealth Constitution (Australia) and with comparison to one non-Westminster political and legal system

Relevant Sections of the Constitution:

Section 73 — appellate jurisdiction of the High Court; Section 7 — The Senate; Section 24 — Constitution of the House of Representatives

Keywords: implied right to political communication, High Court appeals dismissed

In Victoria and Tasmania, abortion is decriminalised, and each state parliament has passed legislation that creates “safe access zones” with a 150 metre radius of abortion clinics to protect those seeking access to or working in premises that provide termination procedures.

In Victoria, it is an offence under the *Public Health and Wellbeing Act 2008* (Vic) to communicate “by any means in relation to abortions in a manner that is able to be seen or heard by a person accessing, attempting to access, or leaving premises at which abortions are provided and is reasonably likely to cause distress or anxiety”.¹ Kathleen Clubb was charged under these provisions for standing about five metres from the entrance of an abortion clinic attempting to hand out pamphlets which campaigned against early termination of pregnancy.

In Tasmania — under Section 9(2) of the *Reproductive Health (Access To Terminations) Act 2013* (Tas) — a person is not to engage in “a protest in relation to terminations that is able to be seen or heard by a person accessing, or attempting to access, premises at which terminations are provided”. Mr Preston was charged under the Act for being visible within the 150m ‘safe access zone’ with placards which included statements such as “EVERY ONE HAS THE RIGHT TO LIFE, Article 3, Universal Declaration of Human Rights” and “EVERY CHILD HAS THE RIGHT TO LIFE, Article 6, UN Convention on the Rights of the Child” and depicting — among other things — a representation of a foetus at eight weeks.²

Both Clubb and Preston appealed to the High Court on the basis that the relevant Sections of each Act were invalid because they were an unacceptable burden on the implied constitutional right to freedom of political communication.

In their joint judgment, Kiefel CJ, Bell and Keane JJ held that this question was to be resolved with reference to the test for invalidity as stated

in *McCloy v New South Wales* [2015] HCA 34:

1. *Is the law a burden to the implied freedom of political communication?*
2. *If yes, is the law for a legitimate purpose that is consistent with the system of representative and responsible government?*
3. *If yes, does the law adequately balance the importance of its purpose with the burden on the implied freedom to political communication?*³

Kiefel CJ, Bell and Keane JJ also held that Clubb’s pamphlet did not interfere with the implied freedom because it “lacked any evident connection with the electoral choices to be made by the people of the Commonwealth”.⁴ In addressing the constitutionality of the provisions prohibiting certain communication within the “safe access zone”, the justices acknowledged that communication could be considered political if it was to campaign for government to restrict or facilitate abortions and, consequently, the provisions could be a burden to the implied freedom.

In dealing with Preston, the High Court unanimously held that the Tasmanian law was a burden on the implied freedom as it explicitly banned protests within the prescribed safe access zone outside abortion clinics.

In both cases, the justices, however, held that the burden did not impede the system of representative and responsible government as one of the purposes of the law was to enable citizens to safely access the healthcare options that had been made available under legislation passed by parliament. Further, the purposes of the law in protecting the privacy and dignity of women accessing abortion services justified a limitation on the exercise of free expression within the safe zone.

The High Court dismissed the appeals of both Clubb and Preston.

Application:

This case study illustrates the role of the High Court as the highest court of appeal and the importance of judicial independence when it acts as the final authority on the constitutionality of legislation — which were state laws in these cases.

This case study is also relevant to the democratic principle of popular participation in that it provides elaboration on the scope and limits of

1 O'Donnell, Julian, 'Are Victoria's Safe-Access Zones Safe from the Constitution?' *Australian public law*, 10 October 2018, <<https://auspublaw.org/2018/10/are-victorias-safe-access-zones-safe-from-the-constitution/>>.

2 Morris, Shireen and Stone, Adrienne, 'Abortion protests and the limits of freedom of political communication: Clubb v Edwards; Preston v Avery', *Sydney law review*, 15, 40(3), 2018, <<http://www.austlii.edu.au/au/journals/SydLawRw/2018/15.html#fn14>>.

3 Paragraph [5].

4 Paragraph [31].

the implied freedom to political communication. This freedom was first set out by the High Court in *Australian Capital Television Pty Ltd v Commonwealth* [1992] HCA 45. In *Nationwide News Pty Ltd v Wills* [1992] HCA 46 — a case handed down on the same day as the Australian Capital Television case — Brennan J stated: “it

would be a parody of democracy to confer on the people a power to choose their Parliament but to deny the freedom of public discussion from which the people derive their political judgments”.⁵

Case study: *Spence v Queensland*

Spence v Queensland [2019] HCA 15

Ruling: 15th May 2019

Relevant Syllabus points:

- lawmaking process in parliament and the courts, with reference to the influence of
 - individuals
 - political parties
 - pressure groups
- roles and powers of the High Court of Australia, including Sections 71, 72, 73, 75 and 76 with reference to at least one common law decision and at least one constitutional decision
- federalism in Australia with reference to:
 - constitutional powers of state and Commonwealth parliaments, including exclusive, concurrent and residual powers — Section 51, 52, 90, 107 and 109
 - financial powers of the Commonwealth Parliament, including taxation power, tied or special purpose grants, including Section 51(ii), 87, 90, 92 and 96
 - change in the balance of power since federation, with reference to:
 - financial powers, including vertical fiscal imbalance and horizontal fiscal equalisation, the Grants Commission
 - referral of powers Section 51(xxxvii)
 - the Council of Australian Governments (COAG)
 - National Federation Reform Council (NFRF) and the National Cabinet (replaced COAG in June 2020)
 - Co-operative federalism as opposed to coercive federalism
 - High Court of Australia constitutional interpretation, including external affairs power Section 51(xxix), corporations power Section 51(xx) and taxation powers

- The accountability of the Commonwealth Parliament
 - through elections for the House of Representatives and the Senate
 - through the House of Representatives and Senate Privileges Committees
 - within the procedures and processes of the Parliament
 - through judicial review

In 2018 Queensland enacted amendments to its electoral laws preventing property developers making political donations to registered political parties. The purpose was to prevent corruption, which had been a chronic problem at local government level in the state.

On the recommendation of the Joint Standing Committee on Electoral Matters, the Commonwealth *Electoral Legislation Amendment (Electoral Funding and Disclosure Reform) Act 2018* inserted a new clause — Section 302CA — into the *Commonwealth Electoral Act 1918*. Section 302CA permitted donations to registered political parties.

The change to Commonwealth law put it in conflict with Queensland electoral laws, which meant Section 109 of the Constitution would invalidate Queensland’s ban on donations. Nevertheless, the state law would remain valid unless challenged in the High Court.

Gary Spence—former President of the Queensland Liberal National Party (LNP) — challenged Queensland electoral laws in the High Court. He claimed the Queensland law was invalid because it was inconsistent with the Commonwealth *Electoral Act*. He argued that Section 109 should invalidate them. Queensland — joined by other states — defended the state law.

At issue in *Spence v Queensland* (2019) was the regulation of donations to political parties. Political parties endorse candidates at both state and Commonwealth levels. The question before the Court was ‘which level of government should regulate donations to political parties?’

⁵ Paragraph [18].

Section 302CA aimed to enable the Commonwealth to regulate donations at *both* levels. Section 302CA permitted donations to political parties regardless of their status as state or national branches. The parties could then decide whether to use the money for state or federal elections. Section 302CA meant it *might* be possible for donations made at the Commonwealth level to be used in state election campaigns.

Queensland argued its law was valid. Moreover, it argued that Section 302CA of the *Commonwealth Electoral Act* was unconstitutional. Queensland claimed that regulating state elections is a core state jurisdiction — that is, it lies within the heartland of state legislative power. Queensland maintained that Section 302CA intruded into states' power by preventing them from regulating donations that might affect state elections. According to Queensland, Section 302CA was unconstitutional because it was beyond the power of the Commonwealth Parliament to interfere in the states' electoral jurisdiction.

Queensland's argument was fascinating because the Commonwealth undoubtedly has the power to regulate federal elections. However, Queensland argued that because money donated at the federal level *might* be used in a state election, Section 302CA was beyond the power of the Commonwealth Parliament.

The High Court dismissed Spence and upheld Queensland's argument. Section 302CA of the Commonwealth *Electoral Act* was declared invalid.

Application:

In its judgment the High Court refers to the "heartland of state legislative power", which is implied by a federal constitution. In referring to state power in this way, the High Court is recognising the role of the states within the federation and placing a limit on the Commonwealth's legislative power because Section 302CA of the *Electoral Act* could not be characterised as relating to federal elections.

Case study: Section 44 disqualifications

Ruling: 27th October 2017

Relevant Syllabus points:

- **roles and powers of the High Court of Australia, including Sections 71, 72, 73, 75 and 76 with reference to at least one common law decision and at least one constitutional decision**
- **The accountability of the Commonwealth Parliament**
 - **through elections for the House of Representatives and the Senate**
 - **through the House of Representatives and Senate Privileges Committees**
 - **within the procedures and processes of the Parliament**
 - **through judicial review**

Throughout 2017 and into 2018 the Section 44 constitutional citizenship issue played out in the parliament and the High Court.

In a series of decisions referred to as the Citizenship Seven cases, the High Court acting as the Court of Disputed Returns reviewed the qualifications of many members of parliament sitting in the 45th Parliament.

Senators Matthew Canavan, Scott Ludlam, Larissa Waters, Malcolm Roberts, Fiona Nash

and Nick Xenophon, and Barnaby Joyce MP were the subjects of the cases. They were alleged to have — or be entitled to have — the citizenship of another country.

The cases clarified and declared the meaning of Section 44 of the Constitution. Section 44 specifies reasons why a person is "incapable of being chosen or of sitting as..." a member of parliament. Key to the Citizenship Seven cases was the issue of allegiance to a foreign power — most commonly understood to be being entitled to dual citizenship.

The High Court took a literal and narrow view of the meaning of Section 44. It held that anyone entitled to foreign citizenship — even if they did not know it — would be in breach of Section 44. They would have to leave parliament if they were a sitting member. From a legal perspective, it would be as if they were never elected.

Following the Citizenship Seven cases, President of the Senate Senator Stephen Parry, Senators Jacqui Lambie and Skye Kakoschke-Moore, and John Alexander MP also resigned over citizenship doubts.

These cases illustrate the High Court's review of the parliament.

Case study: Williams No. 2

Williams v Commonwealth [2014] HCA 23

Ruling: 19th June 2014

Relevant Syllabus points:

- roles and powers of the High Court, including Sections 71, 72, 73, 75 and 76 with reference to at least one common law decision and at least one constitutional decision
- lawmaking process in parliament and the courts, with reference to the influence of
 - individuals
 - political parties
 - pressure groups
- The accountability of the Commonwealth Parliament
 - through elections for the House of Representatives and the Senate
 - through the House of Representatives and Senate Privileges Committees
 - within the procedures and processes of the Parliament
 - through judicial review

In response to the High Court's decision in Williams No. 1, the Gillard Government rushed new laws through the parliament to authorise the National School Chaplaincy Program (NSCP).⁶ It amended the *Financial Management and Accountability Act 1997* to include provisions authorising NSCP payments as "benefits to students". It used legislative power specified in Section 51(xxiiiA) of the Constitution — the welfare power. Ronald Williams challenged this Act in a second High Court case.

In Williams No. 2, the High Court reached a unanimous verdict. It found that the welfare power allows benefits to be paid directly to beneficiaries — for example an Age Pension to an actual Aged Pensioner and a "benefit to students" to actual students. The problem with the government's legislation was that it authorised payments to the Scripture Union Queensland (SUQ) and not to the students themselves. The NSCP had been struck down a second time.

Application:

In striking down the amendments to the *Financial Management and Accountability Act 1997*, the High Court reviewed parliament's legislative power and held it to account to the Constitution.

Case study: Williams No. 1

Specific Title: Williams v Commonwealth [2012] HCA 23

Ruling: 20th June 2012

Relevant Syllabus points:

- roles and powers of the High Court, including Sections 71, 72, 73, 75 and 76 with reference to at least one common law decision and at least one constitutional decision
- lawmaking process in parliament and the courts, with reference to the influence of
 - individuals
 - political parties
 - pressure groups
- The accountability of the executive and public servants
 - through collective and individual ministerial responsibility

- through Senate Estimates and at least one other committee of the Commonwealth Parliament
- through the Commonwealth Auditor General and the Administrative Appeals Tribunal (AAT)
- through judicial review

In 2006 the Howard government used Section 61 of the Constitution to establish the National School Chaplaincy Program (NSCP). This program engaged private service providers to deliver chaplaincy services to public schools throughout Australia. These services included counselling students, staff and parents; consulting in classrooms; and providing support for those working through emotional difficulties. The Scripture Union Queensland (SUQ) entered into the NSCP to provide chaplaincy services at the Darling Heights State School in Queensland. Ronald Williams had four children at this school and objected to the NSCP and his children

⁶ For details of Williams No. 1, see *Williams v Commonwealth* [2012] HCA 23 below.

being a part of it on the basis that they did not subscribe to any religion.

In 2010 Williams commenced proceedings in the High Court, challenging the Commonwealth's authority to enter into the funding agreement with the SUQ.

The High Court ruled 6:1 in Williams' favour, finding that Section 61 of the Constitution — the power establishing the Commonwealth executive — did not permit the government to fund the NSCP without legislation. This case helped define and limit the prerogative powers of the executive. The High Court declared the Constitution does not permit the executive to fund programs if the parliament has the power to legislate, but has not done so. The judgment summary of this case states:

By majority, the High Court held that the Funding Agreement and payments made to SUQ under that agreement were invalid because they were beyond the executive power of the Commonwealth. In the absence of legislation authorising the Commonwealth to enter into the Funding Agreement, the Commonwealth parties relied upon the executive power granted by s 61 of the Constitution. Relevantly, s 61 provides that the executive power of the Commonwealth "extends to the execution and maintenance of this Constitution, and of

the laws of the Commonwealth". A majority of the High Court held that, in the absence of statutory authority, s 61 did not empower the Commonwealth to enter into the Funding Agreement or to make the challenged payments. In particular, a majority of the Court held that the Commonwealth's executive power does not include a power to do what the Commonwealth Parliament could authorise the Executive to do, such as entering into agreements or contracts, whether or not the Parliament had actually enacted the legislation. A majority also held that s 44 of the Financial Management and Accountability Act 1997 (Cth) did not provide the Commonwealth with the necessary statutory authorisation to enter into the Funding Agreement or to make payments to SUQ under that agreement.⁷

Application:

What the judgment summary above states — in simple terms — is that the Constitution limits the executive power to those actions that the parliament cannot otherwise authorise under statute. It means that if the parliament has a 'head of power' under which to authorise an action by statute law and chooses not to — then the executive may not exercise any prerogative power in that area.

Case study: Pape

Pape v Commissioner of Taxation [2009] HCA 23

Ruling: 7th July 2009

Relevant syllabus points:

- lawmaking process in parliament and the courts, with reference to the influence of
 - individuals
 - political parties
 - pressure groups
- roles and powers of the High Court, including Sections 71, 72, 73, 75 and 76 with reference to at least one common law decision and at least one constitutional decision
- the accountability of the Executive and public servants
 - through collective and individual ministerial responsibility

- through Senate Estimates and at least one other committee of the Commonwealth Parliament
- through the Commonwealth Auditor-General and the Administrative Appeals Tribunal (AAT)
- through judicial review
- legislative, executive and judicial powers with reference to the Commonwealth Constitution (Australia)

Relevant sections of the Constitution:

Section 61 — executive power, Section 83 — Money to be appropriated by law, Section 81 — consolidated revenue fund

Keywords: Section 61 — executive power, Section 81 — consolidated revenue fund

On 18 February 2009 the *Tax Bonus for Working Australians Act (No 2) 2009* (the Tax Bonus Act) was granted Royal Assent. This legislation

⁷ *Ronald Williams v The Commonwealth of Australia & Ors* [2012] HCA 2320, Summary, June 2012, pp 1–1.

enacted the government's economic response to the Global Financial Crisis, and gave Australian taxpaying citizens a bonus of up to \$900 as a one-off payment designed to stimulate the economy.

Bryan Pape — who was entitled to receive \$250 under the Tax Bonus Act — issued a writ against the Commissioner of Taxation disputing the constitutional validity of the Act. He argued that the payments were not a valid exercise of executive or legislative power and that they were 'gifts' arbitrarily fixed by Parliament.

The High Court held that the Tax Bonus Act was valid when read in conjunction with Sections 51(xxxix), 61, 81 and 83 of the Constitution. In his judgment, French CJ referred to the interpretation of these provisions by Mason J in the Australian Assistance Plan Case (1975). In this case, Mason J held that "in my opinion there is to be deduced from the existence and character of the Commonwealth as a national government and from the presence of ss 51(xxxix) and 61 a capacity to engage in enterprises and activities peculiarly adapted to the government of a nation and which cannot otherwise be carried on for the benefit of the nation". When applied to the facts in this case, the economic stimulus was designed to be paid quickly to Australian citizens to minimise widespread damage to the national economy. For French CJ, it followed that this "expenditure is on a scale and within a time-frame peculiarly within the capacity of the national government" and therefore fell within the executive "nationhood power" of Section 61 of the Constitution.

Significantly, the High Court held that this executive power under Section 61 for the

expenditure of public money is not unconditional and must be read in conjunction with Sections 81 and 83 of the Constitution. These provisions essentially provide that an Act of Parliament must support the appropriation of funds to be spent for purposes that fall under the nationhood power of Section 61.

Application:

This case study illustrates the role and power of the executive in the Australian political and legal system. The 'nationhood power' provided for under Section 61 of the Constitution, confers upon the Commonwealth government the ability to engage in activities for the benefit of the nation as a whole which can only be effected by a national government. In this case it was the payment of tax bonuses to mitigate a national economic crisis and only the Commonwealth government had the resources to respond with the efficiency required by this crisis.

This case study also demonstrates the role of the High Court as an accountability mechanism for the exercise of the activities of the executive under Section 61 of the Constitution. In this case, the executive's actions were held to be valid.

While Pape was unsuccessful in his challenge to the Tax Bonus Act and the exercise of executive power, this case demonstrates the potential for individuals directly affected by executive policy to challenge these actions in the High Court, influencing the creation of precedent. Pape was an Australian citizen and taxpayer entitled to the bonus payment, and therefore had standing to bring his case against the Commissioner of Taxation.

Case study: Roach

Roach v Electoral Commissioner [2007] HCA 43

Ruling: 30th August 2007

Relevant syllabus points:

- lawmaking process in parliament and the courts, with reference to the influence of
 - individuals
 - political parties
 - pressure groups
- roles and powers of the High Court of Australia, including Sections 71, 72, 73, 75 and 76 with reference to at least one common law decision and at least one constitutional decision
- the accountability of the Commonwealth Parliament
 - through elections for the House of Representatives and the Senate
 - through the House of Representatives and Senate Privileges Committees
 - within the procedures and processes of the Parliament
 - through judicial review
- the ways in which Australia and one other country can both uphold and/or undermine democratic principles, with reference to
 - political representation
 - popular participation

- the rule of law
- judicial independence
- natural justice
- **legislative, executive and judicial powers with reference to the Commonwealth Constitution (Australia)**

Relevant sections of the Constitution:

Section 76 – original jurisdiction of the High Court, Section 7 – The Senate, Section 24 – Constitution of the House of Representatives

Keywords: right to vote, legislative power, individuals influence lawmaking, accountability of Parliament, role of the High Court, ultra vires, original jurisdiction

Australia's electoral laws have always provided for some level of restriction to the voting rights of prisoners. In 2006 the Howard Government — who had a government majority in the Senate at the time — passed the *Electoral and Referendum Amendment (Electoral Integrity and Other Measures) Act 2006*. Among the changes legislated to the *Commonwealth Electoral Act 1918* was the disqualification of all prisoners from voting in federal elections. Prior to the amendments, only those prisoners serving a term of imprisonment of three years or more were disqualified from voting.

In 2004 Vickie Roach was convicted of various offences and sentenced to an imprisonment term of six years, with a non-parole period of four years. As an imprisoned person who would be serving her sentence when the next federal election took place, she had standing to challenge the Howard Government's amendments that disqualified all prisoners from voting. In March 2007 Roach — with the assistance of the Human Rights Law Research Centre — launched a legal challenge to the amendments to the *Commonwealth Electoral Act 1918*. Roach was particularly passionate about the disproportionate impact that these amendments would have on Indigenous Australians, particularly women. In June 2006, 20,209 people were imprisoned across Australia, with approximately 35 per cent of prisoners serving a sentence of two years or less.⁸ Indigenous people made up 24 per cent of this prison population.

In her High Court challenge Roach argued that the amendments to the *Commonwealth Electoral Act 1918* disqualifying all imprisoned persons from voting were invalid. Her contention was that the criteria for the disqualification to vote was arbitrary and, consequently, inconsistent

with Australia's representative democracy, which is provided for by Sections 7 and 24 of the Constitution. Sections 7 and 24 both state that the Senate and House of Representatives are "to be directly chosen by the people".

In a 4:2 majority judgment, the High Court held that the disqualification of all prisoners from exercising the right to vote under the 2006 amendments to the *Commonwealth Electoral Act 1918* were unconstitutional.

In Gleeson CJ's judgment, he reasoned that citizenship in Australia "is a common bond, involving reciprocal rights and obligations ... Serious offending may warrant temporary suspension of one of the rights of membership, that is, the right to vote". However, he also reasoned that when the criteria for disenfranchisement was a sentence of imprisonment — regardless of the length of the term — this becomes problematic for short-term prisoners. These prisoners "include a not insubstantial number of people who, by reason of their personal characteristics (such as poverty, homelessness, or mental problems), or geographical circumstances, do not qualify for, or, do not qualify for a full range of, non-custodial sentencing options". Consequently:

the step that was taken by Parliament in 2006 of abandoning any attempt to identify prisoners who have committed serious crimes by reference to either the term of imprisonment imposed or the maximum penalty for the offence broke the rational connection necessary to reconcile the disenfranchisement with the constitutional imperative of choice by the people.⁹

Application:

This case study illustrates how individuals can have an impact on the lawmaking process in the courts. One of the most significant limitations for individuals influencing lawmaking is cost, and in this case Vickie Roach relied on the support of the Human Rights Law Centre in Melbourne — who were provided with very substantial pro bono assistance by a major law firm and a number of high profile barristers.¹⁰

This case study also demonstrates the role of the High Court in adjudicating constitutional disputes through its original jurisdiction provided for by Section 76 of the Constitution. The plaintiff's argument was that the amendments to the *Commonwealth Electoral*

⁸ *Roach v Electoral Commissioner* [2007] HCA 43, paragraph [36].

⁹ *Roach v Electoral Commissioner* [2007] HCA 43, paragraph [24].

¹⁰ lawgovpol.com, *Case study: Vicki Lee Roach*, < <https://lawgovpol.com/case-study-vickie-lee-roach/> >.

Act undermined the constitutional basis for Australia's representative democracy in Section 7 and 24 of the Constitution. The Parliament was held accountable via judicial review when the High Court declared the amendments disenfranchised all prisoners invalid.

The Roach Case also highlights the importance of the democratic principles of popular participation — ensuring that the franchise is not limited arbitrarily — and judicial independence — High Court acted as a 'check' on the power of the Parliament.

Court cases on the High Court's interpretation of the Constitution

Relevant syllabus points:

- **roles and powers of the High Court of Australia, including Sections 71, 72, 73, 75 and 76 with reference to at least one common law decision and at least one constitutional decision**

Three fields of interpretation illustrate how the High Court interprets the Constitution and help illustrate this vital role.

1. Interpretations defining legislative and financial powers;
2. Interpretations defining executive powers; and
3. Interpretations which discover implications within the Constitution — refer to Table 7.1 in Chapter 7.

Defining the constitutional scope and limits of legislative and financial power

The High Court has been the principal source of constitutional change since federation. Landmark cases may alter the way the Constitution operates by declaring the meaning of its words. This is perhaps the most crucial power of the High Court because its judgments affect the Constitution and, hence, the operation of the fundamental law of the nation. Landmark judgments have changed the Australian federation and other aspects of the political and legal system profoundly since federation in 1901.

The Constitution allocates legislative and financial powers between the two sovereign levels of government within the federation — the Commonwealth and the states. Interpretations within the federal sphere may alter the balance of legislative and financial power between the two levels of government. Powers within the federation are either:

- exclusive — exercisable only by the Commonwealth;
- concurrent — exercisable by both state and Commonwealth governments; or
- residual — exercisable by states alone.

Exclusive and concurrent powers are specified — that is, written and enumerated — and therefore capable of adjudication. Residual powers are unspecified and are non-justiciable. This fact has resulted in interesting historical attempts by the High Court to create doctrines of interpretation intended to protect residual state powers. Chapter 9 discusses federalism in more detail.

Many cases involve disputes about the scope and extent of legislative and financial powers. The Commonwealth Parliament may only enact legislation under 'heads of power' specified by the Constitution. In practice, the parliament may enact any law it chooses. However, if a law lacks a foundation in a head of power, it may be challenged and found unconstitutional. If the High Court finds an Act of Parliament is 'beyond the power' of the parliament, it will strike the law down. Unconstitutional laws are said to be *ultra vires* — literally 'beyond the power'. The Love and Thoms, and Williams No 2. Cases are examples.

Determining constitutional scope and limits of the executive power

The executive government implements legislation and may make limited law under legislative power delegated to it by parliament. Executive-made laws are called regulations, ordinances or instruments — all of which are forms of delegated legislation.

Section 61 of the Constitution vests the executive power of the Commonwealth in the Queen and makes it exercisable by the Governor-General. The Constitution says the role of the executive is to carry out the "execution and maintenance of the Constitution and the laws of the Commonwealth". These words are not limitations to power — they enable power.

Furthermore, under common law, the Australian executive exercises the prerogatives of the Crown; for example, the power to sign treaties and declare war. During the 2019–2020 bushfire emergency, for example, Prime Minister Morrison used executive prerogative to deploy the Australian Defence Force on Australian soil.

Section 61 does not limit the executive to the same heads of power it defines for the parliament — meaning the executive may be able to act where the parliament has no authority. Nevertheless, statutes and High Court interpretations of Section 61 may limit executive power.

The High Court has found a ‘nationhood power’ implied by Section 61. The nationhood power permits the federal government to act even where it has no constitutional or statutory power. However, it is limited to instances where it “engages in enterprises and activities peculiarly adapted to the government of a nation and which cannot otherwise be carried out for the benefit of the nation”.¹¹

The nationhood power goes well beyond the legislative heads of power and allows the federal government to spend money and carry out national programs without parliamentary approval. Another example of the use of nationhood power was the Rudd Government’s spending program designed to keep Australia out of recession at the time of the Global Financial Crisis. The High Court upheld the constitutionality of the program’s reliance on the nationhood power in *Pape v The Commissioner of Taxation* [2009] HCA 23; (2009) 238 CLR 1.

The High Court has limited the scope of Section 61 in recent times, which can be seen in its decision in *Williams No. 1* (2012).

Court case studies that have altered the federal balance of power

Relevant syllabus points:

- **federalism in Australia with reference to**
 - **constitutional powers of state and Commonwealth parliaments, including exclusive, concurrent and residual powers, Section 51, 52, 90, 107 and 109**
 - **financial powers of the Commonwealth Parliament, including taxation power, tied or special purpose grants, including Section 51(ii), 87, 90, 92 and 96**
 - **change in the balance of power since federation, with reference to**
 - **financial powers, including vertical fiscal imbalance and horizontal fiscal equalisation, the Grants Commission**
 - **referral of powers Section 51(xxxvii)**
 - **the Council of Australian Governments (COAG)**
 - **National Federation Reform Council (NFRC) and the National Cabinet (replaced COAG June 2020)**
 - **Cooperative federalism as opposed to coercive federalism**
 - **High Court constitutional interpretation, including external affairs power Section 51(xxix), corporations power Section 51(xx) and taxation powers**

Peterswald Case (1904)

Section 90 makes ‘excise’ an exclusive Commonwealth tax. In *Peterswald v Bartley* (1904) 1 CLR 497, Griffiths CJ applied the

Doctrine of Reserved Powers, holding that a New South Wales tax imposed on brewers was not an excise. He defined excise very narrowly — reserving the taxing power for the states. Narrow interpretations of Section 90 made it less likely that a future state tax could be defined as excise and, therefore, made invalid.

Railway Servants Case (1906)

The Railway Servants Case (1906)¹² was a dispute between WA and the Commonwealth about the right of the Commonwealth to legislate working conditions for workers employed by the Western Australian Government.

The Court — applying the Doctrine of Implied Immunities of Instrumentalities — found that Commonwealth industrial laws passed under Section 51(xxxv) could not apply to State Government Railway employees — a state instrumentality. The states were immune from Commonwealth law in this area.

Increasing Commonwealth Power — 1920–1971

The way the Constitution is written — as in its actual wording — means that it will tend to centralise power in Canberra and erode state sovereignty. The underlying cause of centralisation is that state powers are unspecified and, thus, the High Court cannot interpret them — and so protect them. State powers are non-justiciable. If read without applying particular doctrines of interpretation which enable their protection by the court, the Constitution will concentrate power in Canberra and shift the federal balance of power towards the centre.

¹¹ Mason J: *Victoria v Commonwealth and Hayden* [1975] 134 CLR 338.

¹² *Federated Amalgamated Government Railway & Tramway Service Association v NSW Rail Traffic Employees Association* [1906] HCA 94 is known as the Railway Servants Case (1906).

During this period — 1920–1971 — state powers were eroded in two main ways:

1. The Commonwealth intruded upon state legislative powers; and
2. The Commonwealth's financial power over the states increased.

A case which eroded state legislative power

The Engineers Case 1920

A trade union was involved in an industrial dispute with a sawmilling factory owned by the WA government; that is, it was a state instrumentality. The Commonwealth sought to legislate because it felt it had the power under Section 51(xxxv), the industrial relations power, to make law for state businesses when a dispute crossed state borders. In this case, the workers at the sawmill belonged to the Amalgamated Society of Engineers, which was a national union meaning the dispute extended beyond the Western Australian border.

The High Court agreed — giving a much broader interpretation to the Commonwealth's Section 51(xxxv) industrial relations power.

This decision reversed the precedent of the *Railway Servants Case*, wiping away the protection of state power provided by the Doctrine of Implied Immunities of Instrumentalities. The *Engineers Case*¹³ set a precedent that is persuasive to the present day and has influenced many other constitutional cases.

A case increasing Commonwealth financial power

The Uniform Tax Case (1942)

Section 51(ii) — the taxation power — is a concurrent power that allows both levels of government to raise revenue by various taxes. This power has changed since federation in 1901. High Court decisions in the *Uniform Tax Cases* of 1942 and 1957 validated the Commonwealth's entry into the field of income tax.

During World War 2 (1939 – 1945) Australia came perilously close to invasion by Japanese forces, which had reached as far as New Guinea to the north and the Coral Sea off Queensland. Desperately needing to improve its capacity to fight the war, the Commonwealth passed four Acts:

1. *Income Tax Act 1942* to establish a new federal income tax;

2. *States Grants Acts 1942* to make grants to each state equal to the income tax a state would raise itself;
3. *Income Tax Assessment Act 1942* to force taxpayers to pay their federal income tax before any state income tax; and
4. *Income Tax (Wartime Arrangements) Act 1942* to require the states to transfer all their income tax staff, all offices, furniture and official tax records to the Commonwealth.

The effect of these Acts was to allow a Commonwealth takeover of income tax.

The states challenged the four Acts in the High Court — the First Uniform Tax Case 1942.¹⁴

The Court found that all the Acts were constitutional. The High Court accepted that during a declared war the defence powers of the Commonwealth expanded, providing it with authority to seize income tax. With the conclusion of World War 2, the states challenged again. In 1957 the High Court found three of the Acts remained constitutional based on Section 51(ii) taxation, Section 96 and Section 109.

After 1942 the states were effectively prevented from being able to collect income tax, which had been a significant source of state revenue. The loss of income tax revenue forced the states to levy a range of smaller taxes to make up the shortfall. They also became more reliant on transfers (grants) from the Commonwealth.

Subsequent High Court decisions in a variety of landmark cases have increasingly limited the states' access to revenue from other forms of tax such as franchise fees and sales taxes. See: 'Case concerning financial powers' below.

Income tax is one of the most critical taxes, contributing 57 per cent of all tax collected in Australia in 2013–2014. Before World War 2, it was collected by the states, providing them with a great deal of financial independence. At that time the vertical fiscal imbalance (VFI) was smaller and the states less reliant on Section 96 grants from the Commonwealth. Since the Second Uniform Tax Case the VFI has favoured the Commonwealth strongly.

Broad interpretation of Section 96 grants power

The wording of Section 96 says "... the Parliament may grant financial assistance to any State on such terms and conditions as it

¹³ *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd*, [1920] 28 CLR is commonly known as the Engineers Case 1920.

¹⁴ *South Australia v Commonwealth* [1942] 65 CLR 373 is known as the First Uniform Tax Case (1942). *The State of Victoria v The Commonwealth* [1957] HCA 54 is the Second Uniform Tax Case (1957).

thinks fit". The words 'as it thinks fit' do not suggest any limitation on terms and conditions — quite the opposite. The grants power allows the Commonwealth to attach any condition to monies granted to the states. The Court has not sought to limit the nature of conditions attached to grants. Therefore, grants for financial assistance to the states may make direct intrusions into State residual powers without the Court attempting to defend the sovereignty of the States.

The Commonwealth has altered its use of Section 96 from the straightforward attachment of conditions to grants, to more sophisticated incentive payments.

Specific purpose payments require the Commonwealth to set up systems to monitor the states' compliance with the conditions. The states receive the money first; then the Commonwealth must monitor the spending of the grant.

Incentive payments place the burden on the states to prove that they meet the specified conditions for a grant — they receive the grant after they have met the conditions.

Covering the field and the broad interpretation of the grants power result in diminished concurrent and residual State powers.

Residual powers are unspecified. They cannot be interpreted literally or otherwise by the High Court — there are no words to interpret, and so the powers are **non-justiciable**. The High Court cannot defend them unless it adopts a doctrine of interpretation that allows it to 'guess' at the intent of the Founding Fathers. High Courts since the 1920s have been reluctant to adopt these creative solutions.

The cases outlined above all eroded State powers and expanded the powers of the Commonwealth. Nevertheless, not all cases during this period of time changed the federal balance of power. From the mid-1940s to the early 1970s, the Court's decisions tended to check the expanding power of the Commonwealth.

Cases that limited Commonwealth power

State Banking Case (1947)

In *Melbourne Corporation v Commonwealth* [1947] HCA 26 — the State Banking Case, the High Court struck down Commonwealth legislation that attempted to force the states to bank with the Commonwealth Bank because it discriminated against the states.

Bank Nationalisation Case (1948)

A post-War Australian Labor Party (ALP) Government attempted to nationalise private banks. The High Court — in *Bank of NSW v Commonwealth* [1948] HCA 7 or the Bank Nationalisation Case — struck down the laws because they prevented freedom of interstate trade under Section 92. The decision was controversial because the nationalisation of key industries was Australian Labor Party (ALP) policy at that time. The case effectively made socialism unconstitutional in Australia.

Communist Party Case (1951)

In *Australian Communist Party v The Commonwealth* [1951] HCA 5 — the Communist Party Case (1951) — the High Court struck down the Menzies Government's attempt to ban the Communist Party. Chapter 11 discusses judicial checks on parliament's legislative power.

Cases that favoured the Commonwealth

Uniform Tax Case (1957)

In *Victoria v Commonwealth* [1957] HCA 54, the states attempted to challenge the tax laws that the Commonwealth used to seize income tax during the World War 2. They argued that the end of the war had changed the powers involved. However, the High Court upheld most of its 1942 decisions in the Uniform Tax Case (1942).

Concrete Pipes Case (1971)

Strickland v Rocla Concrete Pipes Ltd [1971] HCA 40 — the Concrete Pipes Case (1971) — saw the right of the Commonwealth to legislate for the intrastate activities of corporations under Section 51(xx) the corporations power was accepted. This case made the *Trade Practices Act 1974* constitutional. The *Trade Practices Act 1974* is one of the most influential pieces of legislation regulating the activities of companies in Australia. This Act covers prices, consumer protection and other aspects of corporate activity.

Increasing Commonwealth Power — 1971 to contemporary times

Expansion of Commonwealth power — Section 51(xxix) external affairs

One of the powers of the Constitution that has been the subject of much interpretation has been Section 51(xxix) — the external affairs power. Since the World War 2 Australia has become far less dependent on Britain for trade and military assistance, and we have emerged as a middle-ranking world power holding significant regional influence within Oceania

and South East Asia. Additionally, international organisations such as the United Nations (UN) have become increasingly prominent in international relations. As a wealthy country with growing power and influence, Australia engages with the world far more today than in the past, and the external affairs power has therefore grown in importance.

Section 51(xxix) works by allowing the Commonwealth to sign treaties or international agreements with other countries or organisations and then ratify these by passing a statute through the Commonwealth Parliament. Ratification makes a treaty or agreement law in Australia. Section 109 will then invalidate any state laws that conflict with the ratified law. In short, Section 51(xxix) provides constitutional authority to make international agreements lawful in Australia and then override state laws that conflict with them. The external affairs power is especially important in Australia's protection of human rights. See: Chapter 15.

A perceptive student will see the combined potential of Section 51(xxix) and Section 109 allows the Commonwealth to become involved in areas of state responsibility such as land management or the management of rivers. An example of this potential is the *Bonn Convention*, an international agreement to protect migratory waterbirds by protecting their wetland breeding habitats. Australia has signed the *Bonn Convention*. The Commonwealth Parliament used the external affairs power to insert protections for the Murray River wetlands in the *Water Act 2007*. These protections limit the extraction of irrigation water from the river because the Act placed environmental protection ahead of economic concerns. Rivers are a state residual power. However, one can see how the Commonwealth has been able to intrude into the state power in this instance.

Koowarta (1982)

Koowarta v Bjelke-Petersen [1982] HCA 27 — the Koowarta Case (1982) — prevented a Queensland Government decision to stop John Koowarta — an Aboriginal man — from purchasing a lease on land because he was Aboriginal. The state decision contravened the Commonwealth *Racial Discrimination Act 1975*. This Act was passed by using the external affairs power to give effect to the *UN Convention on the Elimination of All Forms of Racial Discrimination*, an international human rights agreement signed by the Commonwealth Government in 1965. Queensland lost sovereign powers over land management because of this case.



■ Figure CSC.2 — In *Koowarta* (1982), the High Court limited the power of the Queensland State government.
Source: Alan Moir, *The High Court wrangles Bjelke-Peterson*, (1982), author's permission, <moir.com.au>

Tasmanian Dams (1983)

Commonwealth v Tasmania [1983] HCA 21 — the *Tasmanian Dams Case* (1983) used the Koowarta precedent and external affairs power to prevent the Tasmanian Government from damming the Gordon-below-Franklin River. The Commonwealth had signed the *International Convention for the Protection of the World's Cultural and Natural Heritage* in 1974. Using Section 51(xxix), it then passed the *World Heritage Properties Conservation Act 1983*. Finally, the Commonwealth listed the Gordon-below-Franklin River as a World Heritage Area under the Act — making it unlawful for Tasmania to dam the river. In this case, Tasmania lost sovereign powers over land and river management.

Case concerning financial powers

Ha and Hammond v NSW Cases (1997)

State governments had levied fees on the sale of tobacco and business franchise fees on some types of businesses. In the *Ha and Hammond Cases* (1997)¹⁵ the High Court found these fees to be **excise**, which are exclusive to the Commonwealth under Section 90. The High Court handed down its judgment in both cases at the same time because the facts of the cases were very similar.

The cases severely undermined state financial independence and reduced state taxing powers, increasing the VFI and the financial power of the Commonwealth.

Cases concerning interstate trade

Cole v Whitfield [1988] HCA 18

State laws discriminating against interstate trade in a protectionist manner are unconstitutional

¹⁵ *Ha & Anor v State of New South Wales & Ors; and Walter Hammond & Associates v State of New South Wales & Ors* [1997] HCA 34, 97 ATC.

under Section 92. A Tasmanian company was unable to import smaller South Australian crayfish into the island state because the Tasmanian government had limited the size of crayfish. The Tasmanian law's intent was environmental, not economic. It intended to protect Tasmania's crayfish stocks, not to limit interstate trade. Nevertheless, its effect was to restrict trade from South Australia.

The decision in *Cole v Whitfield* [1988] HCA 18 — the Tasmanian Lobster Case (1988) meant that a state law only needs to have the effect of creating an advantage or disadvantage — it does not have to intend to do it. The new interpretation meant that a state could no longer pass a law which had the effect of protecting intrastate trade and commerce — trade within a state — by giving it a 'competitive or market advantage' over interstate trade and commerce — trade between states. If a law did so, it would be unconstitutional because of the broader meaning of 'absolutely free' in Section 92. The Tasmanian Lobster Case (1988) undermined the legislative power of the States over aspects of their economies.

Betfair Case (2008)

The Betfair Case (2008) — *Betfair Pty Limited v Western Australia* [2008] HCA 11 — is a recent case concerning Section 92 and is the first that has explored the way the 'absolutely free' guarantee works in the internet age. Betfair is an online betting company. Western Australia argued that Betfair should not be allowed to accept bets on Tasmanian sports events from Western Australian residents. The High Court found in favour of Betfair. The case extended trade across borders to the realm of the internet. The decision has broad implications for the future of trade and commerce, given the increasing volume of trade occurring online.

The power of the states to make laws about economic activity within their state may be further limited if the High Court develops the reasoning of the Tasmanian Lobster Case (1988) and the Betfair Case (2008) in future cases.

Expansion of Commonwealth power — Section 51(xx) corporations power

Corporations power

Section 51(xx) is the 'corporations power'. It provides the Commonwealth with the power to legislate for anything related to 'incorporated bodies'. Incorporation is a process for forming a legal entity that the law recognises as a 'person'. For example, an incorporated company can take a case to court and the court

will treat the company the same way as it treats a real person.

Companies, charities, not for profit organisations, and sporting clubs can all be incorporated bodies. One can see how the power to legislate for such legal entities allows the Commonwealth enormous legislative reach. In effect, it can make laws covering much of Australian society and business activity using Section 51(xx).

WorkChoices (2006)

WorkChoices was the Commonwealth industrial relations law introduced by the Howard government in its final term. It sought to take over most of the states' industrial relations powers.

The industrial relations power in Section 51(xxxv) states: "Conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State". Section 51(xxxv) is a narrow power because it limits Commonwealth involvement to interstate industrial disputes and makes conciliation and arbitration the only ways to resolve these disputes.

Section 51(xxxv) was insufficient for the Commonwealth to take over the states' industrial relations powers because it is limited. Therefore, *WorkChoices* — which was an industrial law — was passed using Section 51(xx) the corporations power instead.

Section 51(xx) corporations power says: "Foreign corporations and trading or financial corporations formed within the limits of the Commonwealth". Section 51(xx) is a broad power.

Eighty-five per cent of all Australian workers work for corporations. Thus, the Commonwealth sought to use this power to make laws for the employees of corporations. It is a 'back door' route into industrial relations.

The states and unions challenged the law in the High Court. The case — *New South Wales v Commonwealth of Australia; Western Australia v Commonwealth of Australia* [2006] HCA 52 — was heard in May 2006 and argued the constitutionality of using the corporations power to make industrial relations law. The challenge asked the question: 'Is *WorkChoices* pushing the corporations power too far?'

The states lost the case. The High Court ruled that it is constitutional for the Commonwealth to legislate for industrial law using the corporations power.

Commonwealth power has expanded further under Section 51(xx). The WorkChoices Case (2006) set a precedent, and the Commonwealth has used the corporations power in new ways since then. For example, the Howard government tried to persuade the 'Basin States' to refer their powers over the Murray River. Such a referral of power would allow the Commonwealth Government to control the extraction of river water for irrigation. They failed; the states refused. The Commonwealth then used Section 51(xx) to amend the *Water Act 2007* so that it could control the volume of water irrigators could take from the river. The approach worked because many of the farming and irrigating businesses along the Murray are 'incorporated bodies' — that is, they are corporations — and thus, the Commonwealth could make laws controlling their water use. In effect, the Howard Government simply bypassed the uncooperative states. The Basin

Plan is an example of how legislative heads of power in the Constitution have been redefined by the High Court and then used in new ways by the Commonwealth to extend its power.



■ Figure CSC.3 — In WorkChoices (2006), the High Court made a controversial decision when it extended Commonwealth power over industrial relations.

Source: Tirin, *ACTU protest 2005*, 16 November 2005, CC BY-SA 3.0, <<http://bit.ly/2e8UqXS>>

How High Court decisions can informally change the Constitution

Relevant syllabus points:

- **Formal and informal methods of constitutional change and their impact**
 - referendums, including Section 128
 - High Court decisions
 - referral of powers
 - unchallenged legislation

Trial by jury

High Court cases have resulted in the limitation of the right to trial by jury. As a result, the High Court has not changed the Constitution significantly in respect of Section 80. The High Court has upheld that the parliament may determine in statutes which offences are indictable and which are summary.

Freedom of religion

The *Scientology Case* (1983) 154 CLR 120 affected Section 116. Religious institutions are exempt from paying taxes, but the Victorian Commissioner for Payroll Tax had decided that the Church of Scientology was not a religion and, therefore, had to pay payroll taxes. The Church of Scientology argued it was a religion. The High Court agreed. The meaning of 'religion' was interpreted broadly. According to the Court, a religion does not have to be an established faith such as Christianity or Islam.

Freedom of inter-state trade

Section 92 is the most litigated section of the Constitution. Students should refer to Chapter 9 for a full discussion of cases that have affected the meaning of Section 92 as well as the Compensation for property on just terms.

Cases involving Section 51(xxxi) have clarified the meaning of the word 'property' — first expanding its meaning in 1944, and limiting it again in 1994. The sequence of cases provides an excellent example of how the High Court extends and then limits the meaning of a word or phrase within the Constitution.

Minister of State for the Army v Dalziel (1944) defined property in broad terms:

*Property, it has been said, is nomen generalissimum and extends to every species of valuable right and interest including real and personal property, incorporeal hereditaments such as rents and services, rights of way, rights of profits or use in land of another, and choses in action.*¹⁶

Dorman v Rodgers [1982] HCA 25 clarified property further:

*In modern legal systems, 'property' embraces every possible interest recognised by law which a person can have in anything and includes practically all valuable rights.*¹⁷

¹⁶ Starke J, paragraph [290].

¹⁷ Paragraph [4].

Mutual Pools & Staff Pty Ltd v Commonwealth [1994] 179 CLR 155, limited the property for which the Commonwealth must compensate. The case held that the Commonwealth might deprive a person or company of property without the Commonwealth acquiring the property itself — and thus avoid having to pay compensation:

*Nonetheless, the fact remains that s51(xxxi) is directed to “acquisition” as distinct from deprivation. Extinguishment, modification or deprivation of rights in relation to property does not of itself constitute an acquisition of property. For there to be an “acquisition of property,” there must be an obtaining of at least some identifiable benefit or advantage relating to the ownership or use of property.*¹⁸

Discovering an implied right — The implied freedom of political communication

Step 1: A case comes before the High Court

Australian Capital Television v Commonwealth (1992) 177 CLR 10 concerned the validity of the *Political Broadcasts and Political Disclosures Act 1991*, which limited political advertising during an election campaign and forced commercial television stations to broadcast free political advertising at other times. Television companies challenged the validity of this Act, claiming it inhibited the political communication necessary for democracy to function.

Step 2: The High Court examines the Constitution

Sections 7 and 24 of the Constitution specify that both houses of parliament be “chosen by the people” — creating a representative democracy in Australia. Representative democracy *implies* that electors must be able to hear the arguments of their would-be representatives so they can cast an informed vote. Therefore, the Constitution implies freedom of political communication.

Step 3: The High Court decides

The High Court struck down the section of the *Political Broadcasts and Political Disclosures Act 1991* which banned political advertising. Although no words were changed, the Constitution now contains a new right protecting freedom of political communication. A newly discovered implied right has the same status as an expressed constitutional right.

■ Figure: CSC.4 — David Lange challenged the Australian Broadcasting Corporation in a controversial High Court case in 1997. Source: By courtesy of Horowhenua Historical Society Inc, *David Lange posts a letter*, 1980s, CC BY-SA 3.0, <https://commons.wikimedia.org/w/index.php?curid=47608235>



Step 4: A new implied right is created and applied to future cases

High Court jurisprudence discovers, develops and refines implied rights. For example:

- *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104, in which Andrew Theophanous MP unsuccessfully sued a newspaper for defamation after it published an article questioning his capacity as a member of parliament. The High Court found that the newspaper was free to publish the article because it was a form of political communication protected by the implied freedom of political communication. The Theophanous Case (1994) seemed to create a broad right to political free speech.
- *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 was brought to court by former New Zealand Prime Minister, David Lange. He sued the ABC after it broadcast a program accusing him of allowing business donations to influence his government's policies. The ABC cited the Theophanous Case (1994) precedent in its defence. In its *ratio*, the High Court stated that the implied freedom of political communication is not unlimited, and that it “is limited to what is necessary for the effective operation of that system of representative and responsible government provided for by the Constitution”.¹⁹ The ABC could not use the implied right of political communication as a defence against defamation.

¹⁸ Paragraph [185].

¹⁹ *Lange v Australian Broadcasting Corporation* [1997] 145 ALR 96, paragraph [10–8] and [112].

- *McCloy v New South Wales* [2015] HCA 34 developed the McCloy Test, now used by the High Court to decide if a Commonwealth or state law infringes the implied freedom of political communication. The McCloy Test of 2015 had two questions to address:

1. Does the law limit freedom of political communication?
2. If so, is the law legitimate and compatible with representative democracy?

If the answer to question 1 was YES and the answer to question 2 was NO, the law infringed the implied right of freedom of political communication and was unconstitutional.

- *Brown v Tasmania* [2017] HCA 43 refined the McCloy Test. It did so by developing the ‘third leg’ of the Test:

3. Is the law appropriate — that is, proportional — for its purpose while remaining compatible with representative democracy?

The example above illustrates how an implied right is:

1. discovered;
2. developed and clarified;
3. refined by the development of ‘tests’ that enhance legal consistency and predictability — both of which are features of the rule of law.

The development of a test — like the McCloy Test — ensures consistent and predictable decisions, so litigants, governments and parliaments know where they stand concerning the implied right.

Common Law Cases

Case study: Pell

Pell v The Queen [2020] HCA 12

Relevant syllabus points:

- **lawmaking process in parliament and the courts, with reference to the influence of**
 - individuals
 - political parties
 - pressure groups
- **roles and powers of the High Court, including Sections 71, 72, 73, 75 and 76 with reference to at least one common law decision and at least one constitutional decision**
- **the accountability of the courts**
 - through the appeals process
 - through parliamentary scrutiny and legislation
 - through transparent processes and public confidence
 - through the censure and removal of judges, including Section 72

Relevant sections of the Constitution:

Section 73 — appellate jurisdiction of the High Court

Keywords: George Pell, accountability of courts (appeals), individuals influencing lawmaking

George Pell served as Catholic Archbishop of Sydney from 2001–2014 before being appointed to serve as a high official at the Vatican from 2014–2018. In 2017 Pell was charged with multiple historical child sex offences.

In September 2018 — after a trial that lasted for five weeks, including a week of jury deliberation — the jury was discharged as they could not reach a unanimous verdict. A second trial began in November 2018 and on 11 December 2018 Pell was found guilty by the jury of one count of sexual penetration of a child under the age of 16 and four counts of committing an indecent act with, or in the presence of, a child. In March 2019 the County Court of Victoria sentenced Pell to a six-year term of imprisonment, with a non-parole period of three years and eight months.

Cardinal Pell appealed his guilty verdict of the County Court of Victoria to the Court of Appeal, which dismissed his appeal in August 2019 by a 2:1 majority decision. Pell's appeal was based

on the ground that the jury's guilty verdicts were "unreasonable and cannot be supported having regard to the evidence" ('the unreasonableness ground').²⁰ After reviewing the evidence, two of the three appeal court judges held that it was "open to the jury to be satisfied beyond reasonable doubt that Cardinal Pell was guilty of the offences charged"²¹ and dismissed his appeal.

In April 2020 the Full Court of the High Court of Australia upheld Pell's appeal, acquitting him of all five sexual offences and releasing him from prison after having served 13 months of his six-year sentence. In a single judgment, the High Court held that "a jury acting rationally on the whole of the evidence, ought to have entertained a doubt as to the applicant's guilt with respect to each of the offences for which he was convicted".²² The Court held that, assuming that the jury found the complainant to be credible and reliable, the evidence of other witnesses at trial meant that a rational jury should have entertained some reasonable doubt as to Pell's guilt in relation to the alleged offences. Further, the High Court criticised the Appeal Court's actions in viewing recorded witness testimony from the original County Court trial. The High Court stated that:

*the assessment of the credibility of a witness by the jury on the basis of what it has seen and heard of a witness in the context of the trial is within the province of the jury as representative of the community... the appeal court should not seek to duplicate the function of the jury in its assessment of the credibility of the witnesses where that assessment is dependent upon the evaluation of the witnesses in the witness-box.*²³

20 *Pell v The Queen* [2019] VSCA 186, paragraph [5], citing the *Criminal Procedure Act 2009*, Section 276(1)(a),

21 *Pell v The Queen* [2019] VSCA 186, paragraph [14].

22 *Pell v The Queen* [2020] HCA 12, Summary, p 1, <<https://www.hcourt.gov.au/assets/publications/judgment-summaries/2020/hca-12-2020-04-07.pdf>>.

23 *Pell v The Queen* [2020] HCA 12, paragraph [37].

Essentially, an appeal should not become a “trial by an appeal court”.²⁴

Application:

This case study illustrates the role of the High Court as the highest court of appeal in the Australian judiciary — Constitution, Section 73 — and the circumstances in which special leave to appeal may be granted on the basis that the High Court’s consideration of the matter is required in the interests of the administration of justice under Section 35A(b) of the *Judiciary Act 1903*.

The Pell case also demonstrates the High Court’s power to create binding precedent on all lower courts. The clarity of the precedent created was aided by the single judgment delivered by the Full Court of the High Court, who clearly set out the approach that should be taken when a jury verdict is appealed on the grounds that it cannot be supported having regard to the whole of the evidence. The High Court — in fulfilling its accountability function — was critical of

the Court of Appeal viewing recorded witness evidence, and stated that the function of the appeal court should have been only to assess whether a rational jury should have entertained reasonable doubt as to proof of guilt. An assessment of witness credibility is not within the purview of the court of criminal appeal — even if recorded witness evidence is available — as it is to be assumed that the jury assessed the witnesses to be credible and reliable.²⁵

Pell’s successful appeal also demonstrates the power of an individual in relation to the lawmaking process in the courts. The trial and subsequent appeals are likely to have been very costly, with Pell engaging high profile barristers in his defence team. The Catholic Archdiocese of Sydney publicly stated it would not pay Pell’s legal bills²⁶ however it did run ads and an article in its publication *Catholic Weekly* promoting a fund that had been set up to seek donations to fund Pell’s legal costs.²⁷

Case study: Timber Creek

Northern Territory of Australia v Mr. A Griffiths (deceased) and Lorraine Jones on behalf of the Ngaliwurru and Nungali Peoples [2019] HCA 7

Ruling: 13th March 2019

Relevant syllabus points:

- **lawmaking process in parliament and the courts, with reference to the influence of**
 - individuals
 - political parties
 - pressure groups
- **roles and powers of the High Court, including Sections 71, 72, 73, 75 and 76 with reference to at least one common law decision and at least one constitutional decision**
- **The changing experience of a particular group with respect to their political and legal rights in Australia**

Keywords: *appeal, individuals influencing lawmaking, rights of a group*

Northern Territory of Australia v Mr. A Griffiths (deceased) and Lorraine Jones on behalf of the Ngaliwurru and Nungali Peoples [2019] HCA 7

— the Timber Creek Case (2019) — could have far-reaching consequences.

The case was brought by Mr Chris Griffiths and Ms Lorraine Jones, who carried on the legal fight begun by their late fathers. The applicants were acting on behalf of the Ngaliwurru and Nungali peoples. The case is regarded as the most significant for Indigenous groups since the landmark Mabo Case (1992)²⁸ created the common law principle of native title. In the Timber Creek Case (2019), the High Court has expanded the meaning of ‘compensation’ and increased the compensation available for the loss of native title rights.

In 1992 the Mabo native title precedent overruled 19th Century New South Wales Supreme Court decisions that established the legal doctrine of *terra nullius* — meaning ‘land belonging to no-one’. *Terra nullius* provided the legal foundation for the European colonisation of Australia and

25 *Pell v The Queen* [2020] HCA 12, paragraph [39].

26 Blumer, Claire, ‘Cardinal George Pell’s legal bills won’t be paid by Sydney Archdiocese, Archbishop says’, ABC news, 29 June 2017, <<https://www.abc.net.au/news/2017-06-29/george-pells-legal-bills-not-paid-by-sydney-archbishop-says/8665322>>.

27 Davey, Melissa, ‘Sydney archdiocese runs ads seeking donations for Cardinal George Pell’s legal fees’, The guardian, 9 May 2018, <<https://www.theguardian.com/australia-news/2018/may/09/sydney-archdiocese-runs-ads-seeking-donations-for-cardinal-george-pells-legal-fees>>.

28 *Mabo v Queensland No. 2* [1992] HCA 23.

24 *Pell v The Queen* [2020] HCA 12, paragraph [37].

meant Britain did not make legal agreements — such as treaties — with Aboriginal people. Neither did Britain — nor the later Australian colonies or Commonwealth — compensate Indigenous landowners for loss of land, resources, culture and access to places of spiritual significance.

The Mabo ruling had profound legal implications for Australia's system of land title. It led to a legislative response from parliament to settle land law. The Keating Government introduced the *Native Title Act 1993* to clarify the High Court's Mabo judgment. The *Native Title Act* defined where native title existed and how it interacted with other forms of title — such as freehold and leasehold title — created since European arrival. It also set out broad principles for compensating Aboriginal peoples for loss of native title. Parliament passed the *Native Title Act* in 1993, putting Australia's land law back on a firm foundation.

The judiciary — including the High Court — has a statutory interpretation role. The *Native Title Act 1993* included a right to compensation for the impairment or extinguishment of native title. Because the circumstances of each compensation claim would be unique, parliament did not strictly define the words 'loss' or 'compensation' in the Act. Instead, the courts would decide 'loss' and 'compensation' on a case by case basis, setting the scene for the development of common law through the interpretation of the *Native Title Act 1993* that culminated in the Timber Creek Case.

The Timber Creek Case created new common law allowing the calculation of monetary value for the loss of cultural and spiritual values caused by the extinguishment of native title.



■ Figure CSC.5 — Map showing the isolated location of Timber Creek.

Source: Evad37, Map of Buchanan Highway ... and surrounding road network in north-western Australia, 2014, CC BY-SA 3.0, <<https://en.wikipedia.org/w/index.php?curid=42950858>>

The High Court's Timber Creek Case (2019) hearing was an appeal from the Federal Court case of *Griffith v the Northern Territory* (No 3) [2016] FCA900 106. In that 2016 case, Justice Mansfield awarded the Ngaliwurru and Nungali peoples \$3.3 million for the economic, cultural and spiritual losses caused by Northern Territory Government grants of land near the town of Timber Creek. The land grants were for local government purposes and extinguished native title over a 23km² parcel of land in the process.

In his *ratio decidendi*, Justice Mansfield said it was necessary to, "quantify the essentially spiritual relationship which Aboriginal people... have with country and to translate the spiritual or religious hurt into compensation".²⁹ Native title has no market value because it cannot be sold, mortgaged or leased. With no market value to go by, the court had to decide what dollar value equated to cultural or spiritual value. Justice Mansfield decided to apportion \$1.3 million — of the total \$3.3 million previously awarded — as compensation for a cultural and spiritual loss. The \$2 million balance was for the more easily calculated economic loss.

The Northern Territory and Commonwealth Governments appealed Justice Mansfield's decision. They appealed both the amount of compensation, in general and the cultural and spiritual compensation, in particular. The appellants claimed \$1.3 million was excessive and that descendants of persons now deceased and who had suffered the original loss of cultural and spiritual value should not be compensated. The High Court dismissed the appellants' claim and upheld the amount of compensation for cultural and spiritual loss, declaring the amount of \$1.3 million, "was not manifestly excessive and was not inconsistent with acceptable community standards".³⁰ The High Court did reduce the amount of economic compensation, reducing the total to \$2.5 million. However, the High Court upheld the \$1.3 million for the cultural and spiritual loss, and it is this part of the decision which set a precedent.

Application:

The new precedent has two significant legal effects. First, it establishes that cultural and spiritual loss is compensable, both in dollar

29 *Griffiths v Northern Territory of Australia* (No 3) [2016] FCA 900, paragraph [291].

30 *Northern Territory of Australia v Mr. A Griffiths (deceased) and Lorraine Jones on behalf of the Ngaliwurru and Nungali Peoples & Anor; Commonwealth of Australia v Mr. A Griffiths (deceased) and Lorraine Jones on behalf of the Ngaliwurru and Nungali Peoples & Anor; Mr. A. Griffiths (deceased) and Lorraine Jones on behalf of the Ngaliwurru and Nungali Peoples V Northern Territory of Australia & Anor*, [2019] HCA 7, Summary, p 2.

value and to the living descendants of those — now deceased — who suffered the loss in the first place. Second, it means that the cultural

and spiritual connection of Indigenous people to the land is now a priority in Australian law.

Case study: McGlade 1 & 2

McGlade v Native Title Registrar [2017] FCAFC 10 (McGlade 1) & McGlade v South West Aboriginal Land & Sea Council Aboriginal Corporation (No. 2) [2019] FCAFC 238

Relevant syllabus points:

- **Lawmaking process in parliament and the courts, with reference to the influence of**
 - individuals
 - political parties
 - pressure groups
- **The changing experience of a particular group with respect to their political and legal rights in Australia**

Ms Mingli Wanjurri McGlade was the lead applicant of a group of litigants — called the McGlade applicants. These individuals influenced lawmaking in the following ways:

- Through the courts — In *McGlade v Native Title Registrar* [2017] FCAFC 10 they won a Federal Court case — McGlade 1 — which altered the meaning of the *Native Title Act 1993* and set a common law precedent for future interpretations of the *Native Title Act*. Indigenous Land Use Agreements (ILUAs) must be signed by all registered claimants to be registered with the Native Title Tribunal.

- In the parliament — The Turnbull Government, alarmed at the impact of McGlade 1, rushed the *Native Title Amendment (Indigenous Land Use Agreement) Act 2017* through parliament to override McGlade 1 and restore certainty to existing and future ILUA.

A subsequent case — *McGlade v South West Aboriginal Land & Sea Council Aboriginal Corporation (No. 2)* [2019] FCAFC 238 — McGlade 2, did not influence lawmaking, but led to an application for Special Leave to Appeal to the High Court. The result of the appeal — which was granted — may add to the McGlade applicant's record of influencing lawmaking. Students should refer to the High Court website for an update on the appeal.





Accountability of the parliament

Syllabus point:

- **the accountability of the Commonwealth Parliament**
 - **through elections for the House of Representatives and the Senate**
 - **through the House of Representatives and the Senate Privileges Committees**
 - **within the procedures and processes of the parliament**
 - **through judicial review**

Introduction

Democracy requires the accountability of power. The people are sovereign in representative democracies, so elected representatives must be accountable to citizens. Parliamentarians must be answerable for how they exercise popular sovereignty entrusted to them by the people.

Citizens need to be informed about how parliament uses power. Democratic freedoms and rights — such as the implied right to

freedom of political communication and the right to vote — enable citizens to participate in holding parliament to account.

An informed citizenry may use the ballot box to hold parliament to account. The parliament itself contains procedures, processes and bodies that operate to hold it accountable between elections. Courts hold parliament accountable to constitutional law and review its statutes.

Parliament's place in Australia's political and legal system

The Commonwealth Parliament is the only directly elected institution at the national level of government. It is the embodiment of popular sovereignty.

It has four principal roles. It:

- legislates;
- debates;
- represents the people in electorates and states/territories; and
- makes and breaks the executive.

Parliamentary sovereignty — which is the superiority of parliament over other parts of the political and legal system — makes parliament

supreme. The sovereignty of parliament derives from its embodiment of popular sovereignty. Despite the supremacy of parliament, it is limited by:

- the *Commonwealth of Australia Constitution Act 1900*, Australia's written Constitution;
- a federal division of powers; and
- High Court of Australia (High Court) review of parliament's constitutional roles and powers.

Students are encouraged to review Chapter 2 for a full description of the Commonwealth Parliament and its powers.

Accountability through elections

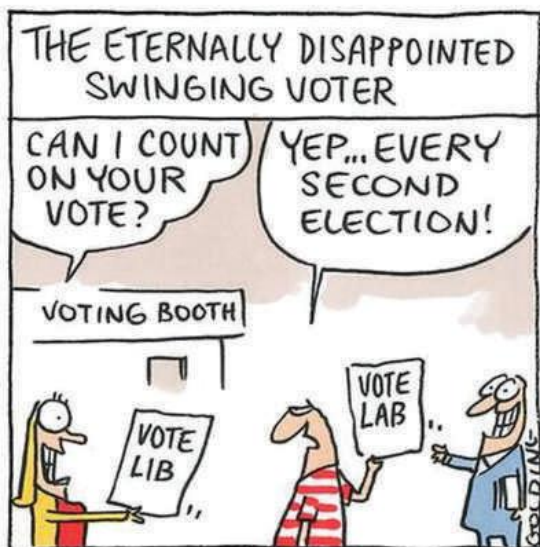
Members of parliament know electors will judge their performance. Such knowledge imposes a form of discipline on parliamentarians, whether they are partisans or Independents. There is a constant pressure on them to listen to their

electorates, make laws which meet people's expectations, debate matters of public concern and do their job in holding the government responsible.

An election is a procedure allowing electors to assess and judge their parliamentarians. Elections permit electors to choose their representatives and directly hold them to account.

Elections confer mandates and provide the means for electors to judge the parliamentarians who claim them. Moreover, elections allow the electorate to hold members of parliament accountable for their personal and political conduct as legislators and representatives.

Elections are the most potent means of accountability in a representative democracy.



■ Figure 11.1 – Elections allow the electorate to hold members of parliament to account for their conduct.

Source: Matt Golding, *The eternally disappointed swinging voter*, 2014, author's permission, <threfingers.com.au>

Criteria	How Australia achieves a 'good' electoral system
Free	The Australian Electoral Commission (AEC) administers the <i>Commonwealth Electoral Act 1918</i> and manages the electoral process. The AEC is independent of parliament. Elected officials have no role in running elections.
Fair	Preferential voting (PV) converts votes into seats in the House of Representatives. The House of Representatives is the house of government and the people. PV expresses the principle of majority rule — a good outcome in the house which forms the government. The PV system uses single member electorates, ensuring a direct link between electors and their representatives — a good outcome for a house of the people. Proportional voting (PR) apportions seats in the Senate according to votes. The Senate is a house of review. PR gives voice to minorities in the upper house and results in a more diverse chamber — a good outcome for a house of review. Compulsory voting ensures large turnouts and firmer mandates, and authentically expresses the will of the majority. Meanwhile, the influence of well-organised minorities — which can be overrepresented if voting is voluntary — is suppressed.
Regular and frequent	Section 28 of the Constitution sets a three-year maximum term for the House of Representatives. There is no minimum term. Section 7 of the Constitution sets a six-year fixed term for the Senate. Senate rotation — where half the senators are elected every three years — ensures continuity and renewal of the parliament at each election.

■ Table 11.1 – Features of the Australian electoral system and how they support the principles of a 'good' electoral system.
Source: Stephen King, 2020

Background information: Australian electoral law and procedures

Electoral processes were studied in detail in Unit 2. Students should refresh their understanding of Australia's electoral and voting systems.

Electoral laws and procedures must be of a high standard if elections are to serve their accountability function. Elections and electoral processes must meet the following criteria to operate effectively:

- elections must be **free** from intimidation or influence;
- electoral systems must allow a **fair** expression of the will of the majority while also allowing the representation of minorities; and
- elections must be **regular** and reasonably **frequent**.

Table 11.1 sets out the ways in which Australian electoral laws and procedures meet the above criteria.

Australian electoral laws and procedures are among the best in the world, but they are not perfect. Undemocratic practices in Senate elections led to the most recent reforms of the Australian electoral system. In March 2016 following 35 hours of debate in the Senate, electoral reform was passed to introduce optional PV for the Senate and to remove group voting tickets (GVTs). Optional preferencing simplified voting and made it easier for electors to express their preferences.

The removal of GVTs prevented micro parties from gaming the electoral system by engineering preference flows. For example, party controlled preferencing had resulted in the 2013 election of Ricky Muir from the Australian Motoring Enthusiasts Party to the Senate with 0.51 per cent of the primary votes. The 2016 reforms stripped parties of their ability to engineer preferences and returned preferencing power to electors.

Australia's electoral system produces free, fair and regular elections that result in majority rule, direct links between electors and their representatives, and an expression of diverse political opinion in the Senate.

The robust nature of Australia's electoral system is fundamental to the accountability of the parliament through elections.



■ Figure 11.2 – Minor party preferencing deals resulted in a balance of power Senate.
Source: Alan Moir, *Take me to your leader*, 2013, author's permission, <moir.com.au>



■ Figure 11.3 – Parliament is accountable for fulfilling its four main roles.

Source: Thennicke, *Parliament House at dusk*, 2017, CC BY-SA 4.0, <<https://commons.wikimedia.org/w/index.php?curid=57886437>>

Electoral accountability of the Commonwealth Parliament

Sections 7 and 24 of the Constitution ensure that each house of parliament is “directly chosen by the people”. Parliament is, therefore, held accountable through elections. However, each house is elected using a different electoral system, and this affects the degree and nature of accountability.

Electoral accountability in theory

Parliament is accountable for what it does. Recall that parliament has four principle roles:

- legislating to make statutes;
- debating issues;
- representing people and states; and
- making and breaking the government.

Parliament is accountable for each of these roles.

In addition to the four principle roles, each house has different functions for which they must be accountable:

- the House of Representatives is the house of the people and the house which forms the government; and
- the Senate is the states’ house and a house of review.

Electoral accountability in practice

Who or what is being held to account during an election? Are electors holding individual members of parliament or political parties to

account? Given Australia’s highly partisan politics, electors are almost certainly evaluating and holding parties — rather than individual parliamentarians — accountable at elections in the majority of the 151 electorates — but not all of them.

The contemporary parliament is an arena of contest between political parties. Electors are inclined to identify with the political parties. When they cast their vote, they tend to consider the performance of parties rather than parliamentarians. However, there are exceptions. For example, Independents in some House of Representatives electorates have a direct personal connection to electors. Some crossbench senators have high public profiles through their skilful use of the Senate balance of power and the media. In these cases, electors know who they are voting for and may make choices based on individuals, rather than parties. See: *Example: Accountability and Independents — Cathy McGowan and Jacqui Lambie*.

Example: Accountability and Independents — Cathy McGowan and Jacqui Lambie

Division of Indi (Vic)

The Victorian electorate of Indi has a recent history of electing Independent members of parliament. Liberal Party minister Sophie Mirabella held the electorate up to 2013. People in the electorate thought that Mirabella was too focused on her ministerial

career and was not adequately representing Indi. In the 2013 election, Cathy McGowan — an Independent — unexpectedly won the electorate. McGowan retained the seat in 2016 and retired in 2019. Indi made history at the 2019 general election when it became the first electorate in Australian history to replace a retiring Independent with another Independent — Dr Helen Haines.

Voices For Indi (V4I) — an electorate based grassroots political organisation — supported Cathy McGowan's election. V4I organised 'Kitchen Table Conversations' throughout the electorate at which more than 400 electors attended and debated the issues of concern to Indi. They selected and nominated Cathy McGowan and supported her campaign. They repeated the process in 2016 and McGowan was re-elected. After McGowan announced her retirement, V4I set about finding a replacement candidate. The task was challenging because a new Independent would not have the strong personal support that McGowan experienced. Nevertheless, V4I's grassroots process selected Dr Helen Haines, who won the electorate in 2019.

Senator Jacqui Lambie (Tas)

Jacqui Lambie is a Tasmanian senator first elected in 2013 when she was Deputy Leader of the Palmer United Party (PUP). She abandoned PUP in 2014 after a bitter disagreement with Clive Palmer and sat as an Independent senator with a balance of power vote. As a result of this move, she has been able to be a strong advocate for Tasmania, a small state where a personal profile is simpler to build. Lambie is ex-Australian Defence Force and used her Senate position to advance the case for better treatment of

defence veterans. Senator Lambie has been at the forefront of several populist issues, including banning the wearing of the burqa. She has been highly critical of Islamic Sharia Law, supportive of increased national security powers, called for the reintroduction of the death penalty and said she was in favour of national service. Senator Lambie frequently appears on the media and has a public profile due to her plain-speaking. She resigned from the 45th Parliament (2016–2019) after discovering she held dual citizenship, which put her in breach of the eligibility criteria of Section 44 of the Constitution. She renounced her British citizenship and was re-elected to the Senate in 2019.

Jacqui Lambie is an example of an Independent who attracts a personal vote sufficient to win a Senate quota. Lambie's outspokenness, populist causes, concern for defence veterans — as well as her wide personal profile in Australia's smallest state — means Tasmanian electors hold her to account personally and choose her in preference to partisan candidates.

“Media provides a constant stream of information about members, especially if there is any hint of personal or political failing, wrongdoing or corruption”

Electoral accountability of the House of Representatives

The House of Representatives is the lower house of the Commonwealth Parliament. It is the house of the people and the house of government.

Members of the House of Representatives (MPs) are elected for three-year terms using the PV system, first adopted in 1919. There are two critical features of the PV system from the perspective of accountability. PV is:

- a **single member electorate** system; and
- a **majoritarian** system.

Single member electorates

In electoral systems based on single member electorates, voters choose one representative for their **electoral division**. There are 151 electoral divisions for the House of Representatives and, therefore, 151 MPs.



■ Figure 11.4 – In winning the seat of Indi in 2013, Independent Cathy McGowan held Liberal Party member Sophie Mirabella to account. Source: <https://cathymcgowan.com.au/> used with permission of Cathy McGowan.



■ Figure 11.5 – Each member sitting in the House of Representatives can be held to account by their electorate.¹
https://www.aec.gov.au/Elections/federal_elections/2019/files/maps/2019-aec-boundary-map.pdf

Single member systems such as PV offer a very high standard of accountability because voters can readily identify their local MP and can get to know them. Because there is only one representative, there is no doubt who to hold to account if a voter is dissatisfied with legislation, debate or representation. A local member's position on issues, how they voted on bills, and their record of speeches in the House of Representatives is readily available in the public space. Media provides a constant stream of information about members, especially if there is any hint of personal or political failing, wrongdoing or corruption.

Members of the House of Representatives directly represent the population of their electorate. Their electorate can evaluate and assess their performance continually through the media and once every three years through the ballot box. If electors feel unrepresented by their local member, they may hold them accountable by voting for someone else. Tony Abbott is an example of an MP whose electorate felt his political views were increasingly at odds with their own. See: *Example: Tony Abbott MP held accountable by Warringah*.

Example: Tony Abbott MP held accountable by Warringah

Tony Abbott MP served as the Liberal Member for Warringah (NSW) from 1994 to 2019. He held ministerial portfolios in the Howard Government, was the Leader of the House, was perhaps the most successful Leader of the Opposition in post-War Australia during most of the Rudd and Gillard years, and became the 28th Prime Minister of Australia in 2013. Abbott is an avowed constitutional monarchist and staunchly opposed the 1999 referendum proposal that Australia should become a republic. As the Howard Government Health Minister in 2006, he opposed access to the abortion drug RU486 — which led to parliament stripping health ministers of their power to approve drugs. Abbott resisted any proposals to legalise same-sex marriage and was a consistent climate change denier throughout his career. He was a very successful representative and a formidable politician who had a distinguished political career.

Abbott is a committed Catholic who entered St Patrick's Seminary intending to become a priest. He was also an accomplished boxer and a vehement anti-Communist. He abandoned the seminary and became a journalist, writing for conservative media.

¹ Note: In the 2019 elections there were 151 electoral divisions.

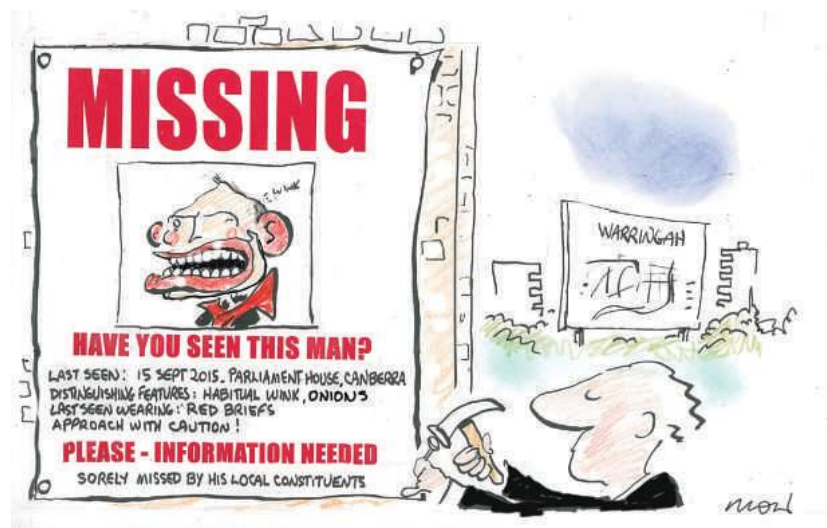
He won the seat of Warringah in 1994 in a by-election. Warringah is a wealthy north Sydney coastal electorate held by the Liberal Party or its predecessors since 1922. It has always been economically conservative, but has become more socially progressive over time. It has always been hostile to the Australian Labor Party (ALP) and the Greens.

As Prime Minister, Abbott demonstrated a presidential style of leadership, making decisions without consulting most of his Cabinet. He and Treasurer Joe Hockey introduced an austere budget in 2014 which was widely unpopular because of cuts to public services and increased charges to taxpayers. Many declared Abbott was out of touch with Australians. He scrapped Rudd/Gillard era carbon and mining taxes, implemented a stringent border protection policy involving long-term offshore detention of asylum seekers and refugees, and announced a Royal Commission into unions. Abbott opposed the expansion of the Renewable Energy Target. He also controversially reintroduced the knights and dames honours into the Australian Honours system. These honours had been discontinued in 1986 under the Hawke Labor Government.

The Cabinet and Liberal Party grew increasingly disenchanted with Abbott. There was a failed spill motion to remove him from the leadership in February 2015. A second spill motion — called by Malcolm Turnbull — successfully ended Abbott's leadership of the party and the country.

As a backbencher in the Turnbull Government (2016–2018), Abbott became an increasingly vocal opponent of Turnbull's policy direction and leadership, especially on climate and energy policy. He was an influential member of the Liberal Party's conservative right wing, advocating against the more progressive stance of the Turnbull led party and government. He was a backbencher when Scott Morrison replaced Turnbull as Prime Minister.

The electorate of Warringah has become more socially progressive over recent years while remaining solidly liberal in outlook. The demographics of the electorate have



■ Figure 11.6 – Tony Abbott MP was punished by his electorate of Warringah for not representing their interests in the parliament.

Source: Alan Moir, *Tony missing in action*, 2015, author's permission, <www.moir.com.au>

also shifted, with more professional people believing in climate science and becoming increasingly ambivalent about the Coalition's asylum seeker policies. Warringah voted 75 per cent YES in the 2017 marriage equality postal vote — Abbott had campaigned vigorously for a NO vote.

By 2019, Abbott no longer represented the views and aspirations of many of the electors of Warringah. They judged him to be out of touch and out of date.

An electorate focused, non-partisan political organisation — called Voices of Warringah (VOW) — formed to try to elect a more representative candidate. It was modelled on V4I. See: *Example: Accountability and Independents* — Cathy McGowan and Jacqui Lambie. Grassroots Kitchen Table Conversations and community forums took place across Warringah to oust Abbott. Zali Steggall was the candidate supported by VOW in the 2019 election.

With the election of Zali Steggall, the electors of Warringah held Abbott to account for his failure to adapt to the changing views of the electorate. They voted for a liberal leaning Independent with progressive views on climate change and marriage equality. They ousted a profoundly conservative, religious climate sceptic who no longer stood for what they believed.

Example: Fraser Anning and accountability of senators

As a member of Pauline Hanson's One Nation Party (PHON), Fraser Anning became a senator for Queensland in November 2017 when he replaced the disqualified PHON



■ Figure 11.7 – Former Queensland Senator Fraser Anning was held to account for his actions when he lost his seat in the 2019 election. Source: The Unshackled, *Fraser Anning on the Unshackled Waves*, Ep. 193, 2018, CC BY 3.0, <<https://commons.wikimedia.org/w/index.php?curid=77379333>>

Senator Malcolm Roberts under Section 44 of the Constitution.

A dispute between his staff and Pauline Hanson led him to abandon PHON and to sit as an Independent senator until June 2018 when he joined Katter's Australian Party (KAP), becoming its only senator.

Anning made many controversial statements in the Senate and media expressing radical views on race, Islam and immigration. He was expelled from KAP because of his views and sat once again as an Independent senator.

Investigative journalists found several of Anning's advisors had close links to white supremacist groups such as True Blue Crew.

He was condemned by Prime Minister Scott Morrison after twice punching 17-year old protester, William Connelly, in the face. Connelly had broken an egg on Anning's head during a television appearance. Anning's supporters subdued Connelly using force. Police cautioned Connelly and charged one of Anning's supporters with assault.

Anning formed his own political party — the Fraser Anning Conservative National Party — to contest the 2019 general election. Anning went to the site of the 2005 Cronulla race riots to announce the candidates his self-named political party would be running in the election.

However, he failed in his bid for re-election, and none of his party candidates were elected either. Anning's views, conduct and methods alienated Queensland electors who used the ballot box to hold him to account for what they believed to be his misrepresentation of their state. For other examples of the power of the ballot box, see the *Case studies* section of this book.

Majoritarian electoral systems

All single member electoral systems — such as PV — amplify a small majority of votes into a substantial majority of seats in parliament — a phenomenon called the **winner's bonus**. A winner's bonus is a feature of all House of Representatives elections. It usually creates strong majorities in the House of Representatives, which helps form strong governments. These governments tend to be stable over time, but not always so. The 2010 election produced the minority Gillard Government, and the 2016 election saw the Turnbull Government returned with a majority of a single seat. The

“Elections based on multi-member electorates fail to achieve strong accountability.”

Morrison Government was forced into minority government in the months leading to the 2019 election and later re-elected with a slender two seat majority. Notwithstanding these recent results, the tendency towards stability is a good thing for the lower house.

Despite the benefits of large majorities and stable governments, majoritarian electoral systems can distort the votes of electors by skewing the results in favour of the winning party. This fact may misrepresent the true voting intentions of electors seeking to hold MPs to account.

Electoral accountability of the Senate

The Senate is the upper house of the Commonwealth Parliament. As the upper



■ Figure 11.8 – Former South Australian Senator Nick Xenophon founded the NXT. Source: Xenoworker91, *Nick Xenophon speaks to the media at parliament house*, 2015, CC BY-SA 4.0, <<https://commons.wikimedia.org/w/index.php?curid=47163059>>

chamber in a bicameral system, it functions as a house of review. The Senate also has a constitutional role as a federal chamber — making it a house of the states.

Background information: Senate accountability as a states' house

Despite its theoretical role in Australian federalism, the Senate has never acted as a states' house, and it is rarely accountable for this function. The exception in recent elections has been the election of Centre Alliance (CA) senators. CA is a state based party seeking to represent South Australia in the Senate. It grew out of the strong personal vote of former senator Nick Xenophon after he formed the Nick Xenophon Team (NXT). After Xenophon resigned from the Senate and moved to state politics, NXT re-branded itself as the Centre Alliance. South Australian electors continued to hold the Senate accountable for its representation of their state by electing CA senators in 2019.

Occasionally, senators such as Lambie from Tasmania have strong state based support and act as advocates for their state rather than partisans, but this is the exception rather than the rule.

The Senate is a partisan house like the House of Representatives, and electors in states rarely consider their senators as state representatives. They do not think of them

much at all — instead, they think of parties when they cast their vote. Most electors choose the more straightforward above the line option on the Senate ballot paper, which means they vote for parties, not individual senators.

Senators are elected for six-year terms using the PR system, first adopted in 1949. In a general election, only half of the senators are up for election. The following two features of the Senate voting system are essential from an accountability perspective:

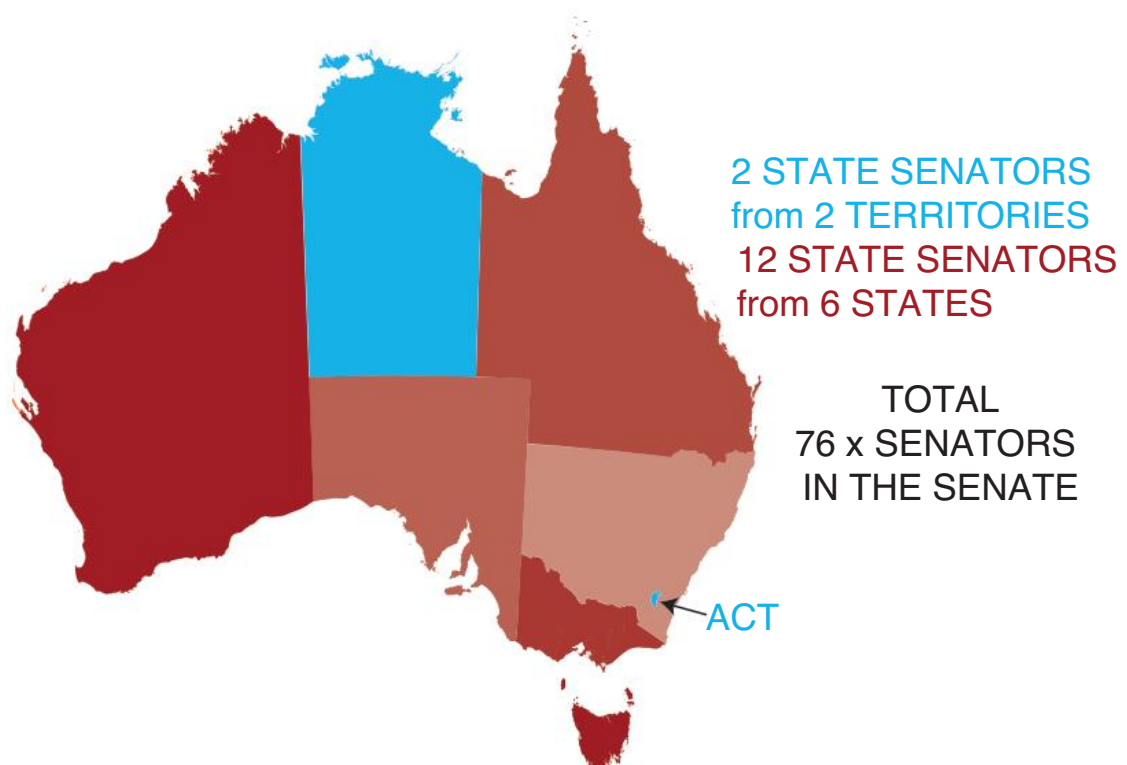
- PR is a **multi-member electorate** system; and
- as the federal chamber, **it equally represents** states regardless of their population size.

Multi-member electorates

PR systems require multiple members per electorate because it is the only way to apportion representation to reflect the proportion of electorate votes.

Elections based on multi-member electorates fail to achieve strong accountability. There are few satisfactory ways to avoid this deficiency in PR systems. The problem is two-fold:

- there are multiple members of parliament for electors to hold to account in their electorate; and
- it is difficult to vote for individual members in PR systems.



■ Figure 11.9 – The use of multi-member electorates in the Senate makes it challenging for voters to hold Senators to account.
Source: Jacqueline Holland, Direction Design 2020

Who is accountable when there is more than a single member? In Senate elections, electors vote in state wide electorates represented by 12 senators each.

The complexity of PR systems further weakens accountability. The Senate is elected using the single transferrable vote PR system (STV PR). The ballot paper can be up to a metre long and have almost 100 Senate candidates listed. Voting for individual senators using this method is cumbersome, exhausting and prone to error. Electors can choose a more straightforward method, but only at the cost of holding individual senate candidates to account. The system creates a negative incentive for holding individual senators to account. See: *Background information: Senate elections and accountability*.

Background information: Senate elections and accountability

There are two ways to vote in the STV PR. Both have problems in relation to accountability.

1. Following the 2016 Senate electoral reforms, an elector is able to vote **above the line** by placing the numbers 1 to 6 in order of their *party* preference. This system is an improvement on the pre-2016 system in which the parties controlled preference distributions. Since the reforms, electors control which party gets their preferences. However, even with the reforms, electors cannot choose which candidate gets elected — the party they vote for chooses the individual senators by listing them on a group ticket. The candidates listed at the top of a party's group ticket are the most likely to get elected. Well over 90 per cent of electors vote above the line and surrender the choice of individual candidates to parties.
2. An elector may vote **below the line** by filling in at least 12 of the boxes in order of preference for *individual* candidates. This method is time consuming and prone to error. However, with the 2016 reforms, electors no longer have to number every box below the line. Electors choosing to vote below the line retain control of their vote by preferencing candidates, not parties. It enables senate candidates to use a below the line electoral strategy by encouraging 14 per cent or more of a state's electors to choose them individually using the simplified below the line method. Lisa Singh (ALP, Tas) was the first person elected to the Senate using a dedicated below the line electoral strategy. Since

■ Figure 11.10 – Former Tasmanian Senator Lisa Singh waged a successful below the line campaign prior to the 2016 double dissolution election. Source: Unknown author, Former Senator Lisa Singh, 2015, CC BY-SA 3.0, <<https://commons.wikimedia.org/w/index.php?curid=84203002>>



her victory in 2016, other candidates have adopted similar approaches. See: *Example: Lisa Singh and the below the line electoral strategy*.

3. The infrequency with which state senators face re-election — once every six years — reduces the capacity of electors to respond to the (mis)conduct of a particular senator.

Example: Lisa Singh and the below the line electoral strategy

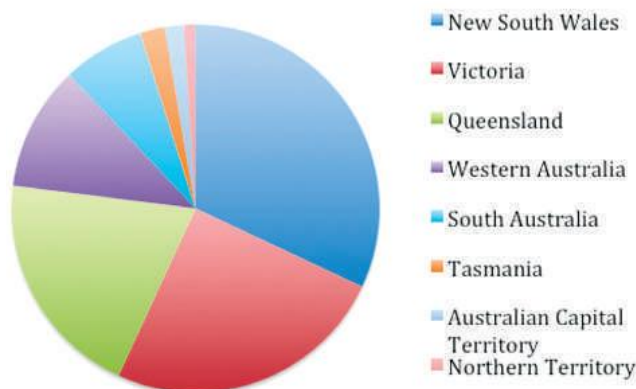
Lisa Singh was a sitting ALP senator for Tasmania, but was demoted by her party to an unwinnable sixth position on the ALP group ticket for the 2016 election. In response, she mounted a campaign to encourage electors to choose her — not her party — by voting below the line. Tasmanian electors responded by giving their preferences to her rather than the ALP, re-electing her to the Senate.

Senator Singh had made history. Since the introduction of above the line voting in 1984, no senator had been elected using below the line voting.² Senator Singh's election showed that electors can exercise greater choice and reduce party control of Senate voting outcomes. In terms of accountability, it means that individual senators are now more directly accountable to electors.

Equal state representation

Section 7 of the Constitution requires the Senate to represent the states equally. For a federal chamber, this is appropriate. However, equal representation of states — not people — contravenes a principle of representation — that is, votes should have equal value — which is often described as 'one vote, one value'.

2 Raue, Ben, 'How Lisa Singh and Richard Colbeck used personal appeal against party rankings', *The Guardian*, 9 July 2016, <<https://www.theguardian.com/australia-news/2016/jul/09/labor-lisa-singh-liberal-richard-colbeck-senate-voting-below-the-line-election-tasmania>>.



■ Figure 11.11 – State and territory populations as proportions of the Australian population (2020).³
Source: Stephen King



■ Figure 11.12 – State and territory representation in the Senate.
Source: Stephen King⁴

Significant distortion of this principle is called ‘malapportionment’.

Figures 11.11 and 11.12 indicate the malapportionment of voting power for state electors of the upper house. Table 11.2 illustrates the approximate 2020 Senate quotas or number of votes required for a senator to be elected.

New South Wales (NSW) and Victoria (Vic) combined contain approximately 57 per cent of Australia’s electors. However, these two most populous states together have about 31.5 per cent of Senate seats. NSW electors have about 15 times less voting power than Tasmanian electors, made worse over time because NSW’s population grows at a faster rate than Tasmania’s. There are significant implications for accountability brought about by the high levels of malapportionment in the Senate.

Retaining **malapportionment** is not good electoral practice for several reasons, including the capacity to hold senators accountable. Tasmanian senators are less accountable than NSW senators because they are answerable to far fewer electors. The same applies to all small-

“New South Wales (NSW) and Victoria (Vic) combined contain approximately 57 per cent of Australia’s electors. However, these two most populous states together have about 31.5 per cent of Senate seats. NSW electors have about 15 times less voting power than Tasmanian electors, made worse over time because NSW’s population grows at a faster rate than Tasmania’s.”

State	Enrolled electors	Senate quota to elect one senator
New South Wales	5,316,929	760,321
Victoria	4,250,574	607,832
Queensland	3,330,589	476,274
Western Australia	1,682,081	240,538
South Australia	1,223,839	175,009
Tasmania	389,310	55,671
Australian Capital Territory	301,178	43,068
Northern Territory	140,780	20,132

■ Table 11.2 – Numbers of electors in each Australian jurisdiction and the number of votes per Senate quota (July 2020).⁵
Source: Stephen King, 2020

state senators, but to a lesser degree because it depends on the extent of the malapportionment.

Small-state senators often have significant influence over lawmaking in the parliament. They can have disproportionate power over Commonwealth legislation, especially if they occupy the crossbench and control the Senate balance of power. They can do so without being accountable to the vast majority of the Australian electorate because they are beyond the reach of electors living in other states.

3 Based on data from Population Australia, <www.population.net.au>

4 Based on information from the Parliament of Australia, <https://www.aph.gov.au/About_Parliament/Senate>.

5 Australian Electoral Commission, Size of the electoral roll and enrolment rate 2020, <https://www.aec.gov.au/enrolling_to_vote/enrolment_stats/national/2020.htm>. Senate quota is based on 14.3 per cent of each state’s enrolled electors.

Example: Small-state senators with disproportionate influence over Commonwealth legislation

Tasmanian Senator Brian Harradine (1975–2005) exercised legislative power with limited accountability. ALP Prime Minister Paul Keating (1991–1996) famously described the Senate as ‘unrepresentative swill’. He objected to the federal nature of the Senate. At the time there were 15 people in NSW for every Tasmanian yet both states had the same number of senators.

A recent example from the 45th Parliament (2016–2019) occurred when South Australian Independent Senator Nick Xenophon’s party — NXT — controlled three seats in the Senate and one in the House of Representatives following the 2016 federal election. NXT blocked the passage of the bill that would have allowed a same-sex marriage plebiscite to be conducted.

An example from the 46th Parliament — elected in 2019 — is that of Tasmanian Senator Jacqui Lambie. Senator Lambie held the balance of power to decide the fate of the Morrison Government’s *Migration Amendment (Repairing Medical Transfers) Bill 2019* — known as the Medevac Repeal Bill. Lambie demanded the Morrison Government agree to a secret condition before she agreed to support the bill in the Senate. The bill passed. However, Australian electors do not know the condition Lambie imposed. There are two serious accountability issues concerning the Medevac Repeal Bill:

- Senator Lambie cannot be held accountable for the impact of a secret deal; and
- the 98 per cent of Australian electors who do not live in Tasmania cannot hold her accountable.

Marginal seat campaigns

Refer to: *Example: Tony Abbott held accountable by Warringah*

All 151 House of Representative seats are contested at an election at least every three years. Therefore, MPs are quite frequently accountable via elections.

MPs hold their seats by varying margins. A margin is the percentage change in the vote needed to defeat the sitting MP. The percentage change in the vote is the **swing** needed for the seat to change hands.

Electorates can be safe, fairly safe or marginal depending on the size of the swing needed to

Seat classification	Sitting member elected by:	Comment
Marginal	< 56 per cent of the vote	Sitting MP at risk of defeat
Fairly safe	56 to 60 per cent of the vote	Sitting MP most likely to retain electorate
Safe	> 60 per cent of the vote	Sitting MP unlikely to lose

■ Table 11.3 – AEC classification of seats by likelihood the sitting MPs will lose the electorate.
Source: Stephen King, 2020

unseat the sitting MP. Table 11.3 shows how the AEC⁶ classifies electorates.

An electorate’s representative has a public record on issues, performance, and personal and political conduct. Any of these may provide reasons to target them at an election. Targeting a sitting MP at an election is likely to be more successful if the electorate is marginal.

Other political parties may target MPs in marginal seats. Pressure groups or well-organised local groups — such as V4I and VOW — may do so as well. See: *Example: Tony Abbott held accountable by Warringah*.

During an election campaign, the Prime Minister and Leader of the Opposition will spend more time — and their parties will spend more resources — in marginal electorates. They visit marginal electorates to defend their at risk MPs and campaign against their opponent’s MPs. Marginal electorates are critical during elections because they determine who will govern.

Sitting member last campaigns

One electoral campaign strategy to unseat a sitting member is to ask electors to place the sitting member last on their ballot paper. It has been used by politically active groups or micro-parties to maximise the electoral accountability of MPs they hold responsible for laws or policies they oppose.

On election day, at polling places a political party using the strategy will issue **how to vote cards** that preference the sitting MP last.

Sitting member last campaigns can have a devastating effect on sitting MPs. In contemporary elections, many candidates rely on preference flows from eliminated candidates to reach the absolute majority needed to win. By directing preferences away from them, a sitting member last campaign can dramatically undermine a sitting MP’s chances of re-election.

6 Australian Electoral Commission, Glossary, 2019, <<http://www.aec.gov.au/footer/glossary.htm>>.

Example: Andrew Nikolic — Putting the sitting member last

The effectiveness of the sitting member last strategy was illustrated in the 2016 election where sitting MP for Bass (Tas), Andrew Nikolic, lost his seat to the ALP's Ross Hart. The progressive pressure group *GetUp!* had sent 90 supporters to hand out 'how to vote cards' advising Bass electors to put Nikolic last on their ballot paper. This strategy had great effect.

Electoral accountability — Differences between the two houses of parliament

Single member electoral systems sharpen the accountability focus on individual MPs.

Individual MPs can be singled out electorally. Marginal seat and sitting member last strategies both work because of this sharp focus. Even MPs in fairly safe and very safe electorates are more accountable than senators because of the PV system.

The Senate's multi-member system does not easily enable a sharp electoral focus. Unless voters choose to number at least twelve of the candidates below the line — and know how to do so strategically — they are unable to direct their vote for or against individual senators. However, Singh's below the line campaign demonstrated that the electoral reforms of 2016 may make it possible to hold senators in small states accountable in the future.

Accountability through privileges and interests committees

There are three special standing committees whose focus is the accountability of the members of parliament. They are the:

- Standing Committee of Privileges and Members' Interests — House of Representatives;
- Senate Standing Committee of Privileges; and
- Senate Standing Committee of Senators' Interests.

“Privileges committees are composed of members of parliament. Parliament is a political arena, not a judicial body. Therefore, its privileges committees lack impartiality and independence”

Parliamentary privilege

Members of parliament are exempt from judicial accountability — that is, criminal or civil liability — for speeches made in parliament or comments made in committees. This exemption is one aspect of what is known as parliamentary privilege and is an enhanced form of freedom of speech essential for parliament to perform its functions.⁷

Parliamentary privilege has a legitimate purpose; it is not a license to say anything. Accountability for comments made under privilege is essential to prevent its abuse. Because the courts cannot sanction MPs or senators who abuse privilege, the parliament holds them to account.

Members of parliament may behave in unparliamentary ways. Poor conduct by members brings the parliament into disrepute, and those accused of unparliamentary conduct may be referred to privileges committees for discipline.

Privileges committees act as tribunals within parliament and may sanction a member found to have breached privilege. Privileges committees are not courts and cannot exercise judicial power. However, they can reprimand and discipline members. Parliament could once expel members. However, this is no longer the case. See: *Case study: Privileges committees holding MPs to account*.

Privileges committees are composed of members of parliament. Parliament is a political arena, not a judicial body. Therefore, its privileges committees lack impartiality and independence, and often their proceedings are contaminated by political interests. Breaches of privilege are newsworthy and reported by media, heightening the stakes in the party political contest. See the *Case studies* section of this book for examples.

Members' and senators' interests

Each house has an interests committee. The House of Representatives assigns the accountability of MPs' interests and privileges to one committee. The Senate has two separate committees — one for privileges and one for senators' interests.

⁷ Parliamentary privilege involves two aspects of parliamentary law: the privileges and immunities of parliament, and the powers of parliament to protect the integrity of their processes and procedures. See: Parliament of Australia, House of Representatives, *Infosheet 5 — Parliamentary privilege*, March 2020, <https://www.aph.gov.au/About_Parliament/House_of_Representatives/Powers_practice_and_procedure/00_-_Infosheets/Infosheet_5_-_Parliamentary_privilege>.

The purpose of interests committees is to make members' financial interests transparent. Members of parliament are required to declare shareholdings, property, investments and other financial interests. The interests committees of each house register these declarations and ensure they are up to date. The committees can investigate any member whose private interests may conflict with their public duties. A clash of private and public interests is called a **conflict of interest** and can be a cause of political corruption.

Conflicts of interest undermine good government. Interests committees hold members of parliament to account to prevent this threat to good government.

Accountability through parliamentary procedures and processes

Section 50 of the Constitution and Westminster tradition are the sources of the Commonwealth Parliament's procedures and processes.

Section 50 of the Constitution gives each house of parliament the power to make its own rules and orders in relation to:

- “i. the mode in which its powers ... may be exercised and upheld; [and]
 - ii. the order and conduct of its business and proceedings ...”.
- Parliamentary procedures relate to the ways in which each house arranges the “order and conduct of its business and proceedings”. Procedures are like rules.
 - Parliament legislates, represents, scrutinises, reviews, inquires and debates. Parliamentary processes relate to the actions or steps taken to achieve these ends. They are the ways in which parliament's powers are “exercised and upheld”.

Each house codifies its procedures in its Standing Orders. Processes are applied by members of parliament in the two houses — according to each house's role and procedures. Many processes operate through the many parliamentary committees formed in each house and jointly by both.

Procedures formalise processes and ensure they occur smoothly.

Table 11.4 provides examples of parliamentary procedures and processes.

Codes of conduct

Privileges committees develop codes of conduct for the members of their respective chambers. Codes of conduct set standards for how members of parliament should act. The committees may investigate and sanction members for contempt or breach of the codes of conduct.

“Procedures formalise processes”

Standing Orders

Standing Orders are the rules governing parliament. The **Standing Orders** govern procedures and processes such as orders of business, proposing and voting on motions, and addressing the Speaker of the House or President of the Senate.⁸ They spell out the procedures and processes for each chamber and its committees.

Ways parliament operates	Examples
Procedures	• appointing the Speaker of the House of Representatives and President of the Senate • rules of debate • motions • divisions • petitions • notice paper or daily program • Hansard transcripts of proceedings • opening and closing a sitting day • organisation of parliamentary business
Processes	• scrutiny of bills • scrutiny of government • legislating⁸ • review of bills • representation via public input into legislation • inquiry into bills and issues of public concern • debate

■ Table 11.4 – Examples of parliamentary procedures and processes.

Source: Stephen King, 2020

⁸ Students studied the legislative process in Unit 1. A revision of the statutory process with a focus on how the process ensures the accountability of lawmaking is encouraged.

The Speaker and the President

The Speaker of the House of Representatives and the President of the Senate are the presiding officers of their respective house; they uphold the Standing Orders in their chamber. Both presiding officers are members of parliament drawn from their respective house. Impartiality is expected — in theory. They act as referees, ensuring adherence to the Standing Orders. See: *Background information: Conduct of the Speaker and the President*.

Parliamentarians are bound by the Standing Orders of their house and subject to the interpretations and rules of the Speaker or the President. They must observe procedures and processes during a session of parliament.

Heated exchanges can occur during parliamentary sittings. Arguments can erupt, and the behaviour of parliamentarians may derail the processes of parliament. By drawing attention to a 'point of order', any member may refer these matters to the Speaker or the President. Points of order require the presiding officer to interpret Standing Orders and restore order so that normal processes can resume.

“*Parliamentarians are bound by the Standing Orders of their house and subject to the interpretations and rules of the Speaker or the President. They must observe procedures and processes during a session of parliament.*”

Each week or fortnight, the House of Representatives publishes a **Procedural Digest**. The Digest contains the rulings of the Speaker and any new precedents or unusual situations that arose in the period covered by the digest. The Senate has an equivalent process for informing senators of the President's interpretations of Senate Standing Orders. Members of parliament are expected to read the Procedural Digest and stay informed about the rules.

The Speaker and the President may caution and warn MPs or senators respectively about their behaviour during a debate, question time or other procedures and processes. If the parliamentarians persist in contempt of the Standing Orders or the rulings of their presiding officer, then they may be ordered from the



■ Figure 11.13 – Speaker of the House of Representatives Tony Smith MP is responsible for upholding the Standing Orders of that house. Source: Argentine Senate, *Tony Smith (Speaker of the Australian House of Representatives)*, 2017, Public Domain, <[https://en.wikipedia.org/wiki/Tony_Smith_\(Victorian_politician\)#/media/File:Tony_Smith_March_2017_cropped.jpg](https://en.wikipedia.org/wiki/Tony_Smith_(Victorian_politician)#/media/File:Tony_Smith_March_2017_cropped.jpg)>

chamber for a period of time. The Speaker and the President have discretion as to how long a member or senator is excluded.

Background information: Conduct of the Speaker and the President

Speakers and Presidents are members of parliament who perform a unique role. They do not take part in the ordinary business of parliament — they referee it. They do not vote on motions except to break deadlocks. Ideally, they do not act as partisans when in the role.

The Speaker in Australia is a political appointment. The House of Representatives appoints the Speaker by a vote, which a majority government will always win. In practice, appointing the Speaker is usually a prerogative of the Prime Minister. An exception is when there is a minority government. They cannot afford the loss of a vote from the floor of the house and will often accept an Independent or other non-government MP as Speaker. For example, the minority Gillard Government (2010–2013) nominated ex-Liberal Peter Slipper MP as the Speaker.

Australian Speakers are open to partisanship and bias in how they do their job, including how they apply the Standing Orders and discipline members.

The individual character of the Speaker is a significant factor in how they do the job of presiding over the House of Representatives. Many argue that partisan bias was a feature of the speakership of Bronwyn Bishop MP during 2013–2015 when she ejected approximately 400 MPs from the house under Standing Order 94A; of these, only seven were from the government side. Students should refer to Chapter 5 to refresh their understanding of the impartiality of the Speaker and also see *the Case study: The role of the Speaker*.

The Senate is a more independent chamber, usually free of dominance by the executive government. The Senate appoints its President by a vote. However, a President is a consensus appointment because Senate majorities are not assured and must be manufactured in each instance. Consequently, Presidents of the Senate tend to be more impartial and less open to partisanship than the Speaker of the House.

The Speaker of the House of Representatives in the 46th Parliament is Tony Smith MP (Liberal, Casey). Refer to:

- Chapter 5 *Background information: Recent Speakers and the impartiality of the Speaker*

Order of business

Agendas — in the form of chamber documents — govern each sitting day through scheduling parliament’s business. Agenda setting helps keep parliament accountable by ensuring the allocation of time and by giving members opportunities to debate and move motions.

The Senate sets its daily agenda by ‘the Red’ — its Order of Business — and the Notice Paper, and these are published every day. Senators who wish to participate in a debate, move motions or take part in other formal proceedings must have their name entered onto the Notice Paper. The President runs the Senate according to the Red and the Notice Paper.



■ Figure 11.14 – The current President of the Australian Senate is Senator Scott Ryan. Source: Senado Federal, *President of the Australian Senate*, President Scott Ryan, 2018, CC BY 2.0, <<https://commons.wikimedia.org/w/index.php?curid=71761893>>

The House of Representatives has an Order of Business and Notice Paper equivalent to that of the Senate. The Speaker runs the business of the house by these agendas.

Orders of Business are procedures that keep parliament accountable by ensuring time is allocated to each of its processes — legislating, representing, debating and holding the government responsible.

Evaluating the accountability of parliament through procedures and processes

Standing Orders

Standing Orders ensure parliament can function. They specify the procedures and processes for how, for example, a bill passes through the House of Representatives, Senate Estimates committees work, votes on motions are held, or divisions are called. They empower the Speaker and the President to uphold rules and maintain order in their respective house.

However, Standing Orders may be suspended or amended by a majority vote. Governments can manipulate the Standing Orders of the House of Representatives, which it dominates. This is equivalent to one side in a sporting match suspending the rules for its benefit. The Senate Standing Orders are less influenced by executive power because no party usually has a majority in its own right.

Table 11.5 summarises the strengths and weaknesses of procedures and processes as ways to hold parliament to account.

Note that students studied the legislative process in Unit 1 and are encouraged to revise their understanding of the stages in the process of making statutes with a focus on how the process ensures accountability in relation to lawmaking.

Background information: Hansard

Hansard is a record of debates in both houses of parliament and committee proceedings. It provides accurate records of debate, motions and divisions. Hansards are published online and available for all to see. In this way, Hansard provides an element of accountability to the parliament. Journalists and electors can read how members of parliament vote and what they say during debates.

Procedures and processes	Strengths	Weaknesses
Standing Orders	Provide rules governing the operation of each house	May be manipulated by the government
Speaker and President	Uphold Standing Orders and maintain order	May act in a partisan way
Legislative process	Provides opportunities for representative lawmaking and scrutiny	Government may gag and guillotine legislative debate and vote through government bills with little debate or scrutiny
Debate	Parliamentary privilege allows for the debate of issues of importance	Government can reduce debate opportunities by manipulation of Standing Orders
Holding the government responsible to the house	Members can use question time and the conventions of ministerial responsibility to achieve their responsibility function	Dominance of the executive undermines the responsibility procedures and processes

■ Table 11.5 – Examples of the strengths and weaknesses of parliamentary procedures and processes.
Source: Stephen King, 2020



■ Figure 11.15 – Hansard transcripts are now available for the public to view online.
Source: Commonwealth of Australia, Parliamentary debates, House of Representatives, 2020, *Official Hansard Monday 15th June 2020*, 2020, Public Domain, <https://parlinfo.aph.gov.au/parlInfo/download/chamber/hansardr/16283df1-dcd4-4919-bcd2-4f21c8ca3c60/toc_pdf/House%20of%20Representatives_2020_06_15_7776_Official.pdf;fileType=application%2Fpdf>

Parliamentary committees

The committee process and the accountability of parliament

Parliamentary committees are the primary means by which parliament's powers are exercised.

A parliamentary committee is a small, specialised subset of private members of parliament. Each committee has a defined membership and a specific area of parliament's work on which to focus.

There are 227 members of parliament — 151 MPs + 76 senators. Parliament is a small community of people with an immense task. Parliamentarians must:

- legislate hundreds of bills every year;
- debate innumerable issues;
- represent over 105,000 electors in 151 electorates ; and
- hold the government responsible for the spending of billions of dollars, thousands of instruments of delegated legislation and hundreds of policies.

“The principles of ‘division of labour’ and ‘specialisation’ allow parliament to function efficiently and get through its work”

Under Standing Order 29, parliament sits formally for about one-fifth of the year — on average about 67 days spread over 20 weeks for an annual total of 627 hours per year.⁹ Sitting periods vary from year to year. The House of Representatives tends to sit a little more often than the Senate. The Senate sits for around 60 days per year.

The principles of ‘division of labour’ and ‘specialisation’ allow parliament to function efficiently and get through its work. Parliament can multi-task by:

- distributing its workload — that is, dividing the labour; and
- apportioning work to specialised subsets of its members — that is, specialisation.

9 Parliament of Australia, ‘Sitting and non-sitting periods’, *House of Representatives Practice*, 7th edition, 2018, <https://www.aph.gov.au/About_Parliament/House_of_Representatives/Powers_practice_and_procedure/Practice7/HTML/Chapter7/Sitting_and_non-sitting_periods>.

Parliamentary committees enable the division of private members of parliament into specialised groups. There are approximately 50 committees. Private members may serve concurrently on more than one committee. See: *Background information: The committee process*.

The committee process enhances accountability by making sure parliament uses its resources efficiently. The specialisation of the committee process improves scrutiny, representation, review, inquiry and the oversight of government, and it enhances many other roles and powers of parliament.

Background information: The committee process

Parliament forms its committees when it first sits after an election. Each house assigns private members to committees based on their expertise, experience and areas of interest.

Ministers cannot participate in parliamentary committees because it would breach the separation of powers. Parliamentary committees are committees of the legislature. The ministry is part of the executive and must be separate from the legislature. Ministers are members of parliament, but have executive roles that distinguish them functionally from private members. The Opposition shadow ministry is composed of private members.

Consequently, shadow ministers may participate in parliamentary committees. Excluding ministers from parliamentary

committees is one of the ways Australia's Westminster system — with its fused legislature and executive — achieves the separation of powers. The separation of powers is a cornerstone of accountability for both the executive and the parliament.

There are different types of parliamentary committee based on:

- membership;
- duration; and
- purpose.

Membership

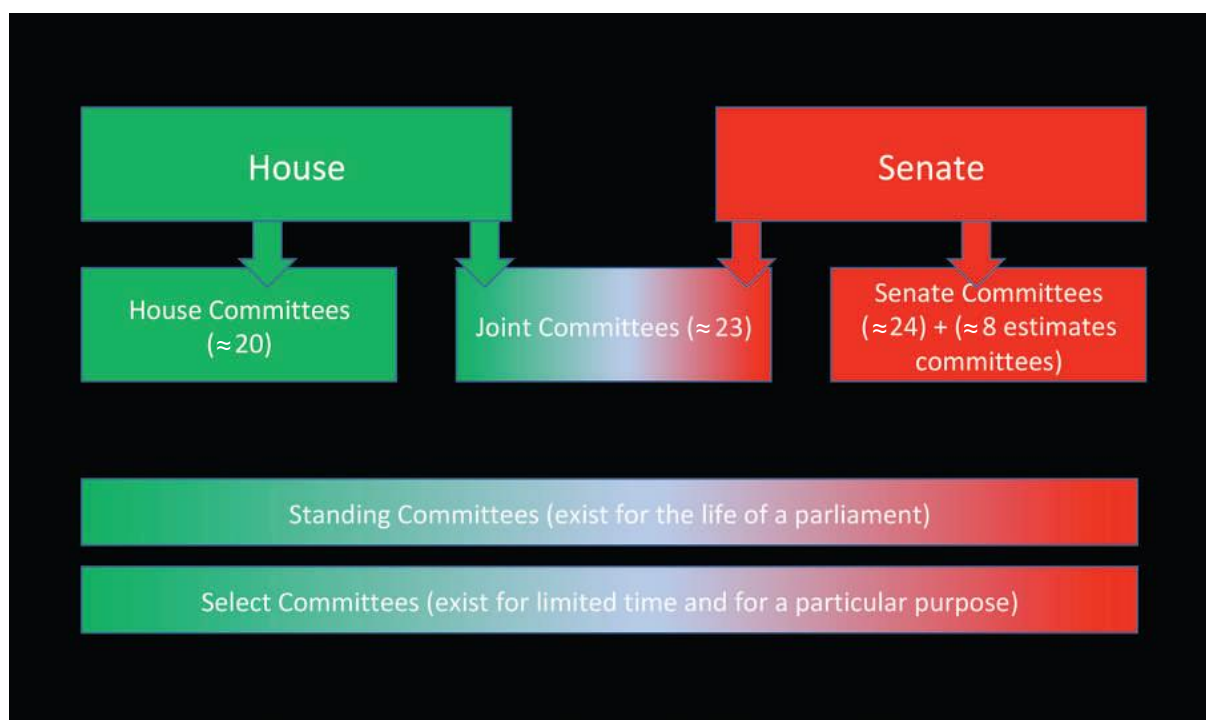
Committees are formed based on their house of origin:

- members of the House of Representatives form committees of that house;
- senators form Senate committees; and
- joint committees have members from both houses.

Duration

Standing committees form when a parliament sits after an election. They endure for the life of the parliament and dissolve with it before an election.

Select committees are formed for a particular purpose and dissolve after achieving their purpose.



■ Figure 11.16 – The three types of parliamentary committees.
Source: Parliamentary Education Office, <www.peo.gov.au>

There are six types of committee which allow flexibility to be tailored to suit their purpose:

- House of Representative standing committees;
- House of Representative select committees;
- Senate standing committees;
- Senate select committees;
- joint standing committees; and
- joint select committees.

Purpose

Committees have a specialised focus — there are *legislation* committees, committees of *inquiry*, and *scrutiny* committees. They enhance the performance of parliament's legislative, representative, debate and responsibility roles.

Example: Committees of the 46th Parliament¹⁰

Table 11.6 contains selected examples of committees of the 46th Parliament elected in 2019. Information in the table is as at May 2020. Select committees may have formed or dissolved since then.

The committee process and the accountability of parliament

The make-up of parliamentary committees reflects the partisan balance of the house where they form. Partisanship can undermine the accountability value of committees. However, three committee processes reduce the effect of partisanship:

- closed sessions;
- constructive cross-party relationships; and
- independence of Senate committees.

Committees usually meet in closed session, so there is no incentive for committee members to score party political points because the media and public are not present.

Committee members develop constructive cross-party relationships by working in small groups for long periods. They know each other personally and professionally across the partisan divide.

Senate committees have more diverse representation and less party dominance than House of Representatives committees. The Senate committee system has evolved over many decades to become more bipartisan

	House of Representatives	Senate	Joint
Standing committees	• Privileges and Members' Interests • Procedure • Economics • Tax and Revenue • Indigenous Affairs • Health • Environment • Social Policy and Legal Affairs	• Privileges • Senators' Interests • Procedure • Scrutiny of Bills • Selection of Bills • Scrutiny of Delegated Legislation • Community Affairs — Legislation and References Committees • Education and Employment — Legislation and References Committees • Estimates Committees — one per group of portfolios	• Parliamentary Joint Committee on Human Rights • Migration • National Broadband Network • Electoral Matters • Public Accounts and Audit
Select committees	• Select Committee on Regional Australia	• COVID-19 • Foreign Interference through Social Media • Administration of Sports Grants	• Joint Select Committee on Australia's Family Law System

■ Table 11.6 – Examples of parliamentary committees and their accountability functions.¹¹
Source: Stephen King, 2020

Following is a colour coded key to the accountability focus of selected committees:

- **legislation — scrutiny of lawmaking;**
- **representation — ensuring adequate representation;**
- **responsibility — scrutiny of government;**
- **accountability of members of parliament and parliamentary business; and**
- **multi-function — legislation, inquiries, scrutiny of government.**

10 Parliament of Australia, *Parliamentary business. Committees*, <http://www.aph.gov.au/Parliamentary_Business/Committees>.

11 This is not a complete list of parliamentary committees. Note also that there are currently eight Estimates Committees which are formed as part of the budget cycle. See: Parliament of Australia, *Committees*, <http://www.aph.gov.au/Parliamentary_Business/Committees>.



■ Figure 11.17 – Due to their composition, Senate Committees are more effective at holding the parliament to account. Source: Gngarra, *Senate Inquiry into the Roe 8 non compliance of environmental conditions*, 2017, CC BY 2.5 au, <<https://commons.wikimedia.org/w/index.php?curid=56566246>>

than the House of Representative committees. This means they can play a more effective accountability role. It has become a model of efficient parliamentary process. The Senate's *mode of exercising power* through its standing legislative and general purpose reference committees has been described as the "accountability powerhouse of the Senate".¹²

Partisanship is a strong feature of the Australian political system. However, it is less characteristic of committees.

Committee processes keep parliament accountable

Parliament has four main functions — to legislate, to represent, to debate and to scrutinise government. Committee processes enable the parliament to carry out these functions more effectively than either of the two main chambers alone.

“Partisanship is a strong feature of the Australian political system. However, it is less characteristic of committees.”

Table 11.7 lists several examples of committees whose processes, expertise and focus hold parliament to account for each of its functions.

Table 11.7 illustrates how committees enable in-depth accountability in specific areas of responsibility. Committees make recommendations and table reports in their respective house of parliament. Therefore,

12 Parliament of Australia, *Senate Briefs, No 4 — Senate committees*, 2020, <https://www.aph.gov.au/About_Parliament/Senate/Powers_practice_n_procedures/Senate_Briefs/Brief04>.

when parliament creates a statute, represents Australians, debates matters of importance and holds the government to account, it does so chiefly through the use of committees.

It is too easy to underestimate the value of the committees. Committees generally are not exciting, and they do not usually sell newspapers or generate clicks on websites. See the *Case study on the Senate Estimates Committee* for recent examples of committee hearings that have generated a lot of public interest. Nevertheless, parliamentary committees are the 'muscles' that make parliament work. In the way that muscles enable a human body to function, so committees enable parliament to perform its roles to a high standard.

Accountability improves standards. The parliamentary committee process raises the standard of parliament's performance across the board. See: *Example: Committees with a legislative accountability role*.

Private members and committees

Private members have no role in the executive or shadow ministry. Their central parliamentary role is participating in committees.

Members of parliament come from all walks of life. They can bring their life experience and professional skills to bear in the work of committees. The wide range of committee work means that most members can contribute to parliamentary processes in ways that suit their skills, knowledge and expertise. See: *Example: Andrew Hastie (Canning, WA)*.

Example: Andrew Hastie (Liberal, Canning, WA)

Liberal Party backbencher Andrew Hastie is a retired army officer with extensive military experience. He studied at the Australian Defence Force Academy from 2003 to 2005, and was an officer from 2007 to 2009 before transferring to the Special Air Service Regiment (SASR), Australia's elite military force. He served overseas in the SASR in some of the world's most dangerous places between 2010 and 2015.

Hastie was elected to represent Canning (WA) at a by-election in 2015 after the death of sitting member, Don Randall MP. He was re-elected to the House of Representatives in 2016 and 2019.

The parliament makes use of Hastie's career experience and expertise by appointing him to work in committees whose specialised work relates to defence and intelligence. During

Role of parliament	Parliamentary committees	Committee process enhancements to accountability
Legislative role	Legislation committees in both houses	Scrutinises bills in their area of specialisation and expertise in detail. May call for expert advice. Improves the accountability of legislation to quality standards. Inquires into bills. Suggests amendments, repeal or consolidation of legislation. Improves the general standard of the body of statute.
	The Parliamentary Joint Committee on Human Rights	Scrutinises bills holding legislation accountable to legislated human rights standards.
	The Senate Scrutiny of Bills Committee	Reviews bills by referring them to legislation committees if needed. Improves accountability of complex or contested legislation, and the upper house's review role.
Representative role	The Joint Committee on Electoral Matters	Scrutinises electoral law and procedure. Recommends reforms to electoral law to enhance the accountability of representativeness.
	Committees can call for public submissions	Inputs public contributions — including those from individuals and pressure groups — directly into the legislative and inquiry processes. Enhances accountability of representation.
	Committees can travel to meet communities	Inputs public sentiment from regions, towns and cities. Enhances accountability. Diversity of input/experiences ensure members are accountable for their representation.
	Committees can call for expert advice	Inputs expert advice to the drafting of statutes and conduct of inquiries. Improves accountability to meet technical and scientific standards.
Responsibility role	Scrutiny of Delegated Legislation Committee	Scrutinises and reviews the executive's use of delegated legislative powers. May recommend the disallowance of executive-made law. Enhances scrutiny of government.
	Public Accounts Committee	Reviews government spending and public service efficiency through the Auditor General. Improves capacity to hold the government responsible to parliament.
Debate role	All committees	Debates are of higher quality than debate in either house due to reduced partisanship and higher expertise. Enhances the standard and quality of debate.

■ Table 11.7 – Examples of committees that support the parliament carrying out its roles (with Processes highlighted in bold).
Source: Stephen King, 2020

“In the way that muscles enable a human body to function, so committees enable parliament to perform its roles to a high standard.”

his time as an MP, Hastie has served on two joint standing committees with defence and intelligence roles. They are the:

- Joint Standing Committee on Foreign Affairs, Defence and Trade; and
- Parliamentary Joint Committee on Intelligence and Security.

Hastie has also served on the:

- Joint Committee of Public Accounts and Audit;
- Joint Standing Committee on the National Capital and External Territories;
- House of Representatives Standing Committee on Tax and Revenue;
- House of Representatives Standing Committee on Infrastructure, Transport and Cities; and
- House of Representatives Standing Committee on Employment, Education and Training Committee.

He served on several of these committees concurrently, demonstrating how members of parliament can participate in more than one committee at the same time.

Hastie was appointed as the chair of the Joint Intelligence and Security Committee on 8 February 2017 and continued in that role in the 46th Parliament, elected in May 2019. His expertise and experience are particularly valuable for the work of this committee.

Example: Committees with a legislative accountability role

Parliamentary Joint Committee on Human Rights

The *Human Rights (Parliamentary Scrutiny) Act 2011* makes the Parliamentary Joint Committee on Human Rights mandatory for each parliament. Its role is to scrutinise legislation for compliance with seven international human rights agreements — that is, a body of international human rights law.

Chapter 15 discusses this committee in more detail. It is sufficient to note here that this committee has the responsibility of holding the parliament accountable — in its legislative role — for compliance with human rights.

The committee evaluates bills and issues statements of compatibility to notify the parliament of the human rights impacts of its legislation. Parliament must then decide how a bill that negatively impacts human rights may be changed or explain why it is necessary to infringe rights.

Scrutiny of Bills Committee

Since 1981, the Senate Standing Committee for the Scrutiny of Bills has assessed legislation for its effect on rights, the rule of law and parliamentary propriety.¹³ It tables reports to alert the Senate of bills it thinks are of concern.

Accountability through judicial review

The separation of powers is a principle of democracy, and it is a feature of Australia's system of government. Chapter 7 addressed the strict separation of judicial power from legislative and executive power. Section 71 of the Constitution vests the judicial power of the Commonwealth in the High Court and other federal courts. These courts are known as Chapter 3 courts. Chapter 3 courts hold the Commonwealth Parliament to account.

Montesquieu's principle works if each branch has sufficient capacity to check and balance the powers of the other branches of government.

“The High Court's power to declare statutes ultra vires is the ultimate accountability mechanism for the parliament's legislative function.”

Section 72 entrenches the independence of the judiciary, enabling it to stand apart from the parliament and review its legislation, members and senators without interference. Sections 73, 75 and 76 of the Constitution vest jurisdictions in the High Court. The *Judiciary Act 1903* and other Acts vest jurisdictions in other Chapter 3 courts. The *Commonwealth Electoral Act 1918* vests special jurisdictions in the High Court. The jurisdictions, independence and separation of

Chapter 3 courts provide them with the power to hold parliament to account.

Courts review the Commonwealth Parliament through:

- High Court interpretation of the Constitution in cases concerning its legislative and financial powers;
- Federal courts' interpretation of Commonwealth statutes — for example, the *Native Title Act 1993*, the *Race Discrimination Act 1975*, the *Migration Act 1958*; and
- the Court of Disputed Returns — a special jurisdiction vested in the High Court by the *Commonwealth Electoral Act 1918*.

Table 11.8 summarises the way federal courts review the Commonwealth Parliament.

Reviewing the constitutionality of legislation

Recall that a statute passed by the Commonwealth Parliament may be unconstitutional if it is not grounded in a **head of power**. Heads of power are the exclusive and concurrent legislative and financial powers expressly granted to the parliament in the Constitution.

Recall also that **unchallenged legislation** stands as valid law because the High Court has not reviewed it.

¹³ Parliament of Australia, *Senate Committees. Senate Standing Committee for the Scrutiny of Bills*, <http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Scrutiny_of_Bills>.

Review of parliament		Court	Nature of review	Examples
Accountable to	What is reviewed?			
Constitutional law	Legislative powers	High Court (Section 76 additional original jurisdiction)	Reviews the scope and extent of exclusive and concurrent lawmaking powers Example: Sections 51(xx), 51(xxix) and 109	Williams v Commonwealth (2014) Spence v Commonwealth (2019)
	Financial powers		Reviews taxing and spending powers Example: Sections 51(ii) and 90	Uniform Tax Cases (1942) and (1957) Hammond & Ha (1997)
	Qualification of members of parliament		Reviews the qualification of members to sit in parliament — Section 44	Reviews of 45th Parliament senators' and MPs' citizenship status Examples: Senators Canavan, Ludlam, Waters, Roberts, Nash and Xenophon, and MP Joyce Reviews of senators' bankruptcy status (Cullerton) and pecuniary interest (Day)
Electoral law	Election results	Court of Disputed Returns — a special jurisdiction of the High Court	Reviews election results where there is doubt about a result Fills casual Senate vacancies when a senator dies, resigns or is disqualified	Loss of 1375 WA Senate ballot papers Disqualified members of the 45th Parliament replaced by countbacks of ballot papers
Other Commonwealth statutes	Meaning of statutes	Federal Court; Federal Family Court; and Federal Circuit Court	Interprets and declares the meaning of statutes falling within the jurisdiction of a Chapter 3 court	Timber Creek Case (2019) (Native Title Act 1993)

■ Table 11.8 – Federal courts' powers to review parliament.
Source: Stephen King, 2020

Statutes made 'beyond the power' of the parliament may be unconstitutional. They are vulnerable to being declared *ultra vires* by the High Court, rendering them invalid. Landmark constitutional cases define the legislative and financial power of the parliament — holding it accountable to the Constitution. See: *Case Studies: Williams v the Commonwealth 2014*; and *Spence v the Commonwealth 2019*.

The High Court's power to declare statutes *ultra vires* is the ultimate accountability mechanism for the parliament's legislative function.

Section 44 of the Constitution specifies the qualification to be a parliamentarian. The Court of Disputed Returns hears challenges concerning the election of members of parliament or their qualification to sit in parliament. These decisions may cause the ejection of a member from parliament. Disqualification of an MP triggers a by-election. Ejected senators create

casual Senate vacancies which are dealt with by the Court of Disputed Returns. See: *Case Study: Section 44 disqualifications and the 45th Parliament*.

Statutory interpretation

Courts' interpretation of statutes is part of Politics and Law Unit 1. Students are advised to review the content of this part of the course.

Statutes are constructed in broad terms, future focused and written in English. Additionally, new statutes become part of a complex system of existing statutes. The rule of law demands that statute be clear and consistent. However, the complexity of the law and the ambiguity of language — including that used to construct statutes — may lead to doubt about parliament's intent.

Moreover, statutes can be passed quickly and without adequate scrutiny. Statutes may conflict

with constitutional and statutory rights. Courts review statutes for clarity, intent and conflicts with other statutes. In doing so, they are reviewing the legislative role of the parliament.

“There is a synergetic and complementary relationship between the parliament and the judiciary that helps keep parliament accountable.”

Parliament takes a close interest in judicial interpretations of statutes. Court decisions alert parliament to an inadequate statute. It may then amend, repeal or replace a faulty statute discovered by the courts.

Perceptive students will note a dialogue exists between parliament and the courts. Courts check statute and parliament responds by adapting statute. Thus, courts exert a pressure upon parliament that holds its lawmaking power to account. Ongoing checking and improving means the judicial review of statutes acts like a ratchet, causing improvements to accumulate in a continuously updated body of statute.

There is a synergetic and complementary relationship between the parliament and the judiciary that helps keep parliament accountable.

See: *Example: Appeals and the common law — Native title and the right to compensation* in Chapter 7.

Summary

- Accountability is essential to democratic systems of government. The parliament — like all institutions in a democracy — must be accountable.
- Parliament is accountable through several mechanisms including elections, privileges committees, parliamentary procedures and processes, and judicial review.

Electoral accountability

- Australian elections are free, fair, regular and administered by an independent statutory authority — the AEC. They are robust and well designed to enable voters to express their will and to hold elected representatives to account.
- Each house uses a different electoral system. From an accountability point of view, the preferential system used to elect the House of Representatives is superior to the proportional system used to elect senators. It enables electors to directly choose or reject individual candidates, including sitting MPs seeking re-election.
- Electoral strategies such as ‘marginal seat’ and ‘sitting member last’ campaigns can effectively target members of the House of Representatives. They are sharp accountability tools.
- Reforms to the Senate electoral system in 2016 improved the electoral accountability of senators by enabling electors to more easily preference candidates — rather than parties — on the ballot paper. Nevertheless, the system is still complicated, and most electors choose the more straightforward above the line option.

Parliamentary committees — Privileges and interests committees

- Privileges and interests committees in both houses hold parliamentarians to account for the use of privileges and to ensure the avoidance of conflicts of interests.
- These committees may become embroiled in partisan contests and be less effective because of the public attention that their investigations generate.

Procedures and process of parliament

- Procedures are formal rules governing processes. Each house codifies its procedures in its Standing Orders. Parliament makes its own rules. However, it follows Westminster tradition.
- Processes are the actions or steps taken to legislate, represent, scrutinise, review, inquire and debate. Procedures ensure the processes occur smoothly.
- The committee process is an important one. Committees perform a great many of parliament’s roles efficiently. There are specialised committees for legislation and the scrutiny of government. All committees debate issues and receive input and representation from the public, pressure groups and experts.
- The presiding officers — the Speaker in the House of Representatives and the President in the Senate — enforce the Standing Orders of their respective house. They may discipline members whose conduct is in contempt of the Standing Orders. The presiding officers may temporarily exclude parliamentarians from parliament. This could be for one hour or as much as one week.
- The Standing Orders allow for the orderly conduct of business, ensuring the accountability of parliament in carrying out its legislative, debate and representative functions.
- Governments dominate the House of Representatives, giving them the power to move and pass motions to suspend or amend the Standing Orders. This reduces the effectiveness of the Standing Orders as rules governing the conduct of parliamentarians and parliamentary business.

continued overleaf

- The government appoints the Speaker. The procedure for appointing the Speaker may result in bias in the application of Standing Orders, particularly in the lower house. A lot depends on the individual character and personality of the Speaker.
- Because of the balance of power in the Senate, Presidents tend to be less partisan than Speakers.
- The Senate is more effectively governed and accountable than the House of Representatives through Standing Orders because of the lack of a partisan majority capable of suspending or amending them.

Judicial review

- The separation of powers is a feature of Australian democracy, with the judiciary being strictly separated and independent.
- The High Court may strike down statutes that it judges unconstitutional, such as amendments to the *Financial Management and Accountability Act 1997* in the Williams Case (2014). Statutes must be challenged and brought before the High Court by a party with 'standing' before it can make any judgment. Alongside elections, High Court constitutional interpretation is the most potent check on the legislative function of the parliament in the Australian political system.
- Ordinary federal courts — Chapter 3 courts — may interpret Commonwealth statutes.
- Courts provide feedback to parliament about statutes. Parliament modifies statutes, taking into account court judgments.
- Statutory interpretation means courts and parliament are in dialogue. The interaction between the two exerts a constant pressure for the improvement of the entire body of statute.

Exam practice questions

Short answer

- 1a) Explain what is meant by 'accountability' as it applies to Australia's political and legal system.
- 1b) Outline **three** procedures that are used to hold the Commonwealth Parliament to account.
- 1c) Discuss the extent to which individual parliamentarians are held to account through elections for the House of Representatives and/or the Senate.
- 2a) Explain the purpose of the House of Representatives or the Senate privileges committee.
- 2b) Explain the relationship between elections and parliamentary accountability.
- 2c) With reference to at least **one** example, discuss the role of the High Court in finding that the Commonwealth Parliament had acted *ultra vires*.
- 3a) Explain the term 'judicial review' as it applies to the accountability of the Commonwealth Parliament.
- 3b) Explain how the separation of powers is upheld through the parliamentary committee system.
- 3c) With reference to at least **one** example, discuss the extent to which **one** parliamentary procedure or process keeps parliamentarians responsible.
- 4a) Define the term 'Standing Orders'.
- 4b) Outline **three** features of Australia's electoral system that contribute to the accountability of the parliament.
- 4c) Discuss the extent to which the House of Representatives or Senate privileges committee can hold members of parliament to account.

Source analysis

Read the source below and answer the questions that follow.

The source is adapted from: Anne F Davies, 'Australian election: Tony Abbott loses his Warringah seat to Zali Steggall'.¹

One of the Liberals' leading conservatives and Australia's 28th prime minister, Tony Abbott, has lost his blue-ribbon Sydney seat of Warringah after moderate Liberal voters abandoned him in protest over the role that he played in opposing climate change action.

Abbott lost to the independent candidate and Olympian Zali Steggall, with the count showing she was likely to win almost 60% of the vote on a two-party-preferred basis.

"I think we can see that there is something of a realignment of politics going on right around this country. It's clear that in what might be described as 'working seats,' we are doing so much better.

"It's also clear that in at least some of what might be described as 'wealthy seats,' we are doing it tough, and the green-left is doing better," he said.

Backed by a number of local community groups, Steggall was drafted as a candidate to advocate for more action on the climate crisis. She had run on a platform that was almost entirely focused on taking meaningful action to counter it, including adopting much tougher targets than the Coalition has embraced — a message that resonated with the middle-class voters of Warringah. Her support was especially strong in Mosman and Manly.

continued overleaf

¹ Davies, Anne F, 'Australian election: Tony Abbott loses his Warringah seat to Zali Steggall', *The Guardian*, 18 May 2019, <<https://www.theguardian.com/global/2019/may/18/australian-election-tony-abbott-loses-his-warringah-seat-to-zali-steggall>>.

The loss of one of the most outspoken members of the conservative wing would normally send deep shockwaves through the Liberal Party, but given the other results on Saturday night it seems less certain that Abbott's defeat will prompt internal debate about the party's positioning on the climate crisis.

Abbott said the result showed that where climate change was a "moral issue, we do it tough. But where it's an economic issue, we do very, very well."

Steggall's campaign was supported by a number of grassroots groups which had formed out of disillusion with the Liberal party's policy on the climate emergency.

The Warringah result is certain to be analysed in terms of what a grassroots campaign can do against a seemingly invulnerable politician.

There is also likely to be a heated discussion, particularly from the News Corp publications, about the role of left-leaning and progressive organisations in the political process, with conservatives warning that progressive groups represent a threat to democracy because of their deep pockets.

The seat was a hot spot for activism by GetUp, which door-knocked more than 20,000 households in the north shore and northern beaches seat, and Stop Adani, which was also active.

- 5a) Explain the term 'independent' as it applies to the Commonwealth Parliament.
- 5b) With reference to the source, explain in your own words **two** issues for major political parties in Australian politics.
- 5c) With reference to specific examples, discuss how senators from the smaller Australian states have wielded disproportionate power over the passage of legislation through parliament.
- 5d) Evaluate the extent to which members of the House of Representatives are held more accountable than members of the Senate.

Essay

- 6) Analyse the extent to which elections and parliamentary procedures and processes have held the Commonwealth Parliament accountable in recent years.
- 7) 'Parliamentarians can only be held responsible for their actions through elections. As such, they remain unaccountable between elections'. Evaluate the validity of this claim.

Investigation

Investigate a High Court case within the last ten years that held the Commonwealth Parliament to account. In your research, collate information on the following points:

- 8)
- 8a) the name of the case;
- 8b) the year(s) in which the case was heard;
- 8c) why the case had standing;
- 8d) what was reviewed;
- 8e) the High Court's decision;
- 8f) how parliament was held to account; and
- 8g) the significance of the case.

- 9) Students will undertake a group activity.
- 9a) The class will be divided into pairs or small groups.
- 9b) Each pair or group will be allocated one of the following topics:
 - process — referral to the House of Representatives or the Senate Privileges Committee;
 - process — referral of a bill to a legislative committee;
 - procedure — naming procedures under the Standing Orders;
 - procedure — censure motions against a member or a senator;
 - procedure — grievance and adjournment debates; or
 - procedure — matters of public importance.
- 9c) Students in each pair or group will work together to research the strengths and weaknesses of their allocated process or procedure in upholding parliamentary accountability, providing specific examples.
- 9d) Each pair or group will make its research available to the rest of the class.
- 9e) Each student will then write a response to the following question: With reference to a specific example, discuss the role of one parliamentary procedure or process in holding the Commonwealth Parliament to account.
10. Drawing upon your own research and that of your peers about the strengths and weaknesses of different procedures and processes in holding the parliament to account, complete the table below. Students should customise the number of rows needed to complete this exercise.

The accountability of the Commonwealth Parliament through parliamentary procedures and processes		
Strengths, including examples	Weaknesses, including examples	Overall evaluation



Accountability of the executive (political and administrative)

Syllabus point:

- **The accountability of the executive and public servants**
 - through collective and individual ministerial responsibility
 - through Senate Estimates and at least one other committee of the Commonwealth Parliament
 - through the Commonwealth Auditor-General and the Administrative Appeals Tribunal (AAT)
 - through judicial review

Introduction

The executive is the most familiar part of the political system. Commonly referred to as ‘the government’, the executive runs the nation’s affairs from day to day and bears the name of the Prime Minister — for example, the Morrison Government. Ministers are well-known executive officials responsible for the public service, another part of the executive. The government carries out laws made by parliament and makes subordinate law using power delegated to it by parliament. Governments have policies. Policies are government plans for how it intends to carry out existing law and propose changes to the law.

The government must be accountable for administrative decisions and its political and legal power. This chapter examines the accountability of the Prime Minister, Cabinet and the public service. The accountability of the Governor-General is the subject of Chapter 13. See: *Background information: The nature of the executive branch.*

Background information: The nature of the executive branch

The executive is by far the largest of the three branches of government. It has three parts:

1. the Queen, represented by the Governor-General;
2. Prime Minister, Cabinet and ministry; and
3. public service.

Legally, executive power is formally vested in the Queen and is ‘exercisable’ by the Governor-General. Chapter 2 of the *Commonwealth*

of Australia Constitution Act 1900 (the Constitution) establishes the formal — or constitutional — executive. Section 62 makes the Federal Executive Council (EXCO) the link between the *constitutional executive* and the elected *parliamentary executive*. EXCO gives legal force to decisions already made by Cabinet, which under the Westminster system is a de facto body of executive power.

Section 64 of the Constitution requires ministers to be members of parliament. By convention, executive power is assigned to this *parliamentary executive* — that is, a ministry composed of elected members drawn from parliament. The Prime Minister selects and heads the ministry and chooses a Cabinet of senior ministers who, along with the Prime Minister, are commissioned by the Governor-General. The Cabinet is the seat of executive power, but it has no legal basis. Westminster conventions govern the formation and accountability of the ministry. In reality, executive power rests with the Cabinet and is subject to political rather than strictly legal definitions. It functions according to Cabinet conventions. Executive power at this level is political, ideological and contested. Areas of government responsibility are assigned to portfolios. Ministers are responsible for portfolios. Portfolios link the ministry to the public service — that is, the *administrative executive* — for which they are — by convention — responsible.

Public servants are appointed officials who carry out the work of government. They make up the *administrative executive*. Approximately 150,000 employees work in Commonwealth Government departments, agencies and statutory authorities, and serve the public by daily executing the laws, making hundreds of thousands of administrative decisions every day. It operates using the bureaucratic principles of hierarchy, division of labour, specialisation, expertise and rules. Executive power at this level is rule based and systematic. Examples of public service jobs include clerical staff, police officers, diplomats, soldiers, lawyers, health professionals, engineers and others.



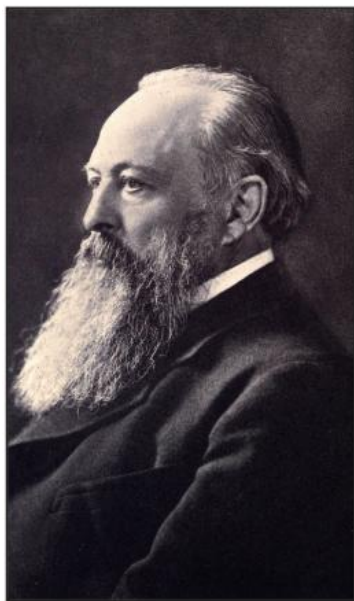
■ Figure 12.1 – The Hon. Scott Morrison MP leads the government of Australia’s 46th Parliament.

Source: David Foote AUSPIC/DPS

The need for executive accountability

“Power tends to corrupt, and absolute power corrupts absolutely”, said John Dalberg-Acton.¹

Governments control the power of the State and have a monopoly on the legitimate use of force. Governments can levy taxes, coerce, conduct surveillance, gather and retain information, restrict rights, detain citizens, declare war and much more. Holding government accountable counteracts tendencies to corruption. It also makes administrative decisions that affect people’s lives. Decisions should be contestable if they negatively impact people.



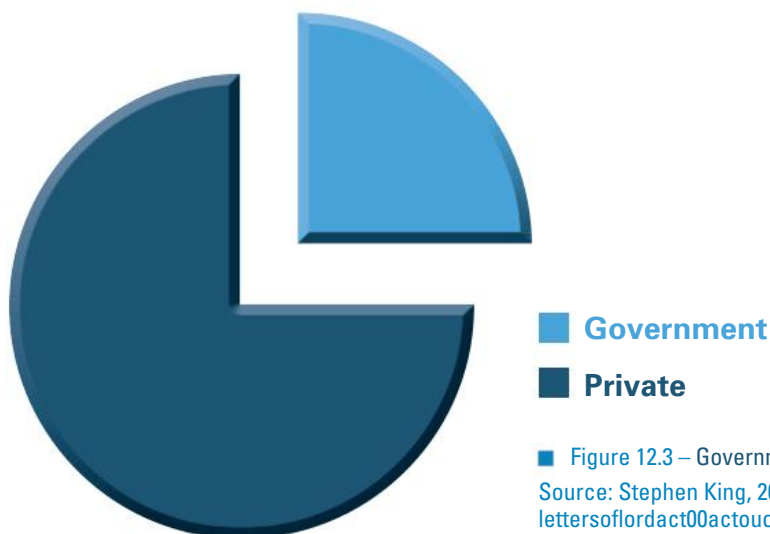
■ Figure 12.2 – John Dalberg-Acton is famous for his quote on power.

Source: Paul, Herbert (ed), *Letters of Lord Acton to Mary, Daughter of the Right Hon. W.E. Gladstone*, Allen & Co., 1904, <<https://archive.org/stream/lettersoflordact00actouoft#page/n7/mode/2up>>

The size of government can be measured by the ratio of government spending to a country’s gross domestic product (GDP). Australia has a relatively low ratio of government spending to GDP compared to the other 36 OECD countries.² In 2018 Australia’s government spending to GDP ratio was 38.7 per cent. This means that government represents nearly 40 per cent of economic activity in Australia. Increased government spending during the COVID-19 recession will have further increased the size of government in Australia. Government spending is financed through taxation and borrowing. Government spending must be approved by parliament.

Figure 12.3 shows the government proportion of economic activity in Australia. This is an approximate measure of the financial expenditure of the Commonwealth Government.

Despite being small by world standards, Australia’s government is still enormous; it spends approximately 38.7 per cent of GDP. The government spends public money — that is, taxpayers’ money — and its spending should be efficient and deliver value to taxpayers. Mismanagement and waste can be costly in an organisation as large as the government.



■ Figure 12.3 – Government spending as a proportion of Australia’s GDP in 2020.³

Source: Stephen King, 2020 & Co., 1904, <<https://archive.org/stream/lettersoflordact00actouoft#page/n7/mode/2up>>

1 Lord Acton, ‘Power and authority’, in *Lord Acton quote archive*, <<https://www.acton.org/research/lord-acton-quote-archive>>.

2 The OECD is the Organisation for Economic Co-operation and Development.

3 Based on OECD data. See: OECD, General government spending, <<https://data.oecd.org/gga/general-government-spending.htm>>; and < OECD (2020), General government spending (indicator). doi: 10.1787/a31cbf4d-en>.

Keeping the executive accountable

Good government and democracy require State power and government spending to be accountable. The executive is accountable in

many ways. Table 12.1 summarises the ways Australia holds executive power to account.

Accountability mechanisms	Explanation and examples		Focus
Westminster conventions	traditional unwritten rules governing the expectations and conduct of executive power	- individual ministerial responsibility - collective ministerial responsibility	- Cabinet - ministry
The Administrative	many parliamentary committees support the responsibility role of parliament	- Senate estimates committees - Senate Scrutiny of Delegated Legislation Committee - Joint Committee of Public Accounts and Audit	- Cabinet - ministry - public servants
The Auditor-General	- an independent officer of the parliament - reports to parliament via tabling reports - reports scrutinised by the Joint Committee of Public Accounts and Audit	conducts reviews of public service performance, finances and compliance with the law	public servants
Administrative Appeals Tribunal	an independent tribunal	reviews administrative decisions of the public service and ministers, making merit based decisions	- public servants - ministry
Judicial review	independent courts	make legally binding rulings on the lawfulness and constitutionality of government policies and activities	- Cabinet - ministry - public servants

■ Table 12.1 – The methods of executive accountability.
Source: Stephen King, 2020

Westminster conventions

Australian governments are Westminster-style parliamentary executives. They are made — and can be broken — by the lower house of parliament. Westminster governments are accountable to parliament and through it to the people. The Westminster chain of accountability links the public service through ministers to parliament and finally the people.

Government power is accountable through a range of Westminster conventions and practices. Two of the most important of these conventions are individual and collective ministerial responsibility. They allow parliament to dismiss an incompetent or corrupt government or any of its ministers. They are part of the parliament's responsibility function discussed in Chapter 2. See: *Background information: Ministerial responsibility*.

Background information: Ministerial responsibility

Westminster executives are parliamentary executives — that is, formed by, and responsible to, parliament. The lower house forms governments and holds them accountable through various procedures and processes. There are two forms of the convention of ministerial responsibility.

1. Individual ministerial responsibility holds ministers responsible to the lower house. Ministers must be competent, honest and conduct themselves in a manner appropriate for a minister. Parliament can censure a minister who fails these standards. By convention, a minister censured by parliament should resign. The convention is more influential in the

Australian House of Representatives than in the Senate because of its historical origins in Britain's powerful lower house — the House of Commons.

2. Collective ministerial responsibility holds the Cabinet and ministry — that is, the entire elected parliamentary executive — accountable to the House of Representatives. If the executive cannot command the confidence of the House, it must resign. Thus, a vote of no confidence by the House of Representatives can break a government.

The conventions of ministerial responsibility depend on parliamentary procedures and processes such as:

- question time — a period in each sitting day when any private member may ask any minister — including the Prime Minister — questions about the activities of the government; and
- motions of no confidence and censure motions — motions and votes that target the executive and make it accountable to parliament.

Individual ministerial responsibility in practice

There has never been a censure motion passed against a minister in the House of Representatives.⁴ Two factors undermine the effectiveness of individual ministerial responsibility:

- party discipline; and
- the government's control of the House of Representatives.

The governing party's members vote as a single bloc to defeat motions against their ministers. Nevertheless, an opposition moving a censure motion has the opportunity to speak to the motion. Parliamentary speeches can target an incompetent or corrupt minister. Enough public pressure applied through parliament may force a minister to resign, or at least change their behaviour. See: *Example: Bridget McKenzie and sports rorts and the Case study: The sports rorts affair*.

Censure by the Senate

The Senate may also censure a minister. Upper house censures are a unique feature of Australia's version of the Westminster system. First, the Senate is a powerful house, and second, ministers may come from the upper house — neither of these features comes from our British heritage. The Senate successfully censured Senator George Brandis — the Attorney General in the Abbott and Turnbull Governments — in March 2015. The government was not able to defeat the motion because it lacked an upper house majority. However, censures by the Senate do not have the effect a lower house censure would have because they lack the weight of Westminster convention. Brandis was vigorously defended by Tony Abbott and survived the motion.

Evaluating individual ministerial responsibility

Censure motions always fail, so are they useful? Recent and contemporary examples illustrate the value of individual ministerial responsibility in holding ministers to account.

The convention establishes an expectation of ministerial conduct and behaviour. There is an expectation that ministers be honest and competent despite the weakening of the convention. The expectation of ministerial integrity and competency is held by the public, the parliament and by the ministry itself.

When a minister fails to meet ministerial expectations, they are at risk. The pressure of expectations can modify ministerial behaviour. If the pressure is intense enough, it can motivate the Prime Minister to consider a minister's future. If the Prime Minister concludes that the minister's departure serves the political interests of his or her government, the minister will usually resign.

In theory, ministers are responsible to parliament; in practice, they are accountable to their Prime Minister. Prime Ministers will seek to manage the departure of an underperforming minister in a way that causes the least political damage.

Individual ministerial responsibility is useful because it imposes a set of expectations upon ministers and Prime Ministers that can improve ministerial performance and behaviour. In the most severe cases, it can bring about the resignation of a minister. In short, it holds ministers accountable in practice — even if it cannot work as it should in theory.

⁴ Parliament of Australia, 'Chapter 9 — Motions. Motions of no confidence and censure', *House of Representatives practice*, 2018, <https://www.aph.gov.au/About_Parliament/House_of_Representatives/Powers_practice_and_procedure/Practice7/HTML/Chapter9/Motions_of_no_confidence_and_censure>.

Collective ministerial responsibility in practice

Governments rarely fall because they have lost the confidence of the House of Representatives.

A no confidence motion against the government takes precedence over any other business. A debate follows automatically. Standing Orders allow debate on the motion for up to 30 minutes by the Leader of the Opposition, 30 minutes by the Prime Minister and ministers, and 20 minutes by private members. A vote on the motion follows the debate.

The opposition uses these motions as opportunities to frustrate the executive and — because they trigger an automatic debate — to speak at length against the government. The opposition will try to highlight problems and embarrass the government.

Motions of no confidence almost always fail for the same reasons: censure motions do not succeed — that is, party discipline combined with government control of the House of Representatives.

The House of Representatives may ‘withdraw its confidence’ from the government in other ways. The defeat of a signature government policy or bill can be considered a vote of no confidence and could result in the government resigning. The defeat of signature bills might cause a government to move a motion of confidence to test its support in the House of Representatives. The amendment or blocking of government money bills by the House is also a serious test of confidence.

Evaluating collective ministerial responsibility

Governments have lost office to votes of no confidence. The last occasion was in 1941 when the minority Fadden Government resigned after the House of Representatives moved to reduce its budget by £1. Blocking or amending a government’s budget is a denial of supply — which is considered a vote of no confidence.

The Gillard Government (2010–2013) was at constant risk of failing because of its fragile majority — it was a minority ALP government relying on non-ALP MPs to retain confidence and supply.

Following the 2016 election the strength of the Turnbull Government (2016–2018) was undermined because it had only a single seat majority and was divided along ideological lines. The Liberal’s conservative wing and the Nationals rebelled against Turnbull’s progressive leadership. The divisions brought down the Prime Minister, but the Coalition Government never lost the confidence of the House of Representatives.

In 2019 — when the first Morrison Government fell into minority with the loss of two seats in the lower house — it also lost a vote on a signature bill.

The convention permits the opposition to suspend the business of the House of Representatives and engage in lengthy attacks upon the government. These attacks may highlight weaknesses, mismanagement and problems within the public service, and cause the government significant embarrassment.

Committees and accountability

The Senate committee system

The Senate committee system is what makes the Senate a potent check on executive power. See: *Background information: Strong bicameralism and the Senate committee system.*

The Senate has over 20 committees, some of which perform an accountability role. Senate committees are independent of the government. There are special Senate committees — called estimates committees — which focus exclusively on holding the executive to account.

From the perspective of the accountability of the executive, there are eight particularly important committees. These standing committees are for:

- community affairs;
- economics;
- education and employment;
- environment and communications;
- finance and public administration;
- foreign affairs, defence and trade;
- legal and constitutional affairs; and
- rural and regional affairs and transport.

Together, these committees cover every area of government activity. The ratio of parties on these Senate committees is three government senators, two from the opposition and one crossbench senator. Organised in paired committees, each has a legislation and references function. Each version of the committee has an overlapping membership and shares the same secretariat — that is, staff appointed by the Senate to assist a committee to do its work. For example, the Senate Standing Committee on Economics has an:

- Economics *References Committee*; and an
- Economics *Legislation Committee*, which share:
 - a common membership of senators; and
 - a common secretariat.

All eight of the above committees have this structure. In mid-2020, the Senate was conducting 54 concurrent inquiries through its committees.

When the Senate wants to conduct an inquiry, it delegates the task to the relevant references committee — for example, in 2020 the Economics *References Committee* conducted inquiries into Australia's naval shipbuilding capacity and the unlawful underpayment of workers by some employers.

Meanwhile, the Scrutiny of Bills Committee sends bills to the relevant *Legislation Committee* — for example, in 2020 the Economics *Legislation Committee* was scrutinising the National Radioactive Waste Management Amendment (Site Specification, Community Fund and Other Measures) Bill 2020.

Senate estimates committees

Each of the eight legislation and references committees perform a third role twice a year. In May and October/November they conduct special hearings into the government's budget. These sessions are called estimates hearings. The word 'estimates' refers to budget projections of future government spending. When examining the budget estimates, the Economics Legislation and References Committees will sit as the Economics *Estimates Committee*. The other seven committees will also form their own estimates committees.

At budget time each year, the Senate receives memorandum papers from the House of Representatives containing the estimates of the government's budget bills. As the House of Representatives debates the budget bills in

May, Senate estimates committees — informed by the budget memorandum papers — question public servants and ministers — or their proxies — about government spending.

In committee rooms in parliament house, executive officials are questioned in an inquisitorial manner by senators during estimates hearings. They must answer questions about the spending and activities of the government.

Estimates hearings have become a potent mechanism for the accountability of the executive. Historically, Senate estimates committees were used for scrutinising government spending — they have always been part of the budget cycle. In recent decades, estimates committees have evolved enhanced powers. They now scrutinise virtually everything the government does. The justification for this expansion is that all government activity involves spending public money and so it is legitimate for estimates committees to scrutinise all government activity.

The Senate's committee system came into being in the 1980s when the Australian Democrats emerged as the first party to utilise the balance of power in the Senate to hold the government to account. Democrats' founder Don Chipp declared the party would use its Senate balance of power to "keep the bastards honest"⁵ — the 'bastards' being the government of the day. The committee system was established and strengthened to perform this enhanced executive accountability role.

The Australian Senate's committee system has influenced other Westminster parliaments.



■ Figure 12.4 – Senate Estimates Committee is one of the most effective mechanisms for holding the government to account.

Source: Hamiltonstone, Australian Senate committee hearing, 2008, CC BY-SA 3.0, <<https://commons.wikimedia.org/w/index.php?curid=5193165>>

5 Megarrity, Lyndon, in Parliament of Australia, 'Chipp, Donald Leslie (1925–2006)', *The biographical dictionary of the Australian Senate*, 2017, <<http://biography.senate.gov.au/chipp-donald-leslie/>>.

Background information: Strong bicameralism and the Senate committee system

Westminster systems rely on the lower house to hold the government to account. It makes and breaks governments — performing the so-called responsibility role. In contemporary Australian parliaments, partisanship is so intense that the disciplined party of government firmly controls the House of Representatives. Recall the decline of parliament thesis, which claims members of the executive dominate the House of Representatives, undermining its Westminster responsibility role. Since the Gillard era (2010–2013) governments have been weaker. Nevertheless, Australian members of the executive remain in control of the House of Representatives because commanding a majority of its seats is the defining characteristic of parliamentary government.

Australia's political system is a 'Washminster' hybrid, combining Westminster and non-Westminster features. Strong bicameralism — adopted from America — is one such feature and has become critical for the accountability of Australian executives. The Australian Senate is a powerful house elected in a way that usually creates an independent chamber where government majorities are not assured. It can perform its functions well because of its independence from government and its co-equal power with the lower house.

Recall the counterargument to the decline of parliament thesis — that is, that the Senate compensates for the House of Representatives' inability to hold governments to account. Since 1949 and especially since the 1980s the Senate has emerged as a house that keeps the executive accountable. It has compensated for the weakness of the House of Representatives by evolving strong accountability measures.

Evaluating Senate estimates committees

Senate estimates committees are a uniquely Australian feature that combines the power and the independence of the Senate. The estimates function has grown in scope to include investigations into almost every government activity. Estimates hearings are one of the most potent parliamentary checks on executive power.

Despite their power to hold the government to account, there are limitations to the estimates process. Most ministers sit in the House of Representatives. Senate estimates committees

cannot call ministers from the lower house to appear in person before estimates hearings. Instead, lower house ministers are represented by a delegated senator to appear on their behalf. Therefore, estimates committees cannot question most ministers in person.

Sometimes, estimates hearings degenerate into partisan contests. Senators on the committees can use the estimates process to push their party agenda, taking the focus off the accountability of the executive.

“Senate has emerged as a house that keeps the executive accountable. It has compensated for the weakness of the House of Representatives by evolving strong accountability measures.”

Despite these limitations, Senate Estimates have evolved to become one of the most robust and effective means of achieving executive accountability. See: *Case study: Senate Estimates Committee*. The case studies illustrate that although estimates hearings cannot reverse government decisions, they can bring significant scrutiny to bear and force a government and its departments and agencies to defend and justify their decisions and actions or make changes if deemed appropriate.

Example: Senator Mathias Cormann and Helloworld

In 2017 Finance Minister Mathias Cormann booked a family trip to Singapore through the company Helloworld Travel. Cormann contacted Helloworld CEO Andrew Burnes to organise the flights. Burnes is both a friend of Cormann and a Liberal Party donor, and at the time was Treasurer of the Liberal Party. In 2019 media reports surfaced that Cormann had not paid for the flights worth \$2,780. Cormann was grilled by Senate Estimates for hours as to whether this travel was a gift. Significant focus was also related to why Cormann had dealt directly with Burnes, rather than an employee whose job it is to book travel.

Cormann rejected Senator Penny Wong's remark that it was “not a great look” when a party donor won a lucrative government

contract.⁶ Cormann argued that companies should not be excluded from government tenders because its CEO had “participated in the democratic process” — that is, by making political donations — of Australia.⁷ When Cormann was made aware that his credit card was not charged for the flights he paid the bill. Helloworld issued a letter which Cormann tabled. They claimed that there had been an administrative error and that “the flights were never free and they were never intended to be free”.⁸

Example: Senator Bridget McKenzie and sports rorts

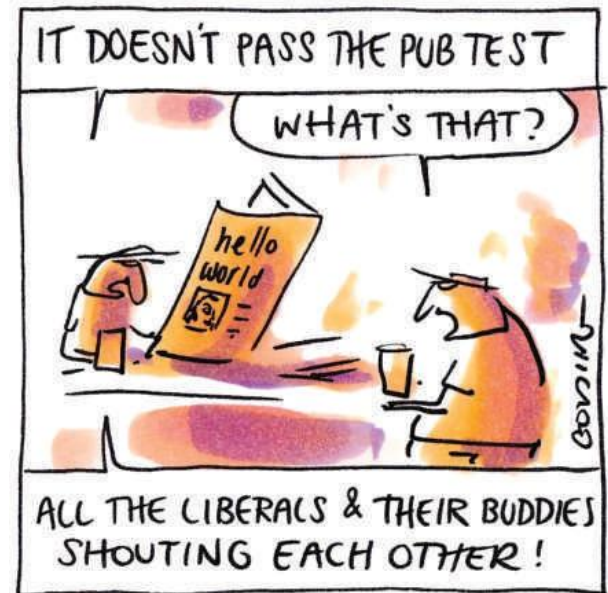
Following the Auditor-General’s report into the assessment process of Bridget McKenzie’s office in the awarding of sports grants to marginal and targeted electorates with political bias in the lead up to the 2019 federal election, Prime Minister Scott Morrison directed Philip Gaetjens — Secretary of the Prime Minister and Cabinet — to investigate. At the conclusion of Gaetjen’s investigation McKenzie resigned from Cabinet.

During Senate Estimates Penny Wong questioned the narrow scope of the investigation undertaken by Gaetjens and why the report had not been made public. Wong alleged that the Prime Minister had known about the way the sports grants were made and that “no one looking at this can come to any conclusion other than Morrison is up to his neck in this” and that “he’s been a very naughty boy”.⁹ In giving evidence to the Estimates Committee, Senator Cormann rejected these claims.

Senate Standing Committee for the Scrutiny of Delegated Legislation

Parliament can delegate lawmaking power to the executive, allowing it to make subordinate legislation. The ability to make subordinate legislation means the executive can create laws called regulations, ordinances and instruments. Making executive instruments allows the executive to respond flexibly to the needs of the government and makes it more efficient.

- 6 Murphy, Katharine, ‘Mathias Cormann booked holiday flights directly with Helloworld chief executive’, *The Guardian*, 19 February 2019, <<https://www.theguardian.com/australia-news/2019/feb/19/morrison-defends-mathias-cormann-over-free-flights-for-family-holiday>>.
- 7 Murphy, Katharine, ‘Mathias Cormann booked holiday flights directly with Helloworld chief executive’.
- 8 Murphy, Katharine, ‘Mathias Cormann booked holiday flights directly with Helloworld chief executive’.
- 9 Langford, Sam, ‘What’s going on with the “sports rorts” scandal?’, *The Feed*, SBS, 2 March 2020, <<https://www.sbs.com.au/news/the-feed/what-s-going-on-with-the-sports-rorts-scandal>>.



■ Figure 12.5 – In spite of the fact that Mathias Cormann was not held to account for his family’s use of the services of Helloworld some thought it did not pass the pub test.
Source: Matt Golding, *It doesn’t pass the pub test*, 2019, author’s permission, <www.threefingers.com.au>

Parliament uses a ‘primary’ statute to delegate legislative power to the executive branch. The primary statute contains clauses which enable the executive to make subordinate legislation. Some clauses give the executive the power to alter the primary statute — these are called Henry VIII clauses.

Perceptive students will note that ‘executive lawmaking’ breaches the separation of powers principle. Parliamentary oversight of subordinate legislation is critical to preserve the separation of powers. The Senate Standing Committee for the Scrutiny of Delegated Legislation (the Scrutiny of Delegated Legislation Committee) performs this oversight role. Through this committee, parliament — which is the superior legislator — retains control over lawmaking.

The Scrutiny of Delegated Legislation Committee — called the Regulations and Ordinances Committee until December 2019 — is one of the oldest standing committees of the Senate. It was first established in the early 1930s and has been vital in holding the executive to account ever since. It predates the robust Senate committee system described above. Since its foundation, parliament has accepted virtually all of its recommendations.

Approximately 1,500 pieces of subordinate law — that is, executive instruments, ordinances and regulations — are scrutinised by the committee each year. The committee can recommend disallowance of subordinate legislation if it decides the executive does not need to make law or has overstepped its role when

making subordinate legislation. The Senate acts on the committee's recommendations by passing disallowance motions. Scrutiny and disallowance are the methods the parliament uses to hold the executive accountable for its subordinate law. See: *Background information: Accountability of subordinate legislation*.

Composition of the committee

The Scrutiny of Delegated Legislation Committee is composed of six senators, three from the governing party and the others being three non-government senators, usually with two from the opposition. The chairperson is always a government senator. Like most parliamentary committees — and perhaps even more so than most — it is not especially partisan in the way it works.

Background information: Accountability of subordinate legislation

The Senate Standing Committee for the Scrutiny of Delegated Legislation (the Scrutiny of Delegated Legislation Committee) examines subordinate legislation that can be disallowed by parliament. In an average year over 1,500 regulations, ordinances or other instruments are scrutinised by the committee.

The committee tables a weekly report — called the *Delegated Legislation Monitor (Monitor)*— in which it publishes its inquiries and recommendations into subordinate legislation.

When conducting its inquiries into subordinate legislation, the committee ensures that executive instruments, ordinances and regulations:

- are “in accordance with the statute”;
- do “not trespass unduly on personal rights and liberties”;
- do “not unduly make the rights and liberties of citizens dependent upon administrative decisions which are not subject to review [...] by a judicial or other independent tribunal”; and
- do “not contain matter(s) more appropriate for parliamentary enactment”.¹⁰

Committee oversight ensures executive instruments, ordinances and regulations:¹¹

- are in accordance with the *spirit* of the primary statute even though legally authorised by it; and do not
 - contain reversals of the onus of proof in criminal matters;
 - infringe traditional civil liberties; for example, by providing for searches of premises without warrant;
 - allow for administrative decisions affecting rights and liberties without a right of appeal to a judicial or other independent body by an aggrieved person; and
 - allow retrospectivity — which means applying from a date in the past — as retrospectivity conflicts with the rule of law.

A close study of the two lists above will reveal that the Scrutiny of Delegated Legislation Committee guards the:

- lawmaking powers of the parliament;
- rights of citizens; and
- processes of natural justice and the rule of law.

The committee tables the *Monitor* weekly. The *Monitor* includes an Index of Instruments, which is a list of subordinate legislation the committee thinks are of concern. It also contains a *Disallowance Alert* that makes recommendations to the Senate about particular regulations, ordinances and executive instruments. The Senate debates and votes on subordinate legislation contained in the *Disallowance Alert*. Disallowance revokes a particular piece of delegated legislation, thus removing lawmaking power from the executive branch. Constant oversight of subordinate legislation and warnings of government overreach keep executive lawmaking under tight parliamentary scrutiny.

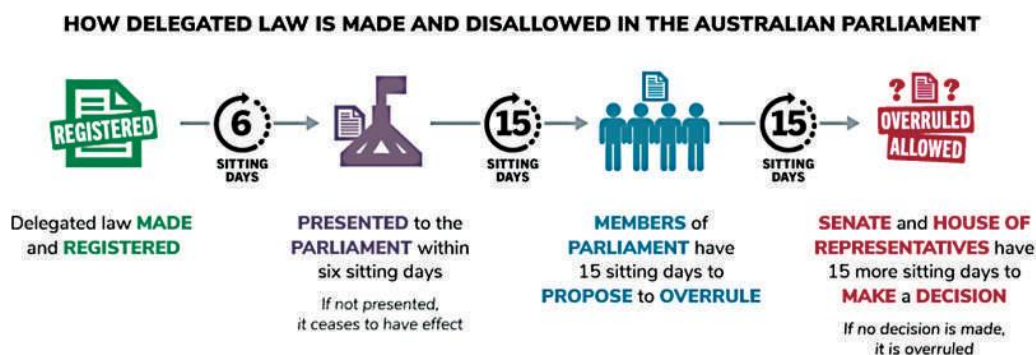
Disallowances occur frequently. Students are encouraged to research contemporary examples by searching ‘Disallowance Alerts’ on the Australian Parliament House website — www.aph.gov.au — where a list of current alerts is published.

¹⁰ Parliament of Australia, *Odgers’ Chapter 15, Delegated Legislation, scrutiny and disallowance*, *Australian Senate Practice*, , 2016, <https://www.aph.gov.au/About_Parliament/Senate/Powers_practice_n_procedures/Odgers_Australian_Senate_Practice>

¹¹ Parliament of Australia, ‘Role of the committee’, *Senate Standing Committee for the Scrutiny of Delegated Legislation*, <https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Scrutiny_of_Delegated_Legislation#:~:text=The%20Senate%20Standing%20Committee%20for%20the%20Scrutiny%20of,rights%20and%20liberties%2C%20and%20principles%20of%20parliamentary%20oversight>.

■ Figure 12.6 – In an average year over 1,500 regulations, ordinances or other instruments are scrutinised by the Scrutiny of Delegated Legislation Committee.

Source: Parliamentary Education Office, *How delegated law is made and disallowed in the Australian Parliament* <<https://peo.gov.au/understand-our-parliament/how-parliament-works/bills-and-laws/delegated-law/>>



Example: COVID-19 regulations under scrutiny

Without parliament sitting, the opposition lacked the formal means to scrutinise the government. Question time, motions of no confidence, committee work and other parliamentary procedures and processes could not operate.

The Senate established a special select committee to scrutinise the government's response to COVID-19. It sat during the crisis, including when parliament was not sitting. However, it could only scrutinise the government's COVID-19 responses — not other government actions. The committee called Finance Minister Senator Mathias Cormann (WA) to answer questions about the Treasury's \$60 billion miscalculation of the cost of JobKeeper. It also called Nev Power — chair of the government's National COVID-19 Coordination Commission — and Phil Gaetjens — Secretary of the Department of the Prime Minister and Cabinet — to answer questions about the Commission's recommendations for a gas led economic recovery plan and the Commission's members' conflicts of interest.

The Labor opposition requested the Auditor-General conduct rolling reviews of the government's COVID-19 spending.

The Scrutiny of Delegated Legislation Committee met regularly by teleconference to maintain parliamentary oversight of government regulations during the COVID-19 crisis. The committee is currently examining 148 executive instruments related to COVID-19, subordinate legislation that is exempt from disallowance (about 25 per cent) and Henry VIII clauses.

The Joint Committee of Public Accounts and Audit

The Joint Committee of Public Accounts and Audit (JCPAA) carries out inquiries into government administration. It can conduct inquiries into matters referred to it by either house of parliament or initiate its own investigations. Its focus is the efficiency of the public service, especially the accountability of government spending and the performance of public organisations such as departments, agencies and statutory corporations.

The JCPAA is the link between the Auditor-General and parliament. It must — by law — examine all reports tabled by the Auditor-General in parliament. The Auditor-General is an officer of the parliament and is independent of the executive. The role of the Auditor-General is discussed below.

Accountability in the modern era

Government finance, operations and decisions

The scope, size and scale of government in the modern era is far more extensive than in the period prior to World War 2 and vastly greater than in the 19th century when the Westminster system — with its conventions of responsible government — reached maturity in Great Britain. Westminster conventions are insufficient by themselves to hold modern Australian executives to account.

The creation or evolution of other institutions meets the increased demands for accountability in Australia's modern democracy. Two such institutions are the Commonwealth Auditor-General and the Administrative Appeals Tribunal (AAT).



■ Figure 12.7 – The Australian National Audits Office aids the Auditor-General.

Source: Bidgee, Australian National Audit Office located in the Centenary House building in Barton, Australian Capital Territory, 2011, CC BY-SA 3.0 au, <<https://commons.wikimedia.org/w/index.php?curid=18254623>>

“The Auditor-General to provide the Parliament with an independent assessment of selected areas of public administration, and assurance about public sector financial reporting, administration, and accountability”

The Commonwealth Auditor-General

The Auditor-General was established soon after federation. In contemporary Australia, the *Auditor-General Act 1997* governs the Auditor-General of Australia and the Australian National Audit Office (ANAO). The ANAO is, therefore, a statutory authority. The Auditor-General is the head of the ANAO. The *Public Governance, Performance and Accountability Act 2013* is the most recent legislation covering the work of the Auditor-General and the ANAO. See: *Background information: An independent officer of the parliament with bipartisan support*.

Grant Hehir was appointed as the Auditor-General in 2015 by Prime Minister Tony Abbott. Auditors-General serve a 10-year term. They are:

- independent officers of the parliament;
- recommended by the Joint Committee of Public Accounts and Audit, and the Prime Minister; and
- appointed by the Governor-General.

The ANAO “supports the Auditor-General to provide the Parliament with an independent assessment of selected areas of public administration, and assurance about public sector financial reporting, administration, and accountability”.¹²

Background information: An independent officer of the parliament with bipartisan support

The Auditor-General is part of the architecture of accountability centred on the parliament’s responsibility role. As a Westminster-style legislature, the Commonwealth Parliament holds the government to account. Westminster conventions are focused on ministerial responsibility — that is, the ministry — but are of limited value in detecting and scrutinising the operations of an immense public service.

Executive power exercised by the public service is rule based and systematic. The Auditor-General examines the rules and systems used by the public service and other government agencies. It enhances parliament’s ability to keep government accountable by examining the vast bureaucratic machinery of public administration, in particular its management processes, spending and compliance with the law. The Auditor-General tables reports in parliament and the Joint Committee of Public Accounts and Audit has a statutory obligation to examine them.

The bipartisan JCPAA recommends the appointment of the Auditor-General. Bipartisan support is an essential requirement for an officer whose job is to ensure that government administration and finances are accountable. After the committee recommends a candidate for the position, the Prime Minister advises the Governor-General to make the appointment.

The Auditor-General is entirely independent of the executive branch. Therefore, the government cannot interfere with the Auditor-General’s investigations of its administration, finances and compliance with the law.

¹² Joint Committee of Public Accounts and Audit, *Reviews of the Auditor-General’s reports and Australian National Audit Office (ANAO) budget statements*, Parliament of Australia, <https://www.aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_Committees?url=jcpaa/agreports.htm>.

Operations of the Auditor-General and the ANAO

The Auditor-General conducts audits of Australian public service departments, agencies and other entities — that is, the administrative executive.

An audit is an independent inspection and report of an organisation's operations, finances and compliance with the law. The ANAO conducts two types of audit:

- performance audits; and
- financial audits.

It also conducts:

- assurance reviews.

Performance audits

An ANAO performance audit is an inspection of the way a government department or agency carries out its day to day business. Performance audits can cover a department's contract processes, human resources management, record keeping, cyber security and stationery. Performance audits ensure systems of operation are efficient, economical and effective.

Performance audits use 'key performance indicators' (KPIs) to measure effectiveness, economy and efficiency. A KPI is a standard of measurement used to assess performance.

Financial audits

Financial audits check the financial statements and records of a government department or agency. As part of the budget process, departments and agencies are supplied with funds to carry out their roles. Financial audits ensure their spending is accountable. Inefficiency and corruption may be detected when an auditor checks the accounts of a public entity.

Assurance reviews

The Auditor-General ensures that relevant laws, standards, codes and guidelines are adhered to by government entities.

The Australian Public Service is governed by:

- the *Public Service Act 1999*;
- the Public Service Standards; and
- a Code of Conduct.

Other laws apply to the public service too. For example, the *Commonwealth Sex Discrimination Act 1984* makes the equal treatment of the sexes in recruitment, training, pay and opportunities mandatory in the workplace. It also prohibits



■ Figure 12.8 – The Auditor-General investigates the proper administration of government programs.

Source: Matt Golding, *Spot the difference*, 2019, author's permission, <<https://www.theage.com.au/national/victoria/government-had-warning-of-recycling-crisis-six-years-ago-watchdog-says-20190606-p51v7k.html>> and <threefingers.com.au>

sexual harassment in the workplace. Every part of the public service must have up to date policies for ensuring equality between the sexes and the prevention of sexual harassment.

Assurance reviews manage 'information risk' by making sure that public organisations comply with relevant and up to date laws, regulations, procedures and policies.

The Auditor-General in practice

The Auditor-General investigates the proper administration of government programs. For example, many individuals and organisations are entitled to receive government grants. Statutes set out the qualification criteria for grants and public service departments or agencies. It uses rules and systems to assess grant applications and makes payments based on the statutory criteria. Ministers may have discretion over grants and other decisions. The Auditor-General will check that the grants comply with the statutory requirements, public service codes of conduct, systematic rule based processes and limitations imposed on ministerial discretion. When an audit implicates a minister in wrongdoing, other parliamentary mechanisms such as the convention of individual ministerial responsibility and Senate estimates hearings may come into play to hold the minister accountable. See: *Example: Senator Bridget McKenzie and sports rorts above*.

Example: Auditor-General reports on the administration of environmental laws

The *Environment Protection and Biodiversity Conservation Act* (EPBC Act) was passed by the Commonwealth Parliament in 1999. It is Australia's primary national environmental legislation. The EPBC Act enables the Department of Agriculture, Water and Environment to work with the various states and territories of Australia to protect the environment and conserve Australia's unique biodiversity.

Under the EPBC Act, all actions which may have a significant impact on matters of national environmental significance must receive prior approval from the Minister for the Environment. This process involves three stages:

- Referral — the controlled action is referred to the minister;
- Assessment — the minister determines the methods for assessing potential impacts of the controlled action. The assessment is then carried out;
- Approval — the minister decides whether to approve the action and any conditions that may be necessary.

The ANAO was tasked with assessing the effectiveness of the Department of Agriculture, Water and Environment's process for the referral, assessment and approval of controlled actions. This was an audit priority of the Commonwealth Parliament.

On June 25 2020, the ANAO published its report. From the approvals assessed by the ANAO, 79 per cent were non-compliant with established procedures or contained clerical or administrative errors. Ultimately, this reduces the department's ability to monitor the conditions or achieve the intended environmental outcome. The ANAO also found that, although the Department has established sound oversight structures, conflicts of interest were not appropriately managed.

Opponents of the Morrison Government's handling of environmental protection — including the Australian Labor Party (ALP), the Greens and the Australian Conservation Foundation — have labelled our environmental laws as "fundamentally broken" and "not equipped to deal with dual extinction and

climate crises".¹³ They have argued that the ANAO's report is a "scathing indictment of the Federal Government's administration of our national environment law". Greens Senator Sarah Hanson-Young said "There must be accountability, and it must be at the top. Not only do our environmental laws need an overhaul but clearly so does those who are in charge of administering them".¹⁴

Minister for the Environment Sussan Ley agreed that the report stressed the importance of change and that the government had already provided \$25 million in funding to address many of the issues highlighted by the ANAO's report.

The ANAO publishes the *Better Practices Guide* to assist senior public servants to implement good administrative practices. The guide serves to inform and educate senior public sector management. It also publishes a newsletter called *AUDITFocus*. The newsletter provides information to public sector employees about the role and practices of the Auditor-General. These publications — found on the ANAO website — both inform and alert public servants that there is a watchdog ready to hold them accountable for their performance, finances and compliance.

The Administrative Appeals Tribunal

The Administrative Appeals Tribunal (AAT) was created by the *Administrative Appeals Tribunal Act 1975*. The AAT is concerned only with the accountability of the public service for its administrative decisions. It has no official capacity to rebuke a minister. Nevertheless, AAT decisions can warn a minister of potentially unlawful policy implementation. See: *Background information: What is a tribunal?*

Background information: What is a tribunal?

Tribunals are like courts. They hear disputes between parties, consider evidence, use procedures based on fairness and natural justice, and resolve disputes. However, tribunals are not courts. Judicial power is the power to preside over legal disputes and to declare the law through the interpretation of the common law, statutes and the Constitution. Court decisions are legally binding and can create common law. Courts have judicial power; tribunals do not.

13 Dalzell, Stephanie, 'Auditor-General's review of EPBC act finds severe deficiencies in Environment Department's processes', *ABC News*, 25 June 2020, <<https://www.abc.net.au/news/2020-06-25/auditor-general-severe-deficiencies-environmental-protection/12393780>>.

14 Senator Sarah Hanson-Young cited in Dalzell, Stephanie, 'Auditor-General's review of EPBC act finds severe deficiencies in Environment Department's processes', *ABC News*, 25 June 2020.

Tribunals review administrative decisions. The AAT reviews government decisions if parties dispute them. Tribunals might have less power than courts, but they are more flexible and can resolve disputes more fairly, cheaply and quickly while allowing parties to remain in control.

Merit review versus judicial review

A court undertaking a *judicial review* can only consider if a government decision was within the bounds of the law — that is, lawful — not if it was the best decision. Tribunals must apply the law, but they can also consider the merit of a decision. The AAT conducts *merit reviews* to determine if the decision under review was the best decision.

Cost and formality

Courts can be prohibitively expensive, requiring parties to hire expensive legal representatives. They can also take a very long time to resolve a dispute, further inflating costs. Court procedures are strict, and cases can be won or lost on legal and procedural technicalities. Court decisions are also legally binding on the parties.

Tribunals emphasise fairness, informality, efficiency, timeliness and economy — with fairness being the most important feature. There are no lawyers. Parties represent themselves in front of a panel of adjudicators and present their side of the argument in plain English. Tribunal processes are based on natural justice and fairness — also called due process. The panel of adjudicators are impartial and unbiased, parties have an equal opportunity to present their side of the case, decisions are based on evidence and hearings are open and accountable. See Chapter 17 for a more complete discussion of natural justice.

Tribunals do not enforce or interpret statutes. Instead, they check administrative decisions made by government departments and/or agencies to ensure fairness, taking into account the merits of the case. They have no power to make common law or to alter the meaning of a statute by interpretation.

Control and flexibility

Parties retain control of their matter in a tribunal. They may opt for alternative dispute resolution (ADR). The AAT uses conferences, mediation and conciliation, case appraisal and neutral evaluation as ADR methods. Resolution often occurs at the conference stage without any need for a hearing before a panel of adjudicators.

Not all tribunals can change an administrative decision; many can only recommend a change. The AAT may do both.

Broad jurisdiction

In July 2015, parliament abolished the Migration Review Tribunal, the Refugee Review Tribunal and the Social Security Appeals Tribunal and assigned their roles to the AAT. The AAT has expanded to become what it describes as a “one-stop shop for the independent review of a wide range of decisions made by the Australian Government”.¹⁵

The Administrative Appeals Tribunal’s jurisdiction

The AAT reviews administrative decisions. An administrative decision is any decision made by a government department or agency in the course of carrying out the law.

The AAT can only review administrative decisions where an Act or regulation enables it. The AAT is currently able to review the merits of administrative decisions made under more than 400 Acts or regulations. According to the AAT’s website the most common decisions it reviews are in the following areas:¹⁶

- child support;
- Commonwealth workers’ compensation;
- welfare entitlements;
- migration and refugee visas;
- taxation; and
- veterans’ entitlements.

It also reviews decision relating to:

- citizenship;
- bankruptcy;
- aviation;
- corporations;

¹⁵ Administrative Appeals Tribunal, *Amalgamation of Commonwealth merits review tribunals, Fact sheet*, July 2015, <https://www.aat.gov.au/AAT/media/AAT/Files/Brochures/The-Amalgamated-AAT-What-is-changing-and-what-is-staying-the-same.pdf>.

¹⁶ Administrative Appeals Tribunal, *About the AAT*, <<https://www.aat.gov.au/about-the-aat>>.

- customs;
- freedom of information;
- disability — under the National Disability Insurance Scheme (NDIS);
- passports; and
- Australian Security Intelligence Organisation (ASIO) security assessments — under anti-terrorism laws.

Note the scope of AAT jurisdiction. It covers broad areas of government decision making.

The AAT and accountability

Perceptive students will note that a single — “one-stop shop” — dispute resolution tribunal with broad jurisdiction to review administrative decisions — to change decisions as well as make recommendations — makes the AAT a formidable force for the accountability of the public service.

As the lists above suggest, parents, companies and corporations, migrants, pilots, injured workers, taxpayers, pensioners, travellers, former soldiers and many others may challenge government decisions affecting them. They can test to see if a decision was the best one rather than just a legal one. For example, a taxpayer can challenge an Australian Taxation Office decision they believe is wrong, and a welfare recipient can challenge an overpayment debt raised against them by the Department of Human Services. In some cases, AAT decisions can alert a government to the potential unlawfulness of its decisions, but it cannot rule a decision unlawful. See: *Example: The Administrative Appeals Tribunal in action*.

The AAT helps members of the public test the merit of administrative decisions affecting them to see that their public service has served them well.

Example: The Administrative Appeals Tribunal in action

The AAT finalised over 47,000 appeals between 1 July 2019 and 30 June 2020. Appeals were related to migration and citizenship decisions of the Department of Home Affairs and Centrelink, child support decisions of Services Australia, and taxation decisions of the Australian Taxation Office. The AAT changed the original administrative decision in 26 per cent of these cases.

Example: Migration and citizenship

Christine and Anthony Hyde moved to Australia in 2009, applying for permanent residency in 2015. The couple’s child — who was born in Australia — was diagnosed with cystic fibrosis. Their application was rejected on the grounds that their son did not meet the permanent residency health criteria and would be a burden on Australia’s healthcare system. In May 2019 the Hyde family appealed the decision to the AAT where it was found that the case met the requirements for ministerial intervention. An online petition calling for the Hyde family to be allowed to stay in Australia received over 115,000 signatures and calls from Victorian Premier Daniel Andrews for the Commonwealth Government to show ‘mercy’ on the family. In July 2019 Immigration Minister David Coleman intervened in the case and ordered for the family to be granted permanent residence.

“A single — “one-stop shop” — dispute resolution tribunal with broad jurisdiction to review administrative decisions — to change decisions as well as make recommendations — makes the AAT a formidable force for the accountability of the public service.”

In 2013 the Lund family moved to Australia after husband and father Jason received a contract to work for the New South Wales Government. Five years later they applied for permanent residency. However, the application was rejected by the Department of Home Affairs due to one of their children having Down Syndrome. Due to the costs of his healthcare needs, he failed the migration health requirement, leaving the entire family ineligible to stay in Australia. The family were given 35 days to leave. The Lund family appealed the decision to the AAT. In July 2020 the AAT overturned the decision and requested for it to be reviewed by the Department of Home Affairs.

Example: Robodebt

Robodebt was an automated debt recovery program introduced by the Commonwealth Government in mid-2016. The robodebt system cross-checked how much an individual reported they earned to Centrelink with what their employer reported to the Australian Tax Office. The aim was to calculate what benefits individuals were entitled to and recover overpayments of welfare. However, the income averaging algorithm used by the robodebt system was flawed and resulted in hundreds of thousands of individuals wrongly receiving debt notices.

Between 2016–2019 of the 1,700 robodebt decision appeals, more than a third were overturned by the AAT. On numerous occasions the AAT warned that robodebt may be unlawful. Although the government ignored these warnings, this highlights how AAT decisions can inform the government of potential issues in policy implementation. The government eventually admitted robodebt was unlawful and is refunding 'debt' paid by many people. For a more in-depth discussion of robodebt, see the *Case study: Robodebt*.

Students are encouraged to access the AAT decisions database to find further examples of how the AAT is a mechanism of executive accountability.



■ Figure 12.9 – Robodebt ended in November 2019 after the Federal Court found the scheme unlawful in *Amato v Commonwealth of Australia* 2019.

Source: Matt Golding, *Darn it!*, 2017, author's permission, <<https://www.smh.com.au/public-service/centrelink-robodebt-public-servants-removed-for-asking-too-many-questions-says-andrew-wilkie-20170116-gts7na.html>>

Judicial review

The law binds the executive branch; everything it does must be within the bounds of the law. The third branch of government plays a fundamental role in the accountability of the executive by holding it accountable to the law.

Courts review government decisions and policies. They exercise judicial power — the power to make legally binding decisions based on interpretations of the law. A judicial review may result in an executive decision, action or policy being declared unlawful or unconstitutional.

Government policies, ministerial decisions and administrative decisions made by the public service are all subject to judicial review.

Courts consider only the lawfulness of executive action, not its merit.

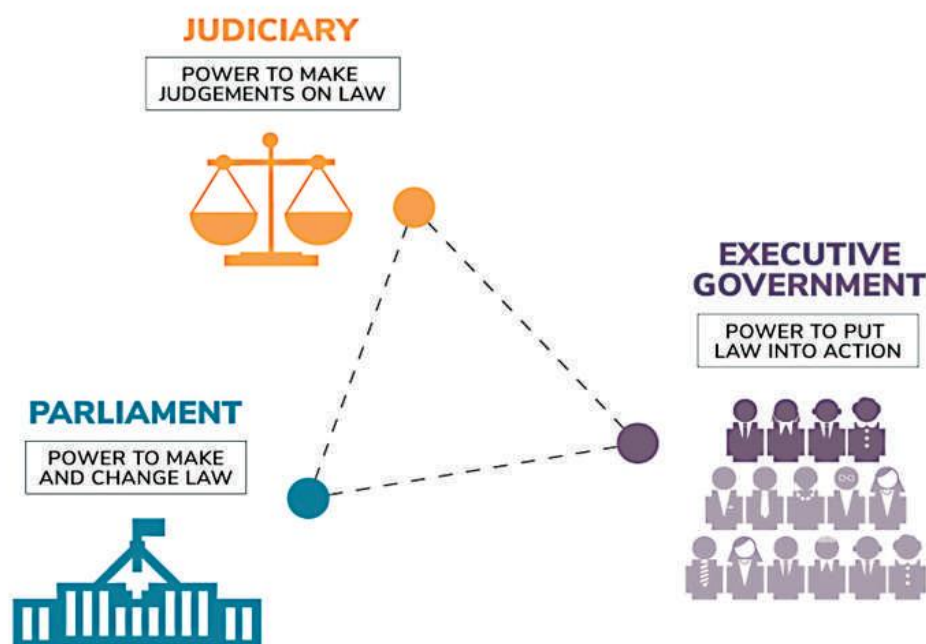
Separation of powers, judicial independence and the rule of law

Section 71 of the Constitution imposes a strict separation of power between the federal judiciary and the other two branches of the federal government. In the *Boilermakers Case* (*R v Kirby; Ex parte Boilermakers Society of Australia* (1955-56) 94 CLR 254] and *Brandy's Case* (*Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245) the High Court strengthened the separation of the judicial branch and reinforced the rule of law. You can read about these cases in Chapter 7.

Section 72 of the Constitution protects Chapter 3 courts from interference by the executive. The judiciary is entirely independent of the executive.

Courts impose the rule of law upon the executive branch. The separation, independence and the power to make legally binding decisions make the judiciary a superior force for holding the executive accountable to the law.

SEPARATION OF POWERS IN AUSTRALIA



■ Figure 12.10 – The *Boilermakers* and *Brandy's* cases reinforced the separation of powers in Australia.

Source: Parliamentary Education Office, *Separation of powers in Australia* <<https://peo.gov.au/understand-our-parliament/how-parliament-works/system-of-government/separation-of-powers/>>

Judicial review of the public service

Taking the government to court is the ultimate test of the lawfulness of a government decision. Parties adversely affected by the government have a right to challenge it in court.

Courts rely on litigation. Litigation uses the adversarial method of dispute resolution. It is dependent on experts, costly, time consuming and complicated, leaving the parties with less control over their matter. Court action is usually the last resort. A further limitation of judicial review is that a court can only decide the lawfulness — not the merit or fairness — of administrative decisions. In most cases, parties will have tried other means such as the AAT to test an administrative decision before they seek a judicial review.

Courts may issue writs and injunctions against public officials, including ministers. Writs and injunctions are legal remedies. Executive officials must comply with court orders. If not, they may be held in contempt of court and jailed by the court. Section 75(v) of the Constitution gives the federal judiciary power to issue writs of mandamus. A writ of mandamus is a court order requiring a government official to carry out — or not carry out — a specific action that the official is obliged to do by law. Courts may also issue prohibitions or injunctions to government departments and agencies. These are writs which prevent specific actions. See: *Example: Court threatens to jail ministers*.

Example: Court threatens to jail ministers

In *AFX17 v Minister for Home Affairs (No 4)* [2020] FCA 926, Federal Court Justice Geoffrey Flick ordered Minister for Home Affairs Peter Dutton to decide a temporary visa application for an Iranian man. The court issued a deadline for the minister to comply.

Justice Flick said it was open to him to find Dutton in contempt of court if he did not comply with the court order and could jail him as a result.

Dutton made a decision just before the deadline.

Judicial review of Cabinet ministers and Cabinet policy

Governments use extensive powers implied by Section 61 of the Constitution. These are prerogative powers of the executive. The nationhood power is an example. Government policies carried out using prerogative powers can be challenged in the High Court. See: *Example: Pape and Williams*.

Example: Pape and Williams

In *Pape v Commissioner of Taxation and the Commonwealth of Australia* [2009] HCA 23, Bryan Pape — a lecturer and barrister — challenged the validity of the Rudd Government's economic stimulus package

that entitled many Australian's to a \$900 tax bonus. Pape claimed that the payments were not a tax bonus, but a gift and were not supported by the taxation power provided under Section 51(ii) of the Constitution, and that the payment had not been appropriated from the Consolidated Revenue Fund by law as required by Section 83 of the Constitution.

The High Court rejected the proposition that Section 81 confers a 'spending power' on the Commonwealth. Instead, power to spend Commonwealth money needs to be supported by a constitutional legislative head of power. However, in a majority 4:3 decision the High Court found that the power to spend can be found in the executive power bestowed on the Commonwealth in Section 61, along with the incidental power in Section 51(xxxix). This 'nationhood power' was necessary to provide short-term fiscal measures to assist in Australia's recovery from the global financial crisis.

In *Williams v Commonwealth of Australia* [2012] HCA 23, Ron Williams — a father of six — challenged the validity of Commonwealth funding for the National School Chaplaincy Program (NSCP). No legislation had been passed to establish or fund the NSCP. Instead, the Australian Government relied on its Section 61 executive prerogative powers to engage private services — such as the Scripture Union Queensland — to provide chaplains in public schools.

In a 6:1 majority decision the High Court declared that executive power is not equivalent with Commonwealth legislative power, and that in most circumstances the executive requires legislation before it can enter into contracts with private parties and spend public money.

The High Court's decision cast doubt on the validity of a vast array of executive funded programs, amounting to somewhere between 5–10 per cent of Commonwealth Government spending. It also limited the broad application of executive powers.

Statutes may grant the executive branch significant flexibility in how it carries out the law. Delegated legislation is one method by which parliament gives the government considerable flexibility. Another is providing ministers with discretion to decide how to carry out a law. Ministerial discretion means a minister can decide how to apply a statute in a particular situation. In several fields, governments must deal with highly case specific situations where

a general statute does not provide a specific legal solution. Migration law is an example — every asylum seeker or refugee temporary visa application is a unique case. In these fields, ministers can decide how to apply the law. See: *Background information: Ministerial discretion*.

Background information: Ministerial discretion

Ministerial discretion is a practical solution to real-world problems. Nevertheless, it gives wide-ranging powers to the executive branch with minimal parliamentary oversight or accountability. The Minister for Home Affairs is an example of a minister with considerable discretion in how the *Migration Act 1958* applies in specific situations.

The Home Affairs Minister's decisions are frequently subject to challenge in the AAT and courts. Each case is unique and often highly emotionally charged. The minister's decisions affect people's lives profoundly and can divide the wider community. See: *Example: Court halts deportation of Tamil asylum seekers*.

Cabinet determines the government policy. Cabinet policies must be lawful. The government's policies — not just single administrative or ministerial decisions — may be reviewed by the courts and ruled unlawful. The Gillard Government's Malaysia Solution is one example. See: *Case study: Robodebt* for a more contemporary example.



■ Figure 12.11 – The Federal Court halted the deportation of a Tamil family to Sri Lanka.

Source: Matt Golding, *If you have to go, you have to go!*, 2020, author's permission, <<https://www.smh.com.au/politics/federal/pm-won-t-chase-twitter-public-sentiment-on-tamil-family-20190904-p52o21.html>>

Example: Court halts deportation of Tamil asylum seekers

Nades and Priya — Sri Lankan Tamils — arrived in Australia by boat in 2012 and 2013 seeking asylum. The couple married and settled in Biloela, a town in central Queensland. Their two daughters were born in Australia. The Department of Home Affairs assessed their claims for asylum and concluded that they did not meet the requirements. In early 2018 the couple's visas expired. In March 2018 they were removed from their home by Border Force officials to a detention facility in Melbourne. After failed court cases appealing their deportation in both the Federal and High Courts, the family were put on a plane for deportation in August 2019. However, mid-flight the Federal Court issued an injunction halting their deportation. Lawyers for the family argued that their two-year old daughter's case for asylum had not been assessed. The following day the Federal

Court extended the injunction, requiring the entire family to be kept in Australia until Tharunicka's case was heard. The family were moved to Christmas Island. In April 2020 the Federal Court found that Tharunicka had not been afforded procedural fairness because she was not notified that her case was being assessed in August 2019 or invited to comment. The Federal Court found that Immigration Minister David Coleman needed to properly decide whether to allow her to apply for a visa. A minister has the power to intervene in cases where a person has not met the legal requirements for a visa, but because of humanitarian or national interest grounds the government intervenes. The family are currently waiting for their hearing, which could be late 2020 or early 2021.

This case shows how ministers can make discretionary decisions and courts can issue injunctions.

Avoiding accountability

In contemporary Australia, governments outsource a range of services formerly provided by the public service. The claim is that outsourcing to the private sector improves the efficiency and lowers the cost of government services by introducing the market mechanism and competition to service delivery. Unfortunately, the private sector is beyond the reach of some accountability processes described in this chapter.

A recent case illustrates the issue. Australian run detention centres on Nauru — a small island nation in the Pacific — are operated for the government by private contractors. As a private business, the contractors are primarily motivated by profit rather than service. The result has seen considerable controversy over the treatment of asylum seekers and refugees in these detention centres. The international community has raised concerns over human rights abuses, and the issue divides Australia's political discourse.

Conclusion

The executive is the most worrisome of the three arms of government because it controls the apparatus of the State and has a monopoly on the use of force. Unchecked executive power is the definition of autocratic government. Holding the executive government to account is a fundamental part of the rule of law and a defining characteristic of democracy and good government.

The balance of parliamentary and extra-parliamentary ways of holding the Cabinet, the ministry and the public service accountable serve Australian democracy well. The blend of Westminster conventions, independent institutions such as the Auditor-General and the AAT, as well as an independent judiciary upholding the rule of law holds the power of government answerable, responsible and accountable.

Summary

General accountability

- The accountability of power is an essential principle of democracy. The executive power, in particular, must be accountable because it is the arm of government which most directly impacts the lives of citizens.
- The elected government — the Prime Minister and Cabinet, and the appointed public service must all be accountable for the use of executive power.

Westminster responsibility

- The Westminster System — adopted by Australia from Britain — is defined by the responsibility of the executive to the legislature — the system known as responsible parliamentary government. This system has several traditional responsibility features, including:
 - individual ministerial responsibility — in which ministers are accountable to the parliament for their conduct and competence, and their department;
 - collective ministerial responsibility — in which the entire Cabinet and ministry is accountable to the parliament; and
 - specific processes and procedures related to the above, including motions of no confidence, censure motions, question time and other parliamentary mechanisms.

Senate estimates and at least one other committee

- Senate estimates committees have emerged over time to become competent in providing parliamentary oversight of the executive.
- Senate Estimates are special sittings of the eight legislative and reference committees of the Senate. They inquire into government spending and activity during budget hearings.
- The Senate Standing Committee for the Scrutiny of Delegated Legislation provides parliamentary oversight of the executive's use of delegated legislative power. It may recommend the Senate disallow executive instruments made by the government under primary statutes.
- The Joint Committee of Public Accounts and Audit is a standing committee that oversees public finances and the operations of the public service.

The Auditor-General and the Administrative Appeals Tribunal

- The Auditor-General is an officer of the parliament not the executive, and provides independent assessments to parliament's Joint Committee of Public Accounts and Audit.
- The Auditor-General conducts performance audits, financial audits and assurance reviews of public service departments and agencies.
- The Auditor-General may investigate matters referred to it by the parliament and the opposition.
- The Administrative Appeals Tribunal is a statutory dispute resolution body. It is not a court.
- The AAT hears disputes about the administration of the law by the public service.
- The AAT is less formal and less expensive than a court — making it more accessible than the courts.
- The AAT can make decisions based on merit. It can reverse decisions made by public service departments or government agencies that come under its jurisdiction.

continued overleaf

Judicial review

- Courts exercise judicial power — the power to make legally binding decisions.
- The judiciary is constitutionally separate and independent from the executive and the parliament. Judicial independence is an essential element of the rule of law.
- Federal courts may make judgments about the lawfulness of Cabinet policy and the decisions of Commonwealth public service departments and agencies.
- The High Court may make decisions about the constitutionality of executive actions and policies.
- Courts may make legally binding orders on the executive. Writs of mandamus and injunctions are examples.

Exam practice questions

Short answer

- 1a) Define the term 'public servant' as it applies to the Commonwealth executive.
- 1b) Explain **three** roles of the Commonwealth Public Service.
- 1c) Discuss the role of the Administrative Appeals Tribunal in holding public servants to account.
- 2a) What is meant by the 'Westminster chain of accountability'?
- 2b) Distinguish between the terms 'individual ministerial responsibility' and 'collective ministerial responsibility'.
- 2c) Discuss the effectiveness of individual ministerial responsibility in upholding the accountability of ministers.
- 3a) Outline the role of the 'Senate Standing Committee for the Scrutiny of Delegated Legislation' in the Commonwealth Parliament.
- 3b) Outline **three** powers of the Administrative Appeals Tribunal.
- 3c) Using **one** example detail the role of judicial review in ensuring the executive is held to account.

Source analysis

Refer to the section 'The Commonwealth Auditor-General' to respond to the questions below.

- 4a) What is meant by the term 'architecture of accountability' as it applies to the Auditor-General?
- 4b) With reference to the source, explain how the Auditor-General is appointed and state **one** advantage of this method of appointment.
- 4c) With reference to at least **one** example, explain how the Auditor-General can act as an 'officer of parliament'.
- 4d) Discuss the strengths and weaknesses of the Senate estimates process in holding the executive to account.

Essay response

- 5) 'Westminster conventions and parliamentary processes provide sufficient accountability of the executive and public service'. Evaluate the validity of this statement.
- 6) 'Financial accountability of the executive is ensured through the Senate Estimates process and the Auditor-General. However, little is done to ensure financial accountability of the public service'. Assess.
- 7) 'Recent case studies have shown that judicial review can be used to hold the executive to account, but that parliament can then take steps to change existing laws allowing government policy'. With reference to at least **one** example, demonstrate the relationship between the High Court, the government and the Commonwealth Parliament, and assess the extent to which judicial review does provide for accountability.

continued overleaf

Investigation

- 8) Using the internet, find two examples of senior Commonwealth Public Servants (sometimes called Secretaries) and state which departments they oversee.
- 9) Use the Administrative Appeals Tribunal website (<http://www.aat.gov.au/decisions>) to find two contemporary AAT cases. For each case, briefly describe:
 - 9a) the context;
 - 9b) the decision made by the AAT; and
 - 9c) the impact of this decision on accountability of the executive and/or public servants.
- 10) Investigate the problems associated with the completion of the 2016 census and consider the following:
 - 10a) What problems arose, and why?
 - 10b) Which government department was responsible for the administration of the census?
 - 10c) Which minister(s) oversaw this department?
 - 10d) What were the consequences for the executive and the public servants involved?
 - 10e) To what extent was the accountability of the executive and public service upheld with respect to the 2016 census?



Accountability of the Governor-General

Syllabus point:

- **the extent of the accountability of the Governor-General and the Office of the Governor-General**
 - **through appointment**
 - **through removal**
 - **the '1975 crisis' and the 'Hollingworth affair'**

Introduction

The accountability of the Governor-General was called into sharp focus in April 2016 when Senator Stephen Conroy attacked the then Governor-General Peter Cosgrove for showing weakness by agreeing to **prorogue** and then recall parliament under Section 5 of the *Commonwealth of Australia Constitution Act* 1900 (the Constitution). The Governor-General had done so on the advice of Prime Minister Malcolm Turnbull so that the parliament could debate proposed legislation on the Australian Building and Construction Commission.

The prorogation and recall of Parliament has occurred 28 times since federation, but not once since 1977 until 2016. Senator Stephen Conroy accused the Governor-General of “demeaning his office” by interfering in the democratic process. He likened the actions of Governor-General Cosgrove to those of “the long, dead arm of Sir John Kerr”¹ who was responsible for sparking the ‘1975 crisis’. The implication on the part of Senator Conroy was that the Governor-General was acting in a manner for which he would not be held accountable to the Australian people.



■ Figure 13.1 – This 1901 cartoon from *The Bulletin* parodying Lord Hopetoun demonstrates the role of public opinion in holding the Governor-General accountable.
Source: Ambrose Dyson, ‘The Special Creation’ *The Bulletin*, 1901, Public Domain, <https://en.wikipedia.org/wiki/John_Hope,_7th_Earl_of_Hopetoun#/media/File:Hopetoun_Cartoon.PNG>

The roots of the Office of the Governor-General lie in the very earliest settlement of Australia by the British.² When Captain Arthur Phillip arrived in Australia he became our very first Governor, with his role being to represent the interests of the Crown in the new colony. Due to the tyranny of distance and the indifference of the British Parliament, the power of our first Governor over the lives of the inhabitants of the new colony was almost absolute. Governor Phillip held both legislative and executive power in the new colony. Today it would be unthinkable in any liberal democracy for one person to wield such power over a society.

Since then the ‘real’ power held by our Governors and Governors-General have diminished. The Governor-General continues to have a role to play in the Australian legislature and executive. However, the exercise of this power has been limited to those outlined in the Constitution and also by convention. In spite of this, there remains the potential for the Governor-General to wield considerable power within Australia’s political system. Consequently, there is also a requirement for some mechanisms to hold the Governor-General accountable for their use of this power.

“Prorogation and recall of Parliament has occurred 28 times since federation, but not once since 1977 until 2016”

Accountability through appointment

The Office of the Governor-General is established in Chapter 1 of the Constitution. Appointment to the position of Governor-General is made by the Queen under Section 2. Appointment is at the “Queen’s pleasure” and the Governor-General is vested with “such powers and functions of the Queen as Her Majesty may be pleased to assign to him”. The implication of Section 2 is that the appointment of a Governor-General and the assignation of their powers by the Queen is the formal mechanism through which Governors-General should be held accountable.

Initially, appointments to the position were made by the King or Queen on the recommendation of the Colonial Office in London. This resulted in the appointment of Governors-General who were born in the United Kingdom (UK) and

1 Senator Stephen Conroy, cited in Ferguson, Richard, ‘G-G notes’, *Spectator Australia*, 30 April 2016, <<https://www.spectator.com.au/2016/04/g-g-notes/>>.

2 See Chapter 16 for a discussion of the impact of white settlement on the Indigenous population of Australia.

who were at times ill suited to the position. For example, Australia's first Governor-General Lord Hopetoun was a controversial figure who asked to be recalled to Britain in 1903 after a dispute about the funding for his position. In fact, all of the Governors-General of Australia were born in Britain up until 1965, except for Sir Isaac Isaacs (1931–1936) and Sir William McKell (1947–1953).

Since the 1930s, the selection of a Governor-General has been made by the Prime Minister in consultation with staff or colleagues. Once a candidate has been selected, they are approached in order to ascertain their interest in the position. Then a recommendation is made to the monarch. The monarch may decline the advice of the Prime Minister and may ask for another nomination or even appoint a person of his or her own choosing. The closest to this ever happening was in 1930 when James Scullin — the then Prime Minister — proposed the appointment of Australian born Sir Isaac Isaacs.

The appointment of Sir Isaacs was strongly opposed by the British monarch, King George V. The primary basis for King George's objection was that an Australian — no matter how highly regarded — was not considered appropriate for the Office of the Governor-General. Prime Minister Scullin was adamant that Sir Isaac Isaacs be appointed and cited the appointment of native born Governors-General in South Africa and Ireland which had been agreed to despite the objection of the British Government. Ultimately, the King agreed to the appointment of Sir Isaacs though he made his dissatisfaction clear. The right of other Prime Ministers in the Commonwealth to advise the monarch directly and to expect their advice to be taken was ratified in the *Statute of Westminster 1931*.

By convention, Queen Elizabeth II is bound to accept the advice of the Australian Prime Minister as to the appointment of a Governor-General. The ability of the Prime Minister to select the Governor-General implies they have the power to appoint people to this position who uphold the values that the government of the day would like to see reflected in the Office of the Governor-General. This can be seen through the commissioning of Sir David Hurley as the 27th Governor-General by Prime Minister Scott Morrison on 1 July 2019. In making the announcement Morrison commented on the significance of Hurley's long military service. Hurley's predecessor, Sir Peter Cosgrove, also had a distinguished military past. The selection of former military personnel is reflective of the importance of conservative values to the Liberal Party. The power of a Prime Minister to



■ Figure 13.2 – The swearing in of the 27th Governor-General of Australia, Sir David Hurley.

Source: Office of the Official Secretary to the Governor-General, on behalf of the Commonwealth of Australia, David Hurley swearing-in, 2019, CC BY 3.0, <<https://commons.wikimedia.org/w/index.php?curid=80615391>>

recommend the appointment of an individual to the position of Governor-General would also seem to imply that they also have the power to have an individual removed. This will be discussed further in the next section.

Prior to formally taking up their commission, the Governor-General must take an Oath of Office in which they swear to serve Australia's monarch "according to law, in the office of the Governor-General of the Commonwealth of Australia"³ and an Oath of Allegiance. The Governor-General then issues a proclamation assuming the Office. This formal acceptance of the Office occurs on the floor of the Senate and is overseen by the Prime Minister, the Presiding Officer of both houses of parliament and the Chief Justice of the High Court of Australia (High Court). The witnessing of the Oath of Office by the Prime Minister reinforces the importance of the Governor-General being accountable for their actions.

Accountability through tenure and removal

The tenure of the Governor-General is at the pleasure of the Queen, though a typical commission lasts for five years. Section 3 of the Constitution set remuneration for the Governor-General at £10,000, until otherwise determined by the parliament. Governor-General David Hurley currently earns an annual salary of \$495,000. Remuneration for the Governor-General is fixed throughout the term of office to enable the Governor-General to act in a politically neutral manner as the executive is unable to manipulate

3 Office of the Governor-General, Governor-General's role, 2017, <<https://web.archive.org/web/20190411022216/http://gg.gov.au/governor-generals-role>>; and <<https://web.archive.org/web/20190321173914/https://www.gg.gov.au/sites/default/files/files/gg/OathOfOffice-Cosgrove.pdf>>.

their salary to achieve the executive's preferred outcomes. Since the passage of the *Governor-General Act 1974*, the salary of the Governor-General has increased after every term of office. The annual salary (\$495,000) of the Governor-General is significantly more than that of senior ministers of government.

By convention, the Queen may choose to **recall or dismiss a Governor-General** before their term is complete, but only on advice by the Prime Minister. Due to the level of respect for the position of Governor-General they are usually given the opportunity to resign, rather than be removed. As no Governor-General has ever been removed in this manner there is some question as to how quickly the Queen might choose to act on such advice from the Prime Minister if it were indeed given. The closest Australia came to such an occurrence was during the '1975 crisis' where there was the possibility of the Prime Minister and the Governor-General attempting to dismiss one another simultaneously.

Section 4 of the Constitution enables the Queen to appoint an administrator to carry out the role of the Governor-General in the event of a vacancy. Such a vacancy could theoretically be caused by the resignation or dismissal of the Governor-General by the monarch. By convention, such a vacancy would be filled by the longest serving state Governor who holds a dormant commission. A dormant commission is a position that only comes into action within the Commonwealth when triggered by a certain event. For example, Tasmanian Governor Guy Green was appointed Administrator on the resignation of Governor-General Peter Hollingworth in 2003. He remained in the position until the appointment of the new Governor-General Michael Jeffery.



■ Figure 13.3 – The circular system of accountability between Australia's Governor-General and the Prime Minister.
Source: Nicol Davis, 2020

Again, it is important to highlight that there has never been a Governor-General dismissed whilst in office. Since federation only three Governors-General have resigned during their term of office, the first being Lord John Adrian Louis Hope —the 7th Earl of Hopetoun between 1873 and 1902. The other two Governors-General faced the threat of removal and this led to their voluntary resignation. Sir John Kerr officially resigned in 1977 ostensibly to accept the position of Australian Ambassador to UNESCO in Paris. In reality, he was forced to resign due to his untenable position with the Australian public, and never did take up the new position. The third resignation was that of Peter Hollingworth who resigned in 2003 to protect the integrity of the Office of the Governor-General.

'The people' and accountability of the Governor-General

It is clear that the traditional mechanisms available under Section 2 of the Constitution and the conventions of responsible government have not been employed to hold the Governor-General accountable. By convention, it is the Prime Minister who has the power to select the Governor-General. Likewise, by convention the Governor-General is accountable to, and can be removed on the request of, the Prime Minister. In fact, though, it is the Australian people themselves who have been most effective in holding the Governor-General accountable for their actions. This is best demonstrated through two case studies including the '1975 crisis' and the resignation of Peter Hollingworth.

The '1975 crisis'

The decision of the Governor-General Sir John Kerr to use his reserve powers on 11 November 1975 to dismiss the Whitlam Government caused many to question the role of the office of the Governor-General. Refer to Chapter 3 of this book for further detail regarding the circumstances of the dismissal. Sir John Kerr's justification of his position was that he was upholding the Constitution and the nation with which he was charged to protect.

Setting the scene

On the afternoon of the dismissal Sir John had arranged a meeting with Prime Minister Whitlam in the Governor-General's office at 1 pm. Upon his arrival Whitlam was informed by the Governor-General that he was being dismissed and was handed a letter of dismissal along with a statement of reasons. The letter referred to the constitutional authority vested in the Governor-General through **Section 64** to appoint the



■ Figure 13.4 – Governor-General Sir John Kerr.
By Australian Government - naa.gov.au, Fair use, <http://bit.ly/2f4kl7d>

Ministers of the Federal Executive Council (EXCO). The now infamous letter made clear Kerr's frustration with Whitlam when he stated "You have previously told me that you would never resign or advise an election of the House of Representatives or a double dissolution".⁴ The key sticking point for Sir John Kerr was Whitlam's refusal to call a double dissolution election in spite of the Senate's refusal to pass **supply**. As a result, Kerr felt it incumbent on him to act by dismissing Whitlam.

Kerr makes a statement of reasons

Kerr's reasoning was further outlined in his statement of reasons.⁵ He noted that "because of the federal nature of our Constitution and because of its provisions the Senate undoubtedly has constitutional power to refuse or defer supply to the government".⁶ Sir John believed that an essential requirement for responsible government was that the Prime Minister be able to guarantee supply. Should a Prime Minister not be able to do so then they must either "advise a **general election** or resign". Whitlam instead proposed a half Senate election which Kerr rejected as he believed that it would not "guarantee a prompt or sufficiently clear prospect of the deadlock being resolved in accordance with proper principles".⁷ Rather, Kerr believed that the only way to proceed was for him to withdraw the Commission of the Prime Minister and commission the Leader of the Opposition

"to form a new **caretaker government** until an election can be held".⁸

The **letter of dismissal** and the detailed statement of reasons written by Sir John Kerr demonstrate that he believed that the Office of the Governor-General should be accountable to the people. As such, a decision as unprecedented as the dismissal of the Prime Minister would need to be justified to the people through a written statement such as the letter of dismissal and his statement of reasons. He again made his position clear in a letter to the Prime Minister, writing:

*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.*⁹

Kerr seeks advice

Kerr felt that to demonstrate his **accountability** to the people it was important to check the constitutionality of his decision through consultation with the Chief Justice of the High Court, Sir Garfield Barwick. This was an unprecedented step as under **Section 63** of the Constitution the Governor-General is charged with taking advice from the EXCO which, by convention, includes the Prime Minister. Kerr had sought and been denied permission from Whitlam to consult with the Chief Justice, but he chose to ignore the Prime Minister's advice.

In his response to the request from the Governor-General, Barwick noted that there was no clear comparison between the elected houses of Australia and the United Kingdom's unelected Upper House. However, he noted that "there is an analogy between the situation of a Prime Minister who has lost the confidence of the House of Commons and a Prime Minister who does not have the **confidence** of the parliament".¹⁰ In the statement of reasons that Kerr provided to Whitlam he made reference to the advice that he had received from Barwick reinforcing his desire to be seen as accountable for his actions.

4 Kerr, John, in WhitlamDismissal, *Official letter handed to Whitlam by Kerr in the Governor-General's study at Yarralumla at approximately 1.00pm on Tuesday, November 11, 1975*, <<https://whitlamdismissal.com/1975/11/11/kerr-letter-of-dismissal.html>>.

5 Sir John Kerr's *Statement of Reasons* can be found at: <<http://whitlamdismissal.com/documents/kerr-statement.shtml>>.

6 Kerr, John, in WhitlamDismissal, *Official letter handed to Whitlam by Kerr in the Governor-General's study at Yarralumla at approximately 1.00pm on Tuesday, November 11, 1975*, <<https://whitlamdismissal.com/1975/11/11/kerr-letter-of-dismissal.html>>.

7 Kerr, John, *Sir John Kerr's Statement of Reasons*, WhitlamDismissal, <<http://whitlamdismissal.com/documents/kerr-statement.shtml>>.

8 Kerr, John, in WhitlamDismissal, *Official letter handed to Whitlam by Kerr in the Governor-General's study at Yarralumla at approximately 1.00pm on Tuesday, November 11, 1975*, emphasis added, <<https://whitlamdismissal.com/1975/11/11/kerr-letter-of-dismissal.html>>.

9 John Kerr cited in: Kelly, Paul and Bramston, Troy, 'Appendix B', *The Dismissal*. In the Queen's Name, Penguin Random House, Melbourne, 2015.

10 Barwick, Garfield in WhitlamDismissal, *Text of High Court Chief Justice Sir Garfield Barwick's advice to the Governor-General, Sir John Kerr*, 10 November 1975, <<https://whitlamdismissal.com/1975/11/10/barwick-advice-to-kerr.html>>.

While Kerr may have felt it was important to justify his decision in the eyes of the Australian people, it is clear he had no interest in explaining his actions in person. This was left instead to his Official Secretary David Smith, who proclaimed the dissolution of the parliament on the front steps of Parliament House. By the time Smith had arrived at Parliament House, news of the dismissal had already spread. An angry crowd of Labor supporters had gathered in front of, and on, the steps of Parliament House. Smith read the proclamation through the jeers of the crowd and finished with the traditional statement “God save the Queen”.

Prime Minister Whitlam argued that Kerr had acted outside of the **conventions** of responsible government under which the Governor-General should only have acted on the advice of the government of the day. When asked by a journalist whether he was satisfied that the Governor-General had the right to withdraw his commission under the Constitution, the former Prime Minister responded by stating “I’m certain the Crown did not have the right to do what the Governor-General did on this occasion”.¹¹ Whitlam also went on to say:

*It’s not just what happens to my Government, what’s been done to my Government, it’s what can happen to any Government which thereafter is given a majority in the House of Representatives by the electors and which retains that majority in the House of Representatives. Parliamentary democracy is at stake in Australia here.*¹²



■ Figure 13.5 – Upon his dismissal Whitlam declared that “parliamentary democracy is at stake”. Source: Australian Conservation Foundation, *Gough Whitlam at the launch of the ACF newsletter*, 1973, CC BY-SA 4.0, <<https://commons.wikimedia.org/w/index.php?curid=67603810>>

11 Whitlam, Gough, in WhitlamDismissal, *Gough Whitlam’s post-dismissal press conference*, 11 November 1975, <<http://whitlamdismissal.com/1975/11/11/whitlam-post-dismissal-press-conference.html>>.

12 Whitlam, Gough, in WhitlamDismissal, *Gough Whitlam’s post-dismissal press conference*, 11 November 1975, <<http://whitlamdismissal.com/1975/11/11/whitlam-post-dismissal-press-conference.html>>.

The use of **reserve powers** available to Kerr through the fact that he held the Office of the Governor-General was extremely controversial. Whitlam summed up the mood of the Australian people in the famous speech he made on the steps of the old Parliament House when he stated “Well may we say ‘God save the Queen’, because nothing will save the Governor-General”.¹³ Whatever your perspective on the actions taken by the Governor-General, it is clear that from the point at which Kerr dismissed the Prime Minister he would be held accountable for his actions by the Australian people.

“Well may we say
‘God save the Queen’,
because nothing will save the
Governor-General”

The reaction in parliament

The reaction of many in the parliament to the dismissal of the parliament is perhaps best summarised by the reaction of Gordon Scholes who was the Speaker of the House of Representatives. On the day after the dismissal Scholes wrote a letter to Her Majesty the Queen expressing his concern about the Governor-General’s use of discretionary reserve powers to dismiss Prime Minister Whitlam. He went even further and requested the “reinstatement of the former Prime Minister in whom the House expressed confidence”.¹⁴ Scholes’ argument against the legitimacy of Kerr’s actions rested on the fact that the reserve powers used to dismiss Whitlam were not specifically written into the Constitution and were open to interpretation. Previous Governors-General had used their discretionary powers to refuse to dissolve parliament at the request of the Prime Minister in 1904, 1905 and 1909. The key difference for Scholes in the matter of the Whitlam dismissal was the lack of advice from any of the representative bodies in Australia.

Caretaker Prime Minister

Another significant concern of Scholes was that the Governor-General had delayed informing the House of Representatives of Malcolm Fraser’s commission as caretaker Prime Minister until

13 Gough Whitlam, cited in Wetherell, Lexi, ‘G-G remembered as great statesman’, *The World Today*, ABC, <<http://www.abc.net.au/worldtoday/content/2011/s3387643.htm>>.

14 John Kerr cited in: Kelly, Paul and Bramston, Troy, ‘Appendix B’, *The Dismissal. In the Queen’s Name*, Penguin Random House, Melbourne, 2015.



■ Figure 13.6 – Former Speaker of the House of Representatives, Gordon Scholes.
Source: Robert Ward, US Department of Defense, *Gordon Scholes*, 1983, Public Domain, <https://commons.wikimedia.org/wiki/File:Gordon_Scholes_HD-SC-98-07512.jpg>

after the passage of supply in the Senate and the dissolution of the parliament. He expressed his concern strongly in stating:

*that to maintain in office a Prime Minister imposed on the nation by royal prerogative rather than through parliamentary endorsement constitutes a danger to our parliamentary system and will damage the standing of your representative in Australia and even yourself [the Queen].*¹⁵

The stern tone of Scholes' letter to the Queen conveys the concern he felt over the **legitimacy** of the action taken by the Governor-General.

A letter written by the Queen's Private Secretary to Scholes, however, demonstrated that it was the view of the Palace that the Constitution "places the prerogative powers of the Crown in the hands of the Governor-General".¹⁶ Even more significantly the letter goes on to state that, "the only person competent to commission an Australian Prime Minister is the Governor-General" and that "it would not be proper for her [the Queen] to intervene in person in matters which are so clearly placed within the jurisdiction of the Governor-General by the Constitution Act".¹⁷ This response on the part of the Queen reinforces the lack of any true **formal mechanism** for holding the Governor-General accountable.

The 'Palace letters'

In 2020 the official biographer of Gough Whitlam, Jenny Hocking won her High Court bid to access the letters exchanged between then Governor-General Sir John Kerr and the



■ Figure 13.7 – There are those who believe the Palace knew more about the dismissal of Prime Minister Gough Whitlam than was acknowledged in public.

Source: The Carl Albert Archives, *Queen Elizabeth standing next to Nelson Rockefeller*, 1976, CC BY-SA 4.0, <https://en.wikipedia.org/wiki/Palace_letters#/media/File:CAC_CC_001_18_16_0000_1597.jpg>

Queen around the time of the dismissal of the Whitlam government. The letters were not due for release until 2027. The National Archives of Australia had refused to release the documents — known as the **Palace letters** — saying they were private papers. Hocking successfully argued that correspondence between the palace and the Governor-General was the property of the Commonwealth and not private.

There has been some debate as to the significance of these letters. Hocking believes that the letters reveal that the Palace was more aware of the events taking place in Australia than previously acknowledged. Only seven days prior to the dismissal, Sir Martin Charteris — the Queen's private secretary — wrote to Kerr regarding the topic of reserve powers, "Those powers do exist...but to use them is a heavy responsibility... I think you are playing the 'Vice-Regal' hand with skill and wisdom".¹⁸ This was followed up with a further letter stating, "If you do, as you will, what the Constitution dictates, you cannot possible [sic] do the Monarchy any avoidable harm".¹⁹ Such statements perhaps suggested to Kerr that he had tacit approval from the Palace and encouraged him to move ahead with his plan to dismiss Prime Minister Whitlam.

¹⁵ John Kerr cited in: Kelly, Paul and Bramston, Troy, 'Appendix B', *The Dismissal. In the Queen's Name*, Penguin Random House, Melbourne, 2015.

¹⁶ Gordon Scholes, Speaker of the House of Representatives, Letter to the Queen, cited in: Kelly, Paul and Bramston, Troy, 'Appendix B', *The Dismissal. In the Queen's Name*, Penguin Random House, Melbourne, 2015.

¹⁷ Gordon Scholes, Speaker of the House of Representatives, Letter to the Queen, cited in: Kelly, Paul and Bramston, Troy, 'Appendix B', *The Dismissal. In the Queen's Name*, Penguin Random House, Melbourne, 2015.

¹⁸ Sir Martin Charteris, cited in: Steketee, Mike, 'I think you are playing the 'Vice-Regal' hand with skill and wisdom', *Inside Story*, 15 July 2020, < <https://insidestory.org.au/i-think-you-are-playing-the-vice-regal-hand-with-skill-and-wisdom/>>.

¹⁹ Sir Martin Charteris, cited in Hocking, Jenny, 'The Palace Letters have glow apart the claim the Queen had no part in the Whitlam dismissal', *Pearls and irritations*, 2020, <<https://johnmenadue.com/jenny-hocking-the-palace-letters-have-blown-apart-the-claim-the-queen-had-no-part-in-the-whitlam-dismissal/>>.

Constitutional law expert Anne Twomey argues that the letters were not in fact a ‘green light’ for Kerr to act but rather an indication that it was for the Governor-General to determine the correct course of action.

What is clear, however, is that the Queen chose not to recall or dismiss the Governor-General despite there being little support for his actions from Buckingham Palace. Sir John’s predecessor as Governor-General was Paul Hasluck. In a twelve page memorandum written by Hasluck and dated the 10 August 1977, he recalls a conversation held with Charteris. Hasluck wrote that it was “apparent that at some stage some pressure had been applied from the palace to bring about his resignation. Charteris — and by implication, the Queen — had a poor opinion of the Kerrs”.²⁰

The court of public opinion

It was in the court of public opinion where rightly or wrongly Sir John Kerr was held **accountable**. In the months leading up to the double dissolution election Kerr was denigrated by the supporters of Whitlam and the Australian Labor Party (ALP) in the hope of increasing support for the Labor Party. The attacks against both Kerr and his wife were often personal in nature and continued after the election. Neither state nor federal Labor politicians would accept the legitimacy of Kerr in the Office of the Governor-General. Through the remainder of his term as Governor-General, Kerr faced angry protests whenever he appeared in public. At the 1977 Melbourne Cup Kerr fronted up to give a speech, but was drunk, and the crowd hissed and booed. In response to the crowd Kerr commented that

“Any little noises that you may happen to hear are only static. It’s just something wrong with the system”.²¹

From this point forward it was clear to all that it would be untenable for Kerr to continue in the role. He resigned from his commission as Governor-General in December 1977, only three years into his term of service — remember a standard term of office for the Governor-General is five years. He and his family moved to London soon after his resignation to avoid continued harassment in Australia. The ‘1975 crisis’ clearly demonstrates that for a Governor-General to be effective in their role it is essential that they maintain the support of the Australian public.

“The court of public opinion that made it untenable for Dr Peter Hollingworth to continue in the position of Governor-General.”

Governor-General Dr Peter Hollingworth

Since Federation no Governor-General has been dismissed from Office. The closest Australia has come to a Governor-General being removed from his position was Dr Peter Hollingworth, who had previously held the position of Archbishop of Brisbane. Hollingworth was commissioned as Governor-General on 22 April 2001 on the recommendation of Prime Minister John Howard. The appointment was **controversial** in the eyes of some who believed that the appointment of a senior figure in the church was a conflict between the separation of church and State.

Allegations began to emerge by the end of the year that during his time as Archbishop of Brisbane Hollingworth had failed to deal appropriately with sex abuse allegations made against a church teacher. Hollingworth’s successor in the role of Archbishop, Phillip Aspinall, set up a Diocesan Board of Inquiry into the matter which began investigating that and other matters in 2002. The findings of the Board of Inquiry were announced to the public on the 1 May 2003. They were also tabled that same day within the Queensland Parliament by Labor Premier Peter Beattie using his **parliamentary privilege**.



■ Figure 13.8 – Whitlam and Kerr fight it out.
Source: Geoff Pryor, *My God! They’ve escaped*, 1978, National Library of Australia, author’s permission, <<https://nla.gov.au/nla.obj-156290945/view>>

20 Sir Martin Charteris cited in: Kelly, Paul and Bramston, Troy, ‘Appendix B’, *The Dismissal. In the Queen’s Name*, Penguin Random House, Melbourne, 2015.

21 John Kerr, cited in Wetherell, Lexi, ‘G-G remembered as great statesman’, *The World Today*, ABC, <<http://www.abc.net.au/worldtoday/content/2011/s3387643.htm>>.

The report identified two situations related to allegations regarding sexual abuse that Hollingworth had mishandled. The first allegation was that Hollingworth could have expressed greater compassion in his correspondence with a victim of sexual abuse. The Board acknowledged that Hollingworth had been provided with advice that such an overture would put the church in a difficult legal position, but believed some expression of regret would have been appropriate. The second — and more damning allegation — was that Hollingworth had allowed a priest to remain in the ministry following his admission that he had sexually abused a minor prior to his becoming a priest.

The release of the report set off a media frenzy. Hollingworth was portrayed as being an even more unpopular Governor-General than the 'despised' Sir John Kerr. Many questioned why Hollingworth chose to accept the position of Governor-General as it should have been obvious that the allegations regarding his handling of allegations of sexual abuse would come to light. Despite the negative media attention Prime Minister Howard continued to support the Governor-General in public. Given Howard's strong religious faith and the fact that the appointment of Hollingworth had been a **captain's pick**, it would have been difficult for him to do otherwise.

It was the court of public opinion that made it untenable for Dr Peter Hollingworth to continue in the position of Governor-General. The campaign calling for Hollingworth to resign was led by Hetty Johnston from Bravehearts, a pressure group advocating for child sex abuse victims. Hollingworth attempted to justify his position in an interview on the ABC program *Australian Story*. He admitted that he had lacked the experience as Archbishop to handle the matter and in the interview he almost appeared to blame the 14-year old victim, in one case stating that "my belief is that this is not sex abuse".²² Hollingworth later apologised to the victims of abuse and released a statement condemning the actions of paedophile priests. As Governor-General he was forced to step down as patron of Barnardos, Kids First Foundation and the National Association for the Prevention of Abuse and Neglect.

At the same time Hollingworth was forced to defend himself against allegations that he had raped a woman in the 1960s. Despite the public support of John Howard, other senior

■ Figure 13.9 – Dr Peter Hollingworth was the 23rd Governor-General of Australia.
Source: Governor-General of Australia, Dr Peter Hollingworth, CC BY 3.0, <<https://commons.wikimedia.org/w/index.php?curid=31674070>>



ministers in the Cabinet — including Deputy Prime Minister John Anderson and Treasurer Peter Costello — suggested that Hollingworth should reconsider his position. On 11 May 2003 Hollingworth stepped aside as Governor-General after a meeting with Prime Minister Howard while the allegations of rape against him were investigated. Following this meeting the Prime Minister announced that "in giving consideration to the longer-term tenure of that office that he [Hollingworth] will place the dignity and protection of that office above all other consideration".²³ Hollingworth was **forced to resign** on 25 May 2003 in response to public pressure.

As a footnote to the story of Peter Hollingworth, in 2015–2016 he faced questions as part of the Royal Commission into Institutional Responses to Child Sexual Abuse regarding claims that he had mismanaged allegations of abuse while he was Archbishop of Brisbane. As a result of the Royal Commission, Hollingworth apologised to the victims of abuse for not handling these claims more rigorously. In his apology he stated "I acknowledge unconditionally that my actions were misguided, wrong and a serious error of judgement".²⁴

Accountability of the Office of the Governor-General

The position of Official Secretary to the Governor-General was established in 1901. Amendments to the *Governor-General Act 1974* resulted in the Office of the Official Secretary to the Governor-General (Official Secretary) being established as a statutory office in 1984. Since this time, the

22 Hollingworth, Peter, in 'The gilded cage', *Australian Story*, 18 February 2002, <<https://www.abc.net.au/austory/the-gilded-cage-feb-28-2002/10422976>>.

23 John Howard, cited in 'GG stands aside over rape allegations', *Sydney Morning Herald*, 11 May 2003, <<https://www.smh.com.au/politics/federal/gg-stands-aside-over-rape-allegations-20030511-gdqqtk.html>>.

24 Carlyon, Peter, 'Former governor-general Peter Hollingworth 'deeply sorry' over child sex abuse complaint mishandling', *ABC news*, <<https://www.abc.net.au/news/2016-02-03/peter-hollingworth-apologises-child-sex-abuse-royal-commission/7135446>>.



■ Figure 13.10 – Governor General Dr Peter Hollingworth resigned on 25 May 2003 in response to public pressure. Source: Geoff Pryor, Archbishop George Pell at desk while Governor-General Peter Hollingworth sweeps child sex scandal under the rug, 2002, National Library of Australia, <<https://catalogue.nla.gov.au/Record/5233453>> nla.obj-158632804 delete this when resolved.

Official Secretary has been appointed by the Governor-General-in-Council. Sir David Smith is undoubtedly the best known Official Secretary, having served five Governors-General between 1973 and 1990. Smith's greatest claim to fame was the role he played as Official Secretary to Sir John Kerr at the time of the '1975 crisis' when he read out the proclamation of the dissolution of Parliament on the steps of Parliament House (now Old Parliament House).

The role of the Official Secretary is to provide the Governor-General with the support needed to enable them to carry out their constitutional, ceremonial and non-ceremonial duties. As such the Official Secretary must meet the accountability

“It is the informal mechanism of public opinion that has been more significant in holding the Governor-General accountable.”

standards required of the public service. This requirement includes the production of an annual report of the Official Secretary, which is tabled in both houses of parliament. The annual report presents information on the outcome and program of the Office along with details on budgeting and reporting requirements.

For example, the Annual Report presented in 2018–2019 reveals that four Freedom of Information requests were made to the Office

of the Secretary of the Governor-General.²⁵ One of these were denied under Section 6A(1) of the *Freedom of Information Act 1982* and the remaining three did not relate to documents held by the Office. The report also revealed that the total appropriation available to the Office was \$23,276,000. The information available in the annual report provides for greater transparency into the operation of the Office and the support the Office provides to the Governor-General. Hence the Office of the Official Secretary to the Governor-General also provides a further mechanism of accountability to this office.

Accountability and the courts

A case which challenged the transparency of decision making within the Office of the Governor-General was that of *Kline v Official Secretary to the Governor-General* [2013] HCA 52. This case involved a request on the part of Ms Kline to documents held by the Official Secretary with respect to the Order of Australia. The request was under Section 6A(1) of the *Freedom of Information Act 1982* which require that the requested documents “relate to matters of an administrative nature”. The Official Secretary denied access to the document on the basis that they were not of an “administrative nature”.

Kline appealed the decision to the Australian Information Commissioner who affirmed the decision of the Official Secretary. She then appealed the decision to the Administrative Appeals Tribunal (AAT) which also supported the position of the Official Secretary. Dissatisfied

²⁵ Office of the Official Secretary to the Governor-General, *Annual report 2018–2019*, Commonwealth of Australia, 2019, p 58.

with these decisions Kline made an appeal to the Federal Court and as a last resort was granted special leave to have the case heard in the High Court.

Ultimately, the High Court denied access on the basis that documents relating to the substantive powers or functions of the Governor-General were not subject to the operation of Section 6A(1) of the *Freedom of Information Act*. The High Court found that the documents requested by Kline were not of an “administrative nature” as they did not concern the “office ‘apparatus’ which support[s] the exercise of the Governor-General’s substantive powers and functions”. Further, the Court found that the request for documents related to the criteria for making of awards in the Order of Australia were readily available to the public and so were not subject to freedom of information laws.

Conclusion

The ‘1975 crisis’ led many to question the role of the Governor-General. Supporters of the Whitlam Labor government believed that the Governor-General John Kerr had misused the powers available to the Office. In the end it was the court of public opinion that held

the Governor-General accountable with Kerr resigning in 1977, almost two years short of the usual commission for a Governor-General.

Dr Peter Hollingworth was forced to resign in 2003 due to public pressure. However, in this case public anger was not due to the perception of the misuse of the powers of the Office of the Governor-General, but due to the (in) actions of Hollingworth prior to accepting his commission. From both the ‘1975 crisis’ and the removal of Hollingworth it is clear that the formal mechanisms for holding the Governor-General accountable are rarely employed due to respect for the Office. Rather, it is the informal mechanism of public opinion that has been more significant in holding the Governor-General accountable.

Judicial review can also be another mechanism through which the Office of the Governor-General can be scrutinised. The case of *Kline v Official Secretary to the Governor-General* [2013] clearly illustrates that Australia is a country which respects the rule of law and that the actions of those within the Office of the Governor-General can be challenged within the court system.

Summary

Accountability through appointment

- Under Section 2 of the Constitution the Governor-General is appointed and holds their position at the pleasure of the Queen.
- In reality, by convention the appointment of the Governor-General occurs on the advice of the Prime Minister. By implication, the Governor-General can also be dismissed on the recommendation of the Prime Minister.
- Under Section 64, the Governor-General is also responsible for the appointment of the Prime Minister. This means the Prime Minister is also accountable to the Governor-General.

Accountability through removal

- The tenure of the Governor-General can only be shortened if they are recalled by the Queen, which has never happened.
- Traditional mechanisms available under Section 2 of the Constitution and conventions of responsible government have not been employed to hold the Governor-General accountable.

The 1975 crisis

- The 1975 crisis saw Governor-General Sir John Kerr use his reserve powers to dismiss the Prime Minister. Ultimately it was the people who held the Governor-General accountable.

The Hollingworth affair

- Governor-General Dr Peter Hollingworth's tenure was challenged because of his handling of sex abuse allegations made against a church teacher while he held the position of Archbishop of Brisbane. In this case it was also the people who held the Governor-General accountable.

Exam practice questions

Short answer

- 1a) Explain what is meant by the term 'prorogue'.
- 1b) Identify and briefly explain **one** statute law relating to the Governor-General and its importance to the accountability of the Governor-General.
- 1c) Discuss the extent to which the Constitution empowers or restricts the Governor-General.
- 2a) What is meant by the term 'commission' as it relates to the Australian political system?
- 2b) Distinguish between the impetus for Sir John Kerr's and Dr Peter Hollingworth's resignation from the Office of Governor-General.
- 2c) 'Governors-General can only be held accountable in theory, but not in practice'. Discuss.

Source analysis

The Speaker of the House of Representatives Gordon Scholes sent a letter dated 12 November 1975 to Her Majesty the Queen. The original of this letter is held at the National Archives of Australia. The Queen's Private Secretary responded to this letter. Read the excerpt below to respond to the following:

"I am commanded by The Queen to acknowledge your letter of 12th November about the recent political events in Australia. You ask that The Queen should act to restore Mr. Whitlam to office as Prime Minister.

As we understand the situation here, the Australian Constitution firmly places the prerogative powers of the Crown in the hands of the Governor-General as the representative of the Queen of Australia. The only person competent to commission an Australian Prime Minister is the Governor-General, and The Queen has no part in the decisions which the Governor-General must take in accordance with the Constitution. Her Majesty, as Queen of Australia, is watching events in Canberra with close interest and attention, but it would not be proper for her to intervene in person in matters which are so clearly placed within the jurisdiction of the Governor-General by the Constitution Act".

- 3a) Explain what is meant by the term 'prerogative powers'.
- 3b) Using the source, explain the Queen's reasoning and the significance of this decision for the Australian political and legal system.
- 3c) Discuss the extent to which the people have played a role in the accountability of Governors-General in Australia.
- 3d) Assess the extent to which the Office of the Governor-General operates in accordance with the practice of 'open government'.

Essay response

- 4) Discuss the accountability relationship that exists between the Governor-General and the Prime Minister of Australia through appointment and removal, and assess the extent to which each is held accountable, making reference to specific occupiers of those executive positions.
- 5) 'Governors-General are just as accountable as any arm of government in the Commonwealth of Australia.' Evaluate with reference to the legislative or executive – political or administrative or the judicial arm of government in Australia.

continued overleaf

Investigation

- 6) Investigate the latest annual report of the Office of the Governor-General. Record details and data relating to the carrying out of the constitutional and ceremonial functions of Governors-General as well as financial statements. Discuss with your peers the level of accountability this annual reporting offers in comparison to other accountability mechanisms.

In 1999 Australia debated and voted in a referendum to become a Republic, and this conversation continues. Part of the proposal to change the Constitution would have changed the words on the position of the head of state.

- 7a) Investigate the various proposals for an Australian republic — particularly the appointment and removal processes for a president.
- 7b) Debate the merits of these appointment and removal processes as well as the impact they may have on the level of accountability of heads of state in Australia.



Accountability and the courts

Syllabus point:

- **the accountability of the courts**
 - **through the appeals process**
 - **through parliamentary scrutiny and legislation**
 - **through transparent processes and public confidence**
 - **through the censure and removal of judges, including Section 72**

Introduction

Courts review parliament's statutes, its members' qualifications, executive decisions and policies, thus holding the other two branches of government accountable. The independence of the courts is critical to their ability to perform these functions.

How are courts — as the third branch of government — accountable? There are issues holding an independent branch of government accountable. See: *Background information: The paradox of judicial independence and accountability*.

Background information: The paradox of judicial independence and accountability

To uphold the rule of law, courts must be independent. Independence means that courts are free from interference from the other branches of government. However, independence creates a problem for the accountability of courts because it insulates them from checks by other political and legal stakeholders.

The following are two authoritative opinions on this particular question.

The Federal Court's website says:

Judges, like all other citizens, are subject to the law, but the need to protect judicial independence in the interests of the whole community means that, in respect of their judicial conduct, they cannot be subject to direct discipline by anyone else.¹



■ Figure 14.1 – Former Chief Justice Murray Gleeson said that [judicial] accountability could take many forms.
Source: JudyHarris08, Chief Justice Gleeson, 2006, CC BY-SA 3.0, <<https://commons.wikimedia.org/w/index.php?curid=16106220>>

“The development of methods of accountability consistent with independence and, in particular, consistent with the judicial function of deciding, impartially, disputes involving governments, is an issue of current debate.”

Former Chief Justice Murray Gleeson said:

Accountability can take many different forms. There are well-established methods of judicial accountability in a common law system. Courts conduct their business in public. Judges are required to hear arguments on both sides of the question, and to give reasons for their decisions. Their decisions are routinely subject to appeal, both on the facts and the law. Our system operates with a high degree of transparency. For some people, however, this is insufficient. Although judges, like other citizens, are subject to the normal processes of the criminal law, they cannot be punished, or disciplined, for making wrong or unpopular decisions, or for conducting their business inefficiently. To someone with a grasp of constitutional principle, the reason is obvious. To many, however, this is a source of frustration. The development of methods of accountability consistent with independence and, in particular, consistent with the judicial function of deciding, impartially, disputes involving governments, is an issue of current debate.²

1 Federal Court of Australia, *Judicial complaints procedure*, 2013, <<http://www.fedcourt.gov.au/feedback-and-complaints/judicial-complaints>>.

2 Gleeson, Murray, *Current issues for the Australian Judiciary*, Address to the Supreme Court of Japan, 17 January 2000, <https://www.hcourt.gov.au/assets/publications/speeches/former-justices/gleeson/cj_Japanj.htm>.

Accountability of the courts

Table 14.1 summarises the ways courts are accountable.

Accountability mechanisms		Focus
Processes within the court system	Appeals process	Appeals scrutinise and check lower courts by: • reversing incorrect decisions; and • overruling outdated precedents
	Court processes and public confidence	The doctrine of precedent: • binds lower courts; and • precedent ensures consistency and predictability. Trial processes ensure fairness through: • unbiased judges and juries; • both sides presenting cases; and • evidence-based decisions. Open trials create public confidence through: • the public being able to attend trials; • media reporting on trials; • judges decisions and reasons being public; and • courts being independent, apolitical and impartial, which builds public trust. Chief Justices: • oversee processes within a court hierarchy; • guide and mentor judges; and • manage complaints.
Processes outside the court system	Parliamentary scrutiny and legislation	Parliament: • makes statutes governing court procedures; • makes statutes governing the interpretation of other laws; • makes statutes that create judicial commissions; • takes note of court decisions; and • may respond to court decisions by: – overriding them with a statute; and – clarifying them with a statute.
	Censure and removal of judges	Judges may be: • removed for “proved misbehaviour or incapacity” by parliament under Section 72 of the Constitution; • investigated by judicial commissions; and • mentored by senior judges.

■ Table 14.1 – The ways courts and judges are accountable.
Source: Stephen King, 2020

Accountability from within the court system

Appeals and transparent processes

The processes and procedures used by courts provide a measure of accountability. These measures originate within the court system itself and are an example of self-accountability; that is, the judiciary holding itself to account. The procedures of the adversary trial and the appeals process developed over centuries in Britain. They continued to develop in Britain’s former colonies, including Australia. Australia’s judiciary and courts are part of this grand tradition. See: *Background information: The doctrine of precedent and the accountability of the courts.*

Background information: The doctrine of precedent and the accountability of the courts

Australia has a federal judiciary and eight regional court hierarchies. At the apex of the court system is the High Court of Australia (High Court). Its position unifies subordinate state and territory courts because decisions made by the High Court — including appeals from state or territory courts — are binding on all courts in the country.

Courts make decisions in cases. In doing so, intermediate and superior courts may create new common law. Following the principle of *stare decisis*, their decisions in cases are followed by other courts in similar cases.

These decisions are binding on all lower courts in the same hierarchy as the court that made the original decision. Precedents may be persuasive at the same level or above within a court hierarchy or across different common law hierarchies, including those in other common law countries.

Keeping lower courts bound to the decisions of higher courts restrains them and keeps them accountable to higher courts. Persuasive precedent is more flexible, but is still a force guiding judicial decisions. A judge seeking to avoid precedent must make a strong case for doing so in their *ratio decidendi* or written reasoning. If their reasoning is wrong, their decision may be reversed on appeal or overruled in later similar cases.

Appellate courts may avoid precedents by reversing an original decision on appeal, or by overruling precedents created by past cases. When courts reverse or overrule previous decisions, they are correcting the decisions made in those cases. In other words, a higher court can decide that a lower court's decision was wrong. In so doing, they are holding the lower courts and judges to account.

Appeals — Courts holding courts to account

Appeals make lower courts accountable to higher courts. Appeals hold both lower court decisions and judges or magistrates to account.

Judges in superior appellate courts have more expertise and experience than less senior judges and magistrates in inferior courts. Courts with appellate jurisdiction can reverse a lower court's decision. Appeals impose scrutiny and accountability on lower courts and their magistrates and judges within a court hierarchy.

Judges must provide reasons for their decisions — called *ratio decidendi*. *Ratios* are published on court websites and in law reports where the

public and media may read them. Publishing ratios is part of the openness and transparency of court processes; it facilitates public confidence. Parliament scrutinises law reports to keep a check on the development of common law.

Senior judges in appellate courts can review ratio decidendi. Ratios provide a means to check an original decision and the reasoning of the judge who made it. Appeals incentivise judges to make the right decisions because they do not want their decision reversed.

There are many grounds for an appeal, including the law, the evidence and the way a judge manages the trial. Appeals impose a form of discipline on judges who fail to uphold fairness or deliver justice by misinterpreting the law, weighing evidence incorrectly or managing trials poorly. Their hopes for promotion to higher courts depend on judgements that withstand appeal. See: Background information: The role of the Attorney-General.

“Appeals impose scrutiny and accountability on lower courts and their magistrates and judges within a court hierarchy.”

Background information: The role of the Attorney-General

The Attorney-General is a Cabinet-rank minister with responsibility for the courts. While the Attorney-General cannot directly interfere with the court's processes, they make recommendations for judicial appointments and promotions. An appeal rate is the measure of a judge's performance. Underperforming judges are unlikely to be promoted.

They may respond to problems within a court by directing more resources to it or to the Chief Justice to address any problems.

The Attorney-General's primary role is to defend the judiciary, which means supporting it so that it can function correctly. The Attorney-General helps the court system overcome problems caused by a lack of resources.

Appeals can bring an underperforming magistrate or judge to the attention of the Chief Justice. The Chief Justice may counsel a judge or place them under the stewardship of a mentor judge to provide oversight and guidance. See: Example: Appeals hold judges



■ Figure 14.2 – Commonwealth Attorney-General Christian Porter. Source: Commonwealth of Australia, *The Hon Christian Porter MP*, 2015CC BY 3.0 AU, <https://en.wikipedia.org/wiki/Christian_Porter#/media/File:Christian_Porter_Portrait_2015.jpg>

and magistrates to account — Judges Sandy Street and Salvatore Vasta. For a more in depth look at the cases discussed in the examples, see also the Case studies section of this book

Example: Appeals hold judges and magistrates to account — Judges Sandy Street and Salvatore Vasta

Two Federal Circuit Court judges — Sandy Street and Salvatore Vasta — have come to public attention in recent times. They have both had numerous decisions reversed and they have been criticised by the Chief Justice over a number of issues.

“The High Court is the final check on the performance of other courts and court systems within the Australian judiciary.”

Street has been criticised for his failure to provide timely written decisions and also for not ensuring fairness in hearings. An Iranian man was seeking a visa rejection review. Judge Street did not find in his favour, leaving the man with 21 days to appeal. However, Street’s written judgement was only made available after 75 days, thereby requiring the applicant’s lawyers to seek an extension. Judge Street has had 10 cases appealed due to unfair hearings and 80 cases reversed on appeal since he was first appointed in January 2015.

Vasta has been described as overbearing and aggressive in his behaviour towards those appearing before him. He has also been found to have edited out threats that he made in court from the published written decision. In one family law case he jailed a father of two for not bringing the right documents to court. In 2019 Vasta was stood down from administrative duties by the Chief Justice of the Federal Court. However, a deal was negotiated allowing Vasta to continue hearing cases.

The Law Council of Australia (Law Council) — the peak body representing the legal profession — has been concerned for some time that the conduct of some judicial officers of the Federal Circuit Court is detracting from the hard work undertaken by the majority of the judges. The Law Council is particularly concerned about Vasta’s reputation and the damage he may cause to public confidence in the courts. Vasta may need to be investigated by parliament to assess his fitness for office.

In the Case studies you will also find a discussion about Judge Dyson Heydon and the ongoing investigation by the Attorney-General’s Department and ACT police into his alleged sexual harassment.

The High Court — The final court of appeal

Section 73 of the *Commonwealth of Australia Constitution Act 1900* (the Constitution) makes the High Court the ultimate court of appeal. The High Court corrects miscarriages of justice caused by failures of trial procedure. Its appeal decisions have led to significant reforms within other Australian court hierarchies. The High Court is the final check on the performance of other courts and court systems within the Australian judiciary. See: *Example: Appeals hold courts and court systems to account — Andrew Mallard*.

Example: Appeals hold courts and court systems to account — Andrew Mallard

Andrew Mallard was convicted for murder in 1994 by the Western Australian Supreme Court. He lost an appeal at the full bench of the Supreme Court and subsequently spent 11 years in jail. He later appealed to the High Court, which quashed his conviction in 2005. It found the Western Australian appeals system failed when it did not order a retrial based on forensic evidence, thus causing a miscarriage of justice.

The Mallard appeal resulted in reforms to the Western Australian court system. The reforms placed the Court of Appeal in a separate division of the Supreme Court. Much later, the Western Australian Parliament legislated the right to a second appeal if new evidence emerged after conviction. The Criminal Appeals Amendment Bill 2019 (WA) is a lasting legacy of the Mallard appeal. See also: the Case study on Cardinal George Pell.

■ Figure 14.3 – Cardinal George Pell’s conviction was overturned by the High Court on a legal technicality. Source: Kerry Myers, *Cardinal George Pell, Redemptoris Mater Seminary, Sydney, 2012, 2012, CC BY 2.0, <<https://commons.wikimedia.org/w/index.php?curid=52229538>>*



Trial processes and public confidence

Courts use traditional and trusted procedures that have withstood the test of time. The procedures of the adversarial trial are an example of reliable court procedures.

Court processes evolved over centuries and have become the traditional way of finding the truth in a court. These procedures are transparent and authoritative, and enhance public confidence in the courts. They are codified in common law and statute, illustrating how parliamentary legislation makes courts accountable.

Fairness, due process and natural justice

Court processes ensure a fair trial. A fair trial must meet the following criteria:

- adjudicators — that is, judges and juries — must be impartial;

- each side must be able to present their case;
- decisions must be evidence-based; and
- hearings should be open and transparent, except in exceptional circumstances.

The above criteria create due process. In ancient times the Romans recognised them as natural justice.

Table 14.2 summarises the procedures of criminal and civil trials in Australian courts. Common law and statute govern trial procedures. The right to trial by jury and legal representation in federal criminal cases are constitutional rights specified or implied by the Constitution. Adherence to strict procedure upholds natural justice and keeps courts accountable. See: *Background information: Natural justice and public confidence*.

Trial stages	Criminal	Civil
Pre-trial	• discovery of crime — by police investigation or observed in-progress; • summons or arrest; • brief of evidence compiled and assessed by a police prosecutor or DPP;³ and • committal and pleading.	• pleadings — statements of claim and defence; • further and better particulars — the discovery of documents and interrogatories; and • compulsory mediation.
Trial	• opening statements by both parties; • calling of witnesses by both parties; – examination-in-chief — own witnesses; – cross-examination — adversary's witnesses; – re-examination — own witnesses; and • closing statements by both parties.	
Post-trial	Sanctions include: • fines; • community based orders; • intensive supervision orders; and • custodial. Sanctions are designed to achieve a balance between: • retribution; • rehabilitation; • deterrence — specific and general; and • community protection.	Remedies include: • damages — monetary compensation for a variety of losses; • injunctions; • orders of specific performance; and • orders of rescission — to rescind contracts. Remedies are designed to right wrongs such as: • negligence; • nuisance; • trespass; and • breach of contract.
Onus of proof	The prosecution — the State — bears the burden of proof.	The plaintiff — a private party — bears the burden of proof.
Standard of proof	Beyond reasonable doubt	On the balance of probabilities
Rights of the accused	An accused's rights are: • right to silence; • right to the presumption of innocence; • right to a fair trial; • right to a jury trial for federal offences; and • right to legal representation in indictable federal offences.	An accused's rights are: • right to a fair trial.

■ Table 14.2 – Summary of the processes of criminal and civil adversarial trials. Courts' strict adherence to procedure ensures due process and natural justice, and enhances public confidence in the courts.

Source: Stephen King, 2020

3 DPP refers to Department of Public Prosecutions. At the federal level, this is the Office of the Commonwealth Director of Public Prosecutions.

Note that Chapter 17 examines how Australia upholds natural justice.

Background information: Natural justice and public confidence

Nemo iudex in causa sua — No one should judge their own cause (impartial adjudicators)

Judges and juries are independent and impartial. They must declare conflicts of interest and remove themselves from a trial if they cannot be disinterested and impartial.

Biased judges or juries can result in a mistrial or an appeal, thus holding adjudicators accountable for their independence.

Audi alteram partem — Hear both sides

Each party to a case may call witnesses, submit evidence and interrogate their adversary's witnesses. Both parties make opening and closing statements. See: Table 14.2.

Judges uphold these processes and ensure procedural fairness. A breakdown of procedures, or the failure of a judge to uphold them are grounds for appeal, holding judges accountable for fairness and due process.

Evidence based decisions

Adversarial trials have strict rules of evidence. Examples of inadmissible evidence include hearsay evidence, opinion evidence, irrelevant evidence and circumstantial evidence.

Parties can object to evidence if it falls outside the rules of evidence.

Only admissible evidence may be used by a judge or jury to reach a verdict.

Western Australian judges must charge juries by instructing the 12 jurors what evidence may decide the verdict. Charging the jury is a critical phase of a criminal trial in both the District and Supreme Courts and one in which errors by the judge may result in appeals.

Failure to apply the rules of evidence or to charge the jury correctly may lead to an appeal, thus holding courts and judges accountable for ensuring fairness and due process.

Public hearings

Courts publish law reports online and news media report cases. The public and media may attend court to watch trials. Judges may decide to hold a trial or part of a trial *in camera* — that is, out of public view — to protect vulnerable witnesses or to protect classified

information such as secret national security intelligence.

Openness creates transparency so the public can see the operation of the justice system and have confidence in it.



■ Figure 14.4 – A biased jury can become grounds for appeal. Source: John Morgan, *The Jury*, 1861, Public Domain, <<https://commons.wikimedia.org/w/index.php?curid=4912282>>

Public confidence in the courts

Courts are independent, apolitical, neutral and authoritative. They follow strict doctrines, principles, rules and maxims developed over hundreds of years — as described above. These and the lack of political partisanship and ideology makes people trust judicial processes and decisions to a greater extent than political decisions made by parliament and executives.

“Judges and courts are trusted because they are impartial and independent — they have integrity.”

Judges do not have to be popular to keep their jobs. They have security of tenure until age 70, as guaranteed by Section 72 of the Constitution. Politicians sometimes have to appeal to populism or spin the truth to gain electoral favour. Judges are immune from these temptations, which helps to preserve their integrity. Integrity increases public confidence in the courts.

When the integrity of a senior judge comes into question, it can undermine public confidence. For example, former High Court judge Dyson Heydon is being investigated for alleged sexual harassment. You will find further information on this investigation in the courts section of Case studies in this book.



■ Figure 14.5 – The trial of Witness K demonstrates the ability of the government to hold closed trials in matters of national security.
Source: Alan Moir, *Freedom from information*, 2019, author's permission, <moir.com.au>

Other factors may undermine public confidence in the courts. There are barriers to accessing the justice system. Cost — which reflects the reliance on scarce legal expertise — is a significant barrier to access. A lack of equal access can foster the perception that justice is only for the wealthy and powerful. Justice delayed is justice

denied. Courts can take years to resolve cases, which can also undermine faith in the process of justice. Cases can be won and lost on legal technicalities and skilful lawyers can manipulate trial procedures to advantage their clients. It undermines public confidence when justice seems to depend on the skill of a lawyer rather than the facts. Finally, secret trials weaken public confidence because they contradict the principle that justice must not only be done; it must be seen to be done. See: *Case study — The courts: The secret trial of Witness K*.

Judges and courts are trusted because they are impartial and independent — they have integrity. Parliament and governments are partisan and dependent on popular will to retain their positions. Judicial integrity is fundamental to public confidence. Several factors can undermine public confidence, including barriers to access, lack of timeliness, manipulation of trial procedure and lack of transparency.

Table 14.3 lists factors that inspire and undermine public confidence in the courts.

Public confidence	
Inspired by	Undermined by
Courts' impartiality	Barriers to access — for example, reliance on expert legal advice
Independence of the judiciary	Cost
Authority of the courts	Time taken to resolve
Natural justice and due process	Manipulation of procedure
Integrity of judges	Secret trials

■ Table 14.3 – Factors upholding and undermining public confidence in the courts.
Source: Stephen King, 2020

Accountability from outside the court system

Parliamentary legislation and scrutiny, and the censure and removal of judges

Robust accountability requires independent institutions. Chapter 11 and 12 discuss how parliament and the executive are accountable through judicial review and institutions such as the Auditor-General and the Administrative Appeals Tribunal (AAT).

The independence of the courts insulates them to a degree against accountability to extra-judicial institutions. However, parliament is the superior branch of government, and courts, and judges are subject to both statute and constitutional law.

Parliament is sovereign because it represents the people, in whom sovereignty is vested in Australia's democracy.

Parliamentary sovereignty makes the legislature superior to the courts. Parliament can make legislation to:

- override judge-made common law;
- clarify common law; and
- limit the freedom of judges.

Parliament may also:

- remove judges.

See: *Background information: Judicial discretion*.

Table 14.4 summarises how parliament and legislation hold courts to account.

Courts are accountable to	Explanation
Parliament	- Parliament is democratic, whereas courts are not. Parliament expresses the will of the people, in whom sovereignty is vested. - The law binds courts. Parliament makes the law. - Parliament has the power to remove judges on grounds defined by the Constitution.
Law	- Statute binds courts and judges. - The Constitution vests original and appellate jurisdiction in the High Court. - Section 72 of the Constitution provides for the removal of judges on the grounds of “proved misbehaviour or incapacity”. - Parliament creates and vests jurisdictions in other Chapter 3 courts and may add additional original jurisdiction to the High Court. - Parliamentary legislation — both Commonwealth and state — governs court procedures, rules of evidence, sentencing and statutory interpretation, and creates judicial commissions to investigate allegations of judicial misconduct.

■ Table 14.4 – How courts are accountable to parliament and the law.
Source: Stephen King, 2020

Parliamentary legislation and scrutiny of the courts

Commonwealth and state parliaments create laws that bind courts in their jurisdictions. For example, legislation such as the *Judiciary Act 1903* and the *Crimes Act 1914* binds Chapter 3 — federal — courts. State parliaments have similar legislation governing state courts. For example, *State Criminal Codes* and *Sentencing Acts* determine the minimum and maximum sentences and the factors judges are allowed to take into account when sentencing. Evidence Acts in all jurisdictions are uniform laws upholding trial procedures across all jurisdictions. *Acts Interpretation Acts* limit the discretion of judges when they interpret other acts — they reduce the scope for judicial activism. Finally, many Australian jurisdictions have enacted parliamentary legislation creating judicial commissions which can independently investigate alleged misconduct by judges. Judicial commissions make recommendations to parliament about the possible removal of judges.

The superiority of statute over common law and the principles of the rule of law mean judges must abide by the statutes. In this way, democratically elected parliaments maintain oversight of judicial power and hold it accountable to the people.

Table 14.5 lists examples of parliamentary legislation which applies explicitly to courts, keeping them accountable to the law and the parliament. Examples of specific legislation from various states are included in square brackets.

Background information: Judicial discretion

It is common practice for parliament to allow judges some flexibility — called judicial discretion — so they may interpret statutes and apply common law accounting for the unique circumstances of each case. Judicial discretion allows the law to develop by precedent and keep pace with a changing society.

Parliament often intends for courts to develop the law. An example is the *Native Title Act 1993*. The Act allows courts to develop the meaning of ‘compensation’ on a case by case basis. By leaving the word undefined in the Act, courts can interpret compensation broadly to fit a range of compensable losses suffered by native title holders. The Timber Creek Case [2019] is an example.

Mandatory sentencing laws in most jurisdictions limit judicial discretion by specifying fixed minimum sentences, compelling judges to jail offenders regardless of the seriousness of the crime and the age and circumstances of the offender.

The Law Council of Australia notes:

Australian parliaments have increasingly intervened in the sentencing process with prescribed mandatory sentences becoming more common. The growth of mandatory sentencing laws reflects a desire in some quarters for tougher sentences and dissatisfaction with the traditional sentencing system where courts have a broad discretion to deal with offenders.⁴

4 Law Council of Australia, *Mandatory sentencing factsheet*, <<https://www.lawcouncil.asn.au/docs/3b338bbd-ae36-e711-93fb-005056be13b5/1405-Factsheet-Mandatory-Sentencing-Factsheet.pdf>>.

Parliamentary legislation applying to courts	Explanation
<i>Judiciary Act 1903 (Cth)</i>	• Applies to Chapter 3 federal courts • Assigns jurisdictions to the High Court • States have similar laws
<i>Commonwealth Electoral Act 1902</i>	• Assigns special jurisdiction to the High Court as the Court of Disputed Returns
Acts Interpretation Act 1901 (Cth)	• Defines the meaning of terms in other Commonwealth statutes • Limits judges' discretion when interpreting other Acts • States have similar laws
Crimes Acts [<i>Criminal Code Act 1913 (WA)</i>]	• Specifies criminal offences — most crimes originated in common law, but were codified in statute during the 20th century as parliaments took over jurisdiction for crimes from the courts
Evidence Acts [<i>Evidence Act 1906 (WA)</i>]	• Specifies rules of evidence
Sentencing Acts [<i>Sentencing Act 1995 (WA)</i>]	• Specifies the minimum and maximum sentences for crimes • Some jurisdictions contain mandatory sentencing provisions
Civil Liability Acts [<i>Civil Liability Act 2002 (WA)</i>]	• Imposes caps on the amount of damages courts can award in civil cases. See: <i>Case studies: Parliament holds courts to account</i>
<i>Judicial Misbehaviour and Incapacity (Parliamentary Commissions) Act 2012 (Cth)</i>	• Enables the Commonwealth Parliament to establish judicial commissions to investigate allegations of misconduct by judges • Judicial commissions make recommendations to parliament which may include removal of a judge under Section 72 of the Constitution
Judicial Commissions Acts [<i>Judicial Officers Act 1985 (NSW)</i>] <i>Judicial Commission of Victoria Act 2016 (Vic)</i>]	• Statutes that establish judicial commissions to investigate allegations of misconduct • New South Wales, Victoria, South Australia and the Australian Capital Territory have permanent commissions established by legislation • The Northern Territory Parliament passed the <i>Judicial Commission Bill 2020</i> to establish a formal statutory framework to deal with complaints about misconduct and mental or physical incapacity of judicial officers and ordinary members of the Northern Territory Civil and Administrative Tribunal (NTCAT). • Queensland establishes temporary judicial commissions when allegations of serious judicial misconduct arise — a process similar to the Commonwealth • Western Australia does not have a judicial commission. The WA Law Society has recommended the establishment of a state judicial commission to improve the accountability of WA judicial officers

■ Table 14.5 – Parliamentary legislation applying specifically to courts.
Source: Stephen King, 2020

Parliament represents contemporary society, whereas common law may originate from times when values were very different. The doctrine of precedent obliges courts to follow precedent and apply common law in contemporary cases. At times, common law can be outdated and no longer fit modern values. In cases where conservative judges apply outdated common law, the parliament may step in and override the common law. In this way, parliament corrects outdated law and limits or removes judges' discretion from a particular field of law. See: *Case study: Parliament holds courts to account.*

The censure and removal of judges, including Section 72 of the Constitution

A state parliament may remove state judges. The Commonwealth Parliament may remove federal judges under Section 72 of the Constitution, a mechanism of accountability adopted from Britain.

Removing a judge is the ultimate sanction and one that could threaten the independence of the courts. Section 72 of the Constitution codifies the criteria and method for removal of a judge. State constitutions do likewise.

Section 72 also contains several provisions concerning judicial appointments and salary. Taken together, they form the basis for the

independence of the judiciary and provide a means for holding judges to account. In short, Section 72 says:

- the executive appoints judges;
- judges' remuneration cannot reduce; and
- both houses of parliament must approve the removal of a judge, but only on the grounds of "proved misbehaviour or incapacity".

See: *Background information: Proved misbehaviour or incapacity.*



■ Figure 14.6 – The Mabo decision in 1992 recognised native title and abolished the legal principle of 'terra nullius'.
Source: Alan Moir, 'Mabo treaty', author's permission, <moir.com.au>

Background information: Proved misbehaviour or incapacity

The terms "proved misbehaviour or incapacity" are deliberately vague. The Constitution does not specify what kind of 'misbehaviour' warrants a judge's dismissal. Nor does it specify what type or level of impairment qualifies as 'incapacity'. The Constitution does not define what 'proved' means. Does it mean a criminal conviction or something less? This lack of clarity is deliberate; it creates space for reflection and doubt and, thus, makes it essential that vigorous debate should occur in parliament. The wording of the Constitution makes it difficult — but not impossible — for parliament to remove a judge. In a liberal democracy the elected parliament should be able to hold the judiciary to account.

The power contained in Section 72 is so extraordinary that parliament has never removed a federal judge. Only one Australian judge — a Queensland judge named Angelo Vasta — has been removed since federation using the same mechanism in the Queensland constitution. See: *Example: Justice Angelo Vasta.*

Undergoing investigation at the time of his death, High Court Justice Lionel Murphy's case illustrates how parliament might use Section 72 in practice. See: *Example: Justice Lionel Murphy.*

Example: Justice Lionel Murphy

The Whitlam Government appointed Senator Lionel Murphy to the High Court in 1975. He was a controversial figure, accused of perverting the course of justice in 1984. The Senate



■ Figure 14.7 – Section 72 of the Constitution contains several provisions concerning judicial appointments, remuneration and removal.

Source: Jacky Holland, Direction Design, 2020

established an inquiry that recommended the prosecution of Justice Murphy. The New South Wales (NSW) Supreme Court found him guilty of attempting to pervert the course of justice. The NSW Court of Appeals ordered a retrial in 1985 and in April 1986 the conviction was quashed.

Following the appeal, parliament established a special Parliamentary Commission of Inquiry — composed of three retired judges — to inquire into Murphy's fitness to be a High Court judge. The Commission investigated forty-one allegations. Fourteen were thought worthy of further investigation. In July 1986 it was announced that Murphy had been diagnosed with terminal cancer. The parliament disbanded the Commission of Inquiry and embargoed its documents for 30

years. Justice Murphy returned to the High Court for one week and died in October 1986.

Had Justice Murphy not become terminally ill the Parliamentary Commission of Inquiry may have continued to investigate. It would have made a recommendation to parliament about whether it should use its Section 72 power or not. The recommendation may have led to a debate in parliament about whether Murphy had misbehaved to a degree justifying his removal.

Example: Justice Angelo Vasta

The Queensland Parliament removed Justice Angelo Vasta of the Queensland Supreme Court. He was implicated in corruption by the *Commission of Inquiry into Possible Illegal Activities and Associated Police Misconduct* (the Fitzgerald Inquiry) in Queensland. The Queensland Parliament established a commission of inquiry led by former High Court Chief Justice Sir Harry Gibbs to investigate the allegations against Vasta. The Gibbs' investigation alleged Vasta engaged in misconduct concerning a company with which his family was associated. His wrongdoing — which did not affect his decisions in court



■ Figure 14.8 – The Whitlam Government appointed Senator Lionel Murphy to the High Court in 1975.

Source: Rob Mieremet, *Lionel Murphy speaking at the International Court of Justice* (21 May 1973), 1973, CC0 1.0, <<https://commons.wikimedia.org/w/index.php?curid=37906055>>

— was found to be ‘misconduct’ and he was removed from office in June 1989 by the Queensland Parliament.

He is the only Australian superior court judge removed from office in the 20th century. None have been removed to date in the 21st century.

Additional ways the courts are accountable

Chief Justices

Australia has nine court hierarchies reflecting the federal division of judicial powers. At the top of each hierarchy is a superior court headed by a Chief Justice **who is the head of that particular jurisdiction**. The Chief Justice has responsibility for monitoring the performance of judges within their area of responsibility and may counsel underperforming judges. See: *Example: Appeals hold judges and magistrates to account — Judges Sandy Street and Salvatore Vasta*.

Codes of conduct

Codes of conduct are forms of self-accountability. Codes of conduct apply to several branches of the Commonwealth Government. For example, there is a code of conduct for ministers, another for the public service, and another for parliamentarians.

The Australasian Institute of Judicial Administration is a non-government organisation. It is composed of 30 representatives from across the legal profession, including judges. Its aim is to research judicial administration and educate those in the legal system “in relation

to court administration and judicial systems”.⁵ It publishes the *Guide to Judicial Conduct* to guide judges in relation to “*what may be an appropriate course of conduct [...] in a range of circumstances*”.⁶

“ The Chief Justice has responsibility for monitoring the performance of judges within their area of responsibility and may counsel underperforming judges. ”

5 Australian Institute of Judicial Administration, ‘About the Australasian Institute of Judicial Administration (AIJA)’, <<https://www.aija.org.au>>.

6 Australian Institute of Judicial Administration, *Guide to judicial conduct*, 2017, <<https://aija.org.au/wp-content/uploads/2017/12/GUIDE-TO-JUDICIAL-CONDUCT-3rd-Edition.pdf>>.



■ Figure 14.9 – Additional mechanisms for judicial accountability.
Source: Jacky Holland, Direction Design, 2020

Examples: Chief Justice Tim Carmody and Magistrate Roger Prowse

Chief Justice Tim Carmody

Tim Carmody was Chief Justice of the Queensland Supreme Court from 8 July 2014 to 1 July 2015. The Queensland Liberal National Party (LNP) Newman Government (2012–2015) appointed him. He was a controversial figure because of the nature of his appointment and his conduct as Chief Justice.

Carmody was openly supportive of several Newman Government policies while serving as a magistrate, notably its anti-motorcycle gang laws. His openly political stance in supporting the government led to criticism. In another matter, Queensland Attorney-General Jarrod Bleijie had been under pressure to resign because he had publicly revealed confidential discussions he had with other judges. Chief Magistrate Carmody was the embattled Attorney-General's only voice of support.

The Newman Government later appointed Carmody as Chief Justice of the Supreme Court. He had experience as a judge on the Queensland District Court and the Federal Family Court. He had been Queensland Chief Magistrate for only nine months. It was a meteoric rise to the very top of the Queensland judiciary, and over the heads of more experienced judges.

A reasonable person may have concluded that Carmody's rapid promotion to the most senior judge was a reward for supporting the government's tough policies and its beleaguered Attorney-General. Even if this was not the case, it might appear to be his reward for political favours. Perceptions of political bias at the top of the court system undermined public confidence in Chief Justice Carmody.

Carmody's appointment divided the Queensland judiciary. Criticism focused on his

lack of experience and the perception of a close relationship with the Newman Government. He continually defended himself against his judicial colleagues' criticism and the media. One of the Supreme Court's retiring judges, Allan Wilson, used his retirement speech to describe Carmody as having lost the respect of his fellow judges. Specifically, Wilson said that Carmody lacked the necessary legal ability and did not do his share of the Supreme Court's caseload, creating more work for other judges. Another judge secretly recorded him referring to his colleagues as "scum".⁷

In short, perceptions that Carmody was too close to the government, inexperienced, lacking in legal competence, inefficient and unfit for the role of judicial leadership undermined public confidence in him as Chief Justice of the Supreme Court.

The final straw for Chief Justice Carmody was an accusation of bias. He once met with Hetty Johnston, founder of the child protection pressure group, Bravehearts. The meeting took place when he was an appellate judge in the case of a convicted child murderer. As the appeal judge hearing a child murder case, his meeting with Bravehearts' founder created an apprehension of bias. Moreover, email communications revealed he had not read previous judgments on the case — an expectation of an appellate judge.

The Queensland Parliament did not sack Carmody. Instead, he resigned as Chief Justice under significant pressure from his judicial colleagues and mounting evidence of the public's lack of confidence. He served as a judge on the Queensland Supreme Court until his resignation on 10 September 2019.

7 'Tim Carmody controversy: timeline', *Brisbane times*, 25 May 2015, <<https://www.brisbanetimes.com.au/national/queensland/tim-carmody-controversy-timeline-20150525-gh8u4u.html>>; and 'Tim Carmody: Justice John Byrne allegedly makes secret recording of conversation with Queensland's Chief', ABC News, 18 May 2015, <<https://www.abc.net.au/news/2015-05-18/chief-justice-tim-carmody-alleged-recorded-by-justice-john-byrne/6477626>>.

Magistrate Roger Prowse

In June 2016 the NSW Supreme Court severely criticised Magistrate Roger Prowse for making mistakes, undermining justice and diminishing his court.

Magistrate Prowse became irritated by police prosecutors in a minor assault case, accusing them of interfering in the case at the Liverpool Local Court. Believing Prowse had undermined court procedure, the NSW Department of Public Prosecutions (DPP) sought a judicial review of Prowse's conduct.

After witnessing him writing a threatening note to the victim, the police arrested the accused and charged him with influencing a witness. The arrest meant that the original assault case could not proceed. Prowse became annoyed that the case had stalled and insisted that the accused be 'un-arrested' by the prosecutor. Prosecutors have no power to 'un-arrest' a person. Prowse then accused the police of "immaterial interference with a court hearing".⁸

The prosecutor requested that Prowse step aside from the case; he refused to do so. He then threw the case out of court. These are the actions that led to the DPP asking for a judicial review of Prowse's conduct.

Supreme Court Justice Helen Wilson conducted the review and found that Prowse had become irritated with the police and sought to punish them. She found his "actions had 'occasioned a serious injustice', that the magistrate 'fell into error' and 'undermined the proper administration of justice and diminished the court over which he presided'".⁹ Justice Wilson quashed Prowse's original rulings and ordered the case to be heard in the Liverpool Local Court by a different magistrate.

8 'NSW magistrate slammed by Supreme Court over "fundamental error"', ABC News, 15 June 2016, <<https://www.abc.net.au/news/2016-06-15/nsw-magistrate-reprimanded-over-clear-error/7512628>>.

9 Robinson, Natasha, 'NSW magistrate slammed by Supreme Court over "fundamental error"', ABC News, 15 June 2016, <<http://www.abc.net.au/news/2016-06-15/nsw-magistrate-reprimanded-over-clear-error/7512628>>.

Summary

Accountability of the courts

- Like all branches of government, the judiciary must be accountable.
- Judicial powers enable courts and judicial officers to make legally binding decisions and to create new common law in their areas of jurisdiction.
- These are substantial powers held by appointed — not elected — officials. Holding such power to account is a necessary feature of good governance.
- The judiciary, however, is a special case because its independence is a fundamental principle of the rule of law.
- Robust external accountability mechanisms could undermine its independence.

Through appeals

- The judiciary has ways of keeping judicial officers and courts accountable.
- The appeals process is the most well-known of these processes.
- Superior courts can review the decisions of lower courts within their court hierarchy.
- Superior courts have more experienced judges who have the power to reverse lower court decisions. Both parties to a case may use the appeals process to test the decision of the court which first heard their case.
- Appeals correct miscarriages of justice and ensure lower courts uphold procedures that provide fairness, due process and natural justice.
- Appeals can lead to reforms throughout court hierarchies.

Through transparent processes and public confidence

- Courts use the doctrine of precedent and strict procedures to ensure fair trials. These processes are ancient and trusted.
- Courts are also public and transparent, being open to the public and the media except in rare circumstances.
- These processes ensure fairness, due process and natural justice.
- Judicial independence, impartiality, authority and integrity inspire public confidence in the courts.
- Barriers to access, the time taken to resolve cases and perceptions of manipulation of cases undermine public confidence in the courts.

Through parliamentary legislation and scrutiny

- Parliaments also hold courts to account through legislation.
- Parliament is the sovereign lawmaker and can abrogate the common law.
- It can make statutes which limit the freedom and discretion of judges, such as Sentencing Acts, Evidence Acts and Acts Interpretation Acts.
- Parliaments have legislated to create judicial commissions that can investigate allegations of misconduct by judges and complaints.
- Parliaments may act on recommendations by a judicial commission to remove a judge.

continued overleaf

Through censure and removal of judges — including Section 72

- Australia adopted British practice in granting power to parliament to remove a judge.
- The only criteria for removing a judge is “proved misbehaviour or incapacity”.
- The criteria for removal are vague. The vagueness is deliberate to ensure parliament cannot use this power without good cause.
- Parliament has never removed a federal judge. Queensland’s parliament removed a superior court judge for misconduct.

By other means

- Chief Justices are responsible for the courts and judicial officers of the court hierarchy over which they preside.
- Chief Justices may order the supervision of a judge by another judge or place them under mentoring by another judge.
- Judicial codes of conduct are a recent innovation. There are similar codes for members of parliament, ministers and public servants in the other two branches of government.

Exam practice questions

Short answer

- 1a) Explain the term 'transparency' as it applies to the accountability of the courts.
- 1b) Explain the role and importance of the Attorney General in holding the courts to account.
- 1c) With reference to at least **one** example, discuss how the appeals process holds the courts to account for their decisions.
- 2a) Define the term 'judicial independence'.
- 2b) Explain the relationship between the doctrine of precedent and the accountability of the courts.
- 2c) Discuss **one** argument for and **one** argument against the claim that 'recent events in the Australian legal system have undermined public confidence in the courts'.
- 3a) Explain the purpose of a judicial code of conduct.
- 3b) Outline **three** elements of natural justice that inspire public confidence in Australian courts.
- 3c) Discuss **one** argument for and **one** argument against the claim that 'parliamentary sovereignty contributes to the accountability of judges'.
- 4a) Explain what is meant by an 'appeal'.
- 4b) Distinguish between internal and external mechanisms of judicial accountability.
- 4c) With reference to at least **one** example, discuss the effectiveness of Section 72 of the Commonwealth Constitution (Australia) in subjecting the courts to accountability through the censure and removal of judges.

Source analysis

Read the source below and answer the questions that follow.

The source is adapted from: Gabrielle Appleby, 'Australia urgently needs an independent body to hold powerful judges to account'.¹

As Chief Justice of the High Court, Susan Kiefel explained in her statement that the complaints against Heydon by his former associates were investigated by an administrative inquiry that had to be specially set up for the task. The inquiry's six recommendations, all of which the High Court has indicated it will adopt, were tailored to redress the particular position of power held by a judge over an associate.

Through his lawyers, Heydon ... emphatically denies the allegations.

Judges occupy an extraordinary, status-based position within the legal profession. In all contexts, including private ones, deference is accorded to judges by lawyers who may have to appear before them. Deference is displayed to higher court judges from those in lower courts whose judgments might be overturned by them. It is displayed from legal academics, who hope their work might be influential to their legal thinking. And the whole legal profession feels the responsibility for maintaining the idea that judges are of the highest integrity, in order to justify the level of power they wield in public life.

At the federal level in Australia, there is no independent regulatory mechanism to deal with complaints that are made against judges, be they related to sexual misconduct or other forms of misbehaviour.

continued overleaf

¹ Appleby, Gabrielle, 'Australia urgently needs an independent body to hold powerful judges to account', The conversation, 24 June 2020, <<https://theconversation.com/australia-urgently-needs-an-independent-body-to-hold-powerful-judges-to-account-141272>>.

Under the current system, complaints against individual judges must be made either to the attorney-general or the head of jurisdiction (that is, the chief justice or judge) of the relevant court.

If a complaint is made, investigated and found to be substantiated, there is no penalty available short of removal of the judge. Rather, the chief justice might recommend the judge undertake counselling, or training, or reassign them from sitting on certain cases, or from sitting on any cases.

Unlike, for instance, the legal or medical professions, or the public service, these avenues for accountability are not designed to provide an independent, standing institutional response when an individual has a complaint about the conduct of a judge, be that on or off the bench.

- 5a) Explain the term 'Chief Justice'.
- 5b) With reference to the source, explain in your own words **two** issues that this case has revealed about the accountability of judges in Australia.
- 5c) With reference to at least **one** example, discuss why it is difficult to remove a federal judge for "proved misbehaviour or incapacity", as provided in Section 72 of the Constitution.
- 5d) Evaluate the extent to which parliamentary legislation and scrutiny can hold judges accountable.

Essay

- 6) Assess the extent to which internal processes are more powerful than external ones in upholding the accountability of the courts.
- 7) 'Upholding public confidence in the courts through transparent processes is the most effective method of holding the courts to account'.
Evaluate this claim.

Investigation

For further exam practice questions see page 445-446



Human rights and how to protect them

Principle of rights including civil, political, economic, cultural and social

Syllabus points:

- **The ways human rights are protected in Australia, including in the Constitution, common law, statutory law and charters of rights, such as the Charter of Human Rights and Responsibilities Act 2006 (Vic) and the Human Rights Act 2004 (ACT)**
- **The ways human rights are protected in one other country**
- **The status of international covenants, protocols and treaties in protecting human rights in Australia**

Introduction

The concept of rights has a long history stretching back to ancient times. Since World War 2, human rights have been a critical feature of liberal democracies. However, it is only in post-World War 2 democracies that the concept of universal human rights has become a necessary consideration in governance.

Human rights extend to everyone. People of all races, genders, ages, levels of ability and economic situation are entitled to human rights. Human rights do not depend on citizenship rights or any other quality.

Human rights impose limitations and obligations on political and legal systems because they must provide for their protection.

Liberalism is the political philosophy that places the rights and freedoms of individuals beyond the reach of government. Liberalism is the core value of liberal democracy. Without liberalism, democracy can degenerate into a tyranny of the majority. Democratic tyranny occurs when a majority ignores the human rights of a group or an individual. Discrimination and persecution follow. 'Illiberal' democracy describes tyranny of the majority — one where rights and liberties are at risk from populist demagogues.

Ever since the ancient Athenians invented the system of government by the people 2,500 years ago, rights have been necessary for democracy. In the 21st century, liberal democracy is the best form of contemporary government from the perspective of protecting human rights and respecting the dignity of human beings.

Societies today are increasingly diverse. Immigration reduces their ethnic homogeneity and increases social, religious, ethnic, cultural, linguistic and other forms of diversity.



■ Figure 15.1 – The Parthenon is an enduring symbol of ancient Greece and Athenian democracy.

Source: Steve Swayne, *The Parthenon in Athens*, 1978, CC BY 2.0, <https://en.wikipedia.org/wiki/Culture_of_Greece#/media/File:The_Parthenon_in_Athens.jpg>

See: *Background information: Snapshot of contemporary Australian society*; and *Background information: Snapshot of United States society*.

This chapter focuses on the protection of human rights in Australia and the United States of America (US). Both are liberal democracies which regard rights and freedoms as fundamentally important. Nevertheless, there are significant differences between each country's methods of protecting human rights.

The differences between the Australian and the US approach to rights protection are often a matter of degree rather than substance. For example, while both countries use constitutional, statutory and common law to protect rights, the US relies heavily on constitutional law, whereas Australia relies on statutory law. One significant difference between each is the status of international human rights law. The US shuns international human rights treaties, covenants and protocols, whereas Australia uses them as the basis for much of its human rights law.

Background information: Snapshot of contemporary Australian society

Australian society is now comprised of its First Nations peoples who have occupied the land for tens of thousands of years, those who have settled here over the past 240 years, and their descendants.

Australia today is a very diverse multicultural nation with 27.7 per cent of the population born overseas. It is likely that this percentage will continue to rise over time.¹ Some of the groups are quite close to the Australian mainstream in terms of cultural affinity and values. These groups include British, New Zealand and South African migrants. However, some groups are quite different from the mainstream and, therefore, may experience discrimination. For example, Muslim Australians may face potential hostility from segments of society because of recent and historical events. Visible migrants and minorities are those whose physical features, language, customs or dress make them easy to identify. They may be subject to discrimination more often than 'invisible' migrants.

¹ Australian Bureau of Statistics, *Australia's population by country of birth*, Series 3412.0, Migration, Australia, 2011–12 and 2012–13, 2014, <<http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/3412.0Chapter12011-12%20and%202012-13>>.

There are also large groups who have faced discrimination through entrenched social and cultural values, and who continue to need their rights protected. Women are one such group. Children, those unable to exercise personal autonomy because of disability, and those with physical and mental disabilities which exclude them from broader participation in society are examples of other groups who also need their rights protected.

Another particular group is Australia's First Nations peoples – that is, Aboriginal and Torres Strait Islanders. They are Indigenous Australians. This group has suffered a long history of discrimination and inequality of rights. Indigenous Australians' experience of political and legal rights is the subject of Chapter 16.

Background information: Snapshot of United States society

The US is much like Australia. It is also a settler society formed by immigration and natural population growth over 300 years in a new land occupied for millennia by First Nations peoples.

Approximately four per cent of Americans were born overseas. Nearly 40 per cent are non-white — that is, Hispanic, Latino, African American or Asian American. Between 3.2 and 3.6 per cent of the population are undocumented immigrants, mainly from South and Central America. The US born children of undocumented immigrants are termed 'Dreamers' and have some rights, but no citizenship rights.

Wealth inequality is higher in the US than in Australia. The US has less generous healthcare and welfare than Australia. As a consequence, many Americans endure diminished political and legal rights because of a lack of access to fundamental human rights such as healthcare and a minimum standard of living.

The US's First Nations peoples are referred to as 'Native Americans'. They form approximately 1.6 per cent of the population and have suffered similar discrimination and inequality to Indigenous Australians.



■ Figure 15.2 – Many groups have their human rights impeded due to discrimination.
Source: Matt Golding, *Human rights*, author's permission, <www.threefingers.com.au/>



■ Figure 15.3 – Native Americans have had to fight for freedom from discrimination and inequality, as have Indigenous Australians.
Source: Denver Public Library, *The Native American Experience*, National Indian Youth Council demonstrations 1970, CC BY SA 3.0, <<https://commons.wikimedia.org/w/index.php?curid=8064702>>

Human rights

Recognising the value of each person is how the Australian Human Rights Commission describes human rights. The Commission says human rights are “shared across cultures, religions and philosophies”,² making them universal to all humanity.

Human rights are universal claims to certain freedoms and to certain entitlements which ensure the dignity, equality and respect of every human being.

Rights have a millennia-long history. The idea of dignity, equality, respect and human flourishing has evolved over many centuries. Today, human rights are internationally recognised and promoted by bodies such as the United Nations (UN). The law of many countries enshrines rights, especially the laws of liberal democracies such as Australia and the US.



■ Figure 15.4 – Eleanor Roosevelt and the *UN Universal Declaration of Human Rights*.

Source: Franklin D Roosevelt Library website, Eleanor Roosevelt and the United Nations Universal Declaration of Human Rights, 1949, Public Domain, <<https://commons.wikimedia.org/wiki/File:EleanorRooseveltHumanRights.png>>

Types of human rights

The *United States Declaration of Independence* (1776) begins with the claim that all people are “created equal” and have rights to “Life, Liberty and the pursuit of Happiness”.³ It is one of the first political documents to claim universal rights. The term ‘first generation’ rights is used to describe these basic rights, which are also called ‘negative’ rights because they require constitutional limits to the power of government. It also needs the rule of law, upheld

by an independent judiciary. Constitutionalism and the rule of law prevent governments from intruding unjustly upon a person’s life, liberty or freedom to live as they choose.

The UN *Universal Declaration of Human Rights* (1948) (UDHR) is the first of many international declarations, conventions and covenants that together form a body of international human rights law. The UDHR is one of the first political documents to claim positive rights. For example, Article 22 of the UDHR states that social rights — such as education — are indispensable to human dignity. The term ‘second generation’ rights applies to ‘positive’ rights. The respect of second generation positive rights obliges governments to provide public goods and services — such as schools and hospitals — that enable the fulfilment of these rights. Therefore, positive rights expand the role of government.

The UN Convention on Indigenous Rights (2007) is an example of international law enabling First Nations communities across the world to determine their futures and practise their cultural heritage. These are ‘third generation’ solidarity rights, so called because they preserve cultural identities. Community run schools delivering an education in traditional languages is an example of a third generation solidarity right. So, too, is the right to practise traditional hunting and the control of sacred places. Protecting third generation solidarity rights obliges governments to consult with cultural groups and provide resources to uphold their rights. Governments may need to exempt group members from other laws — such as laws banning hunting in national parks — to protect these rights. Exempting some groups from laws can be controversial. Solidarity rights require governments to arbitrate between different rights.

The UN *Framework Convention on Climate Change* (1992) and the *Convention on Biological Diversity* (1992) are examples of international law designed to protect the biosphere as a sustainable habitat for *Homo sapiens*. These are ‘fourth generation’ rights. Protecting global assets necessary for the survival and flourishing of humanity requires national governments to cooperate with other countries because these assets are beyond the jurisdiction of any nation. The UN is often the forum through which these rights emerge and are protected.

Table 15.1 classifies rights into generations based on when they emerged in the modern era. It also indicates the role of government in protecting

2 Australian Human Rights Commission, *What are human rights?* 2013, <<https://www.humanrights.gov.au/about/what-are-human-rights>>.

3 National Archives, ‘Declaration of Independence: A transcription’, in *America’s Founding Documents*, 4 July 1776, <<https://www.archives.gov/founding-docs/declaration-transcript>>.

Human rights			
Generation	Type	Role of government	Explanation and examples
First	Negative rights	- Constitutionalism limits government - Prevented from unjust interference in individual freedoms	- Right to life - Freedoms of movement, conscience, speech, association, assembly, and livelihood
Second	Positive rights	Obligated to provide public goods and services to fulfil individual rights	- Education, healthcare - Employment, pay, conditions and safety - Equality and non-discrimination
Third	Solidarity rights	- Obligated to consult with particular communities and provide resources - Arbitrates between conflicting rights	- Self-determination - Group economic development - Participation in cultural heritage
Fourth Emerging in the contemporary period. As yet ill-defined.	Species rights	Obligated to cooperate with other nations' governments to provide transnational and global protection for the rights of humans as a species	- Healthy biosphere - Participation in cybersphere - Bioethics - Shared resources Example: ocean fisheries

■ Table 15.1 – Classification of rights by generation, and the role of government in protecting each category.
Source: Stephen King, 2020

them. First, second and third generation rights focus on individuals as members of societies. Fourth generation rights are a contemporary category of rights that focus on the rights of *Homo sapiens* as a species. These new rights emerge as the impact of humans on the biosphere becomes increasingly recognised.

Other ways of classifying human rights

There are other ways of classifying human rights. Perceptive students will note correlations between first, second and third generation rights and the rights listed in Table 15.2 overleaf which classifies rights by type.

Tables 15.1 and 15.2 list many rights and classify them in different ways. However, categorising rights can obscure a fundamental feature of rights — that is, that rights are a 'package deal'. Human rights are not only universal; they are interdependent and indivisible — thus, the denial of *any* right diminishes the dignity, equality and respect of a person.

The interdependence and indivisibility of human rights have significant implications for the role of government. Governments cannot pick and choose which rights to prioritise — they should aim to protect all human rights. To deny a person a particular human right diminishes the dignity, equality and respect due to that person. This is particularly true of diverse societies and especially of societies founded on the territory of First Nations peoples, such as Australia and the US. See: *Background information: Rights*

are universal, interdependent, indivisible and inalienable.

Conflicting rights

Governments must sometimes override and arbitrate between rights.

Third generation rights can be controversial because they may conflict with other rights. The cultural practices of some groups — such as child marriage and female genital mutilation — are clearly in conflict with the first generation civil rights of girls and women. Governments must therefore override some solidarity and cultural rights in order to protect fundamental individual rights.



■ Figure 15.5 – The hunting of endangered dugong is lawful for some members of Australia's First Nations peoples.
Source: Earthrace Conservation, Dugongs hunted by the indigenous people of Australia, 2013, CC BY 2.0, <<https://wiki.nus.edu.sg/display/TAX/Dugong+dugon++Dugong>>

Human rights		
Type	Explanation	Examples
Civil	Rights eliminating discrimination and empowering people to live full lives within their communities and societies	• Right to life • Right to liberty • Right to equality • Freedom of conscience and thought • Freedom of speech • Freedom of the press • Freedom of association • Right to religious belief — or no belief
Social	Enable the realisation of human potential	• Right to personal autonomy Example: body and reproductive rights • Freedom to marry whom you wish and have a family • Freedom of movement • Rights of children • Right to an education • Right to a minimum standard of health care
Economic	Enable means for survival and opportunities to thrive	• Rights to own property • Right to work • Right to a minimum standard of living — welfare • Right to trade
Cultural	Preserve identity and heritage	• Healthy biosphere • Participation in cybersphere • Bioethics • Shared resources Example: ocean fisheries
Political	Enable participation in government	• Freedom of assembly • Freedom of association • Freedom of political communication • Right to vote • Right to hold public office
Legal	Protection against arbitrary justice	• Right to a fair trial and due process • Right to silence – to not incriminate oneself • Right to the presumption of innocence • Right to legal representation • Freedom from cruel and unusual punishment • Freedom from torture

■ Table 15.2 – Classification of rights by type
Source: Stephen King, 2020

The exemption of members of First Nations groups from specific laws can undermine the first generation right to equality. For instance, the hunting of endangered dugong is lawful for some Western Australian First Nations peoples, but unlawful for everyone else. In these cases, governments must arbitrate between rights.

Resolving conflicting rights is a part of the modern rights debate. There is an obvious paradox between the idea of universality and the concept of solidarity rights in multicultural societies. The paradox illustrates the challenges of protecting human rights. Multicultural liberal democracies — such as Australia and the US — must deal with these challenges through their political and legal systems.

Background information: Rights are universal, interdependent, indivisible and inalienable

Rights are a 'package deal' to which everyone is entitled. The 'rights package' includes all of the following.

Rights are:

- **universal.** They apply to all human beings regardless of any distinctions of race, ethnicity, religion, gender, age, disability, wealth or any other characteristic;
- **interdependent.** The enjoyment of any right depends on the enjoyment of all rights. Therefore, the infringement of any right diminishes all rights;
- **indivisible.** Rights cannot be ranked into an order of importance or partially upheld. The right to a decent standard of living is just as important as the right to life; and

- **inalienable.** A person cannot be divorced from their rights except by just law. For example, a person guilty of murder has breached another person's right to life. The law permits the removal of a convicted murderer's right to liberty and freedom of movement as a consequence. The lawful restriction of a person's rights serves to protect other people's rights. The rule of law protects against the arbitrary removal of rights by upholding respect for legal rights, due processes and a fair trial.

Chapter 16 investigates Indigenous Australians' changing experience of political and

legal rights. Students should keep in mind that the interdependence and indivisibility of rights means that granting equal political and legal rights is insufficient without adequate civil, social, economic and cultural rights. The Indigenous experience of these rights has been very poor in the past. It is still a challenge in contemporary Australia, as demonstrated by the government's Closing the Gap program. Until Indigenous Australians experience real — not simply legal — equality of *all* rights, they cannot enjoy real equality of political and legal rights. See: Chapter 16.

Protecting rights — Types of law

Laws should protect human rights. The method of legal protection affects the security and flexibility of rights. There are advantages and disadvantages to each type of law. Human rights may be protected by:

- superior laws — constitutions;
- ordinary laws — statutes and common law;
- international laws — UN treaties, covenants and protocols; and

- bills of rights — either constitutional or statutory.

Each type of law can protect rights. Different countries use different types of law depending on their approach to rights protection and how entrenched they want rights to be. Most countries — including Australia and the US — use combinations of the above to protect rights.

Table 15.3 summarises each type of law and its advantages and disadvantages for protecting human rights.

Legal protection of human rights		
Type of law	Advantages	Disadvantages
Constitutions: • superior law made by unique processes	• Very secure rights protection • Exceptional mechanisms for amending constitutions' place rights beyond the reach of legislatures and executives • Rights may be specific and implied • Binds all three branches of government	• Least flexible Example: it is challenging to add and remove outdated rights • Elevates constitutional courts to supremacy over rights • Judges may create rights 'by implication' through interpretations of constitutions without any accountability • Rights lie beyond the democratic process
Statutes: • ordinary law made by parliaments	• Secure rights protection • Elevates parliament to supremacy over rights • Rights are accountable through the democratic process — i.e. puts the people in charge of rights • Parliamentary processes emphasise rights protections Example: Parliamentary Joint Committee on Human Rights • Flexible — rights can be added, amended and abolished if out of date • Flexible — conflicting rights can be arbitrated by suspending some rights and prioritising others Example: the Northern Territory Intervention suspended racial equality to protect women and children • Binds two branches of government — executive and courts	• Rights are more easily changed or removed • A democratic majority may wish to persecute an unpopular minority Example: Indigenous Australians in the 19th and early to mid-20th century • Rights may become politically contested • Executive influence in Westminster systems undermines parliament's capacity to protect rights; recall decline of parliament thesis — the typical situation in Australia • Non-binding on parliament

table continued overleaf

table continued from previous page

Common law: • ordinary law made by judges in courts	• Flexible — courts develop rights on a case by case basis • Courts use rules of interpretation that protect rights Example: principle of legality. See: <i>Background information: Does Australia have a “common law bill of rights”?</i> • Especially appropriate for legal rights	• Relatively insecure • Parliament may override common law rights • Executive influence in Westminster systems undermines parliament’s capacity to protect rights — recall decline of parliament thesis • Non-binding on parliament
International law	• Provides a framework for rights protection Example: Australian state and territory based bills of rights contain 20 civil rights adopted from the UN <i>International Covenant on Civil and Political Rights</i> (ICCPR) • Enables courts in one country to apply the human rights jurisprudence of courts in other countries — that is, persuasive precedents	• Not real ‘law’ — there is no sovereign international political and legal system capable of making law • Not legally enforceable in a sovereign country unless agreed by its government and ratified by its legislature • Ignored by many autocratic countries
Bills of rights — constitutional	As for constitutions	
Bills of rights — statutory	As for statutes	

■ Table 15.3 – The advantages and disadvantages of protecting rights using different types of law.
Source: Stephen King, 2020

Protecting rights — Australia and the United States

Constitutional rights in Australia and the United States

Australia and the US have adopted different approaches to protecting rights. The reasons are historical. The US declared independence from Britain on 4 July 1776 and won the War of Independence in 1783. Americans fought and died for their rights. Australians gained their freedom peacefully through debate and the ballot box. The US political and legal system was built to protect hard-won liberties. Meanwhile, Australia’s political and legal system was designed to solve the problems of uniting six former colonies into a federal union. For the US, rights were — and are — a fixation. Australia’s Founding Fathers assumed the parliamentary system would take care of rights, as it did in Britain. It was thought unnecessary — perhaps unwise, given the 19th century desire to build a ‘white Australia’ — to include many rights in the *Commonwealth of Australia Constitution Act 1900 (the Constitution)*.

The US Constitution contains a series of ten amendments which together form the Bill of Rights. The US Bill of Rights protects many civil, political and legal rights.

In contrast, the Australian Constitution contains few rights. The Australian Constitution specifies

a small number of economic and legal rights. Since federation, the High Court of Australia (High Court) has discovered an implied right to legal representation and an implied right to freedom of political communication.

Table 15.4 lists rights specified and implied in the Australian Constitution, and Table 15.5 lists rights enshrined in the US Bill of Rights. Perceptive students will note the US Bill of Rights’ emphasis on civil, political and social rights compared with the narrower and more limited rights expressed in the Australian Constitution. US constitutional rights limit the powers of all US governments because they are enshrined in the Bill of Rights. Australia’s constitutional rights are scattered throughout the Constitution and impose burdens on the Commonwealth, not the states. The exception is the implied right to freedom of political communication, which applies at all levels of government.

Constitutions can specify rights in writing. They can also imply rights if judges decide that the words of a constitution suggest them.

Australian constitutional rights — Specified and implied		
Constitution Section	Rights and freedoms	Notes
Section 41	Right to vote	- The right to vote in Commonwealth elections if — at federation — persons had the right to vote in state elections. - Transitional to ensure Western Australian and South Australian women's voting rights applied after federation in 1901. Other states did not allow women to vote in 1901. - A spent section — no longer relevant.
Section 51(xxxi)	Right to just compensation for the compulsory acquisition of property by the Commonwealth	- Protects property rights. - The Commonwealth may seize private property for government purposes, but must compensate the owner. - Applies to all forms of property Example: land, patents, intellectual, investment etc. - Does not apply to state governments, but they have similar limitations in their constitutions.
Section 80	Right to trial by jury for federal indictable offences	- Persons accused of federal crimes such as importing drugs, immigration offences such as people smuggling, avoiding excise taxes etc. are entitled to a jury trial. - Does not apply to state or territory crimes.
Section 116	Right to freedom of religion	- Prevents the Commonwealth from establishing an official — or state — religion. - Does not guarantee religious freedom in the broad sense. Note: Protestant Christianity is the official religion of the UK and Anglicanism is the state religion of England. There can be no official religion in Australia because of Section 116.
Section 117	Freedom from discrimination based on state residence	- The Commonwealth cannot discriminate against people based on where they live in Australia. - Territorians may be excluded from this right — clarification awaits a future High Court case.
Implied by Sections 7 and 24 of the Constitution	- Right to freedom of political communication – Discovered in the ACTV Case (1992)	- In <i>Australian Capital Television v Commonwealth</i> [1992] (the ACTV Case) the High Court held that Sections 7 and 24 of the Constitution create a representative democracy in Australia because they require each house of parliament be “chosen by the people”. - Representative democracy carries the implication that electors must be able to hear political opinions and arguments so they can cast an informed vote. - See: <i>Case studies: Discovering an implied right: The implied freedom of political communication.</i>

■ Table 15.4 – Australian Constitutional rights, both specified (expressed) and implied (discovered by the High Court).
Source: Stephen King, 2020

“Constitutions can specify rights in writing.
They can also imply rights if judges decide that
the words of a constitution suggest them”

US constitutional rights — The Bill of Rights		
Amendment	Rights and freedoms	Notes
First	- Freedom of religion - Freedom of speech - Freedom of the press - Right to peaceful assembly - Right to petition government	These are first generation negative rights inspired by the Enlightenment.
Second	Right to keep and bear arms	- This resulted from circumstances at time of drafting the US Constitution; that is the aftermath of the War of Independence where Americans fought a tyrannical government. - It is irrelevant in the modern era. - This right, more than any other, illustrates the inflexibility of constitutional rights — many Americans do not want this right, but its removal is virtually impossible.
Third	Freedom from the quartering of soldiers in private homes	- This is irrelevant in the modern era. It stems from the British practice of forcing American colonists to house British soldiers before and during the War of Independence. - It illustrates how outdated rights remain active in constitutional bills of rights because they are hard to change.
Fourth	- Freedom from unreasonable searches and seizures - The requirement for a warrant	- A right emerging from the British practice of searching American colonists and their homes. - Protects citizens from arbitrary executive power by ensuring the judiciary agrees to searches and seizures. - The executive must prove 'reasonable suspicion' before a judge will issue a warrant.
Fifth	Right to silence for an accused person	- This elevates the common law right to silence, inherited from English common law to the status of a constitutional right. - It prevents Congress and the states from passing laws removing the right to silence or shifting the burden of proof to the accused. - It would prevent the US Congress from passing laws similar to Australia's anti-terror laws.
Sixth	- Right to certain legal rights: - a speedy trial; - a public trial; - an impartial jury; - to know the accusations made against you; - the right to legal counsel; - specific rules of evidence (e.g. hearsay)	Elevates other common law rights to constitutional status preventing Congress from passing laws limiting rights to timely, open and fair trials.
Seven	Right to a jury in a civil case	This extends the right to trial by jury from criminal to civil trials.
Eighth	Restriction on government imposing excessive bail, fines and cruel or unusual punishments	- It was inspired by the English Bill of Rights 1689, and passed by the Westminster Parliament to strip the monarchy of its absolute powers. The English Bill of Rights is the foundation of British and Australian democracy. The Ninth Amendment makes it central to American democracy. - Note: Students must not confuse the English Bill of Rights — which is about the rights of parliament — with the US Bill of Rights — which is about the rights of individuals.

table continued next page

Ninth	The listing of rights in the Bill of Rights shall not deny or limit other rights held by the people	This reserves non-constitutional rights Example: common law rights, statutory rights etc. Note: Many rights emerge over time or are unforeseen. It is therefore impossible to list all rights in a bill of rights. Bills of rights may limit rights to those listed. What about rights not included in a bill of rights? This amendment foresaw this problem.
Tenth	Reserves all unspecified rights and powers to the states or the people	- This creates the doctrine of residual powers reserved for states. - It supports the Ninth Amendment by reserving unspecified rights to the people. - It supports statutory interpretations by courts that protect rights Example: the principle of legality. See the section on common law rights.

■ Table 15.5 – Rights enshrined in the US Constitutional Bill of rights.
Source: Stephen King, 2020

Advantages of constitutional rights

Constitutional rights are entrenched in the highest law — beyond the reach of executives and legislatures.

Constitutional rights empower judiciaries. Constitutional courts alone interpret constitutions. Thus, the High Court of Australia and the US Supreme Court have power over constitutional rights. Judicial supremacy over rights is reliable protection because courts are independent. See: *Background: Who oversees rights? Judicial supremacy v parliamentaryism*.

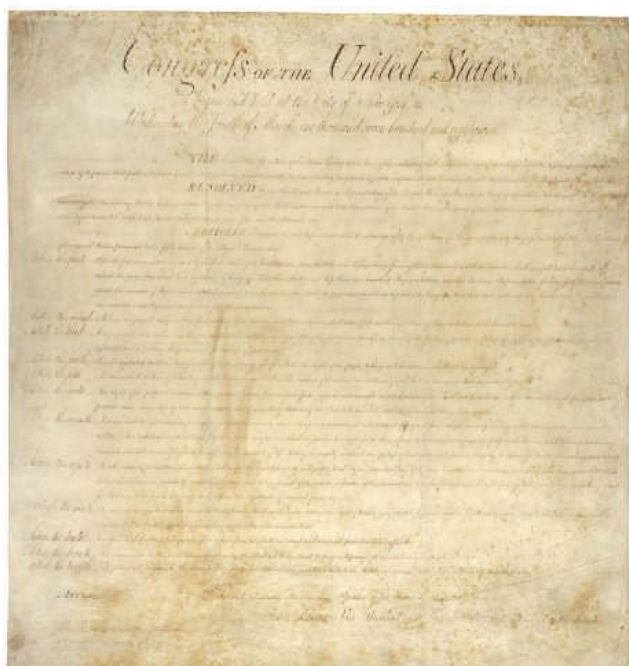
Judges may also discover implied rights in a constitution. Therefore, constitutional interpretation keeps superior law up to date with changing social values. The words of a constitution may imply rights. Discovering implied rights requires an activist interpretation

of a constitution because judges need to think beyond the literal meaning of words.

Another advantage of such concrete rights protection is the encouragement of rights awareness amongst the population. It is easier to educate people about their rights when their society has placed substantial importance on them by including rights in its fundamental law.

Perceptive students will note that judges have significantly more power over constitutional rights than the two elected and accountable branches of government — the legislature and the executive.

“Constitutional law has limited adaptive capacity”



■ Figure 15.6 – The US Bill of Rights provides concrete protection of human rights in the United States.
Source: 1st United States Congress, Bill of Rights, 1789, Public Domain, <<https://commons.wikimedia.org/w/index.php?curid=661347>>

Disadvantages of constitutional rights

According to former Prime Minister Sir Robert Menzies, changing a constitution is “one of the labours of Hercules”.⁴ The Australian and US constitutions are hard to amend. Such concrete security is a strength of constitutional law because it is safe from executives and legislatures who must also obey it. However, it may be a weakness in terms of rights.

Rights evolve. Constitutions tend to remain fixed. Recall that rights emerged over time; there are four generations of them based on historical periods. These are detailed in Table 15.1. They emerge as societies advance. Therefore, laws need to be adaptable to incorporate new rights. Moreover, some rights become outdated as circumstances change. Laws should be flexible enough to permit the removal of outdated rights. See: *Example: The Second Amendment*.

4 Sir Robert Menzies cited in: *The difficulties of constitutional reform*, lawgovpol.com, <<https://lawgovpol.com/difficulties-constitutional-reform/>>.

Example: The Second Amendment

The Second Amendment in the US has led to an ingrained gun culture that makes it almost impossible to remove this outdated right. The Second Amendment reads:

*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.*⁵

The right to bear arms has been defended by the National Rifle Association — a pressure group — in numerous Supreme Court cases. In *District of Columbia v Heller*, 554 U.S. 570 [2008], the Supreme Court upheld the right of Americans to own guns for personal self-defence, expanding the meaning of the Second Amendment.

The wide access to guns and the limitation of laws to regulate the types of weapons and who can buy them leads to the preventable deaths of thousands of Americans every year.

The elected and accountable Congress has attempted to limit gun access by legislating for restrictions on gun ownership and types of guns. However, the unelected and unaccountable Supreme Court has undermined legislative attempts to limit the harm guns cause to Americans.

Judicial supremacy over rights has led to much preventable harm in the United States. See: *Background information: Who oversees rights? Judicial supremacy v parliamentarianism*.

Constitutional law has limited adaptive capacity.

Another disadvantage is that elevating some rights and not others to constitutional level may cause lawmakers and governors — and people generally — to think some rights are less important than others. Thinking this way about rights undermines the indivisibility of rights. See: *Background information: Rights are universal, interdependent, indivisible and inalienable*.

Recall that judges may strike down unconstitutional laws passed by elected, accountable and representative legislatures. Judicial supremacy over rights can be a problem. Arguably, constitutional rights give too much power to unelected and unaccountable judges.

Background information: Who oversees rights? Judicial supremacy v parliamentarianism

Judicial supremacy

A bill of rights can grant courts the power to strike down laws which are incompatible with it. This power puts the judiciary in the most influential position concerning rights.

Constitutional bills of rights vest a country's constitutional court with the power to strike down laws that are inconsistent with the national constitution. Judgments by the constitutional court are final; no legislature or government can appeal a judicial interpretation of the constitution. The US Bill of Rights is an example.

Statutory bills of rights can also empower the judiciary to strike down laws — if the construction of a bill of rights gives this power to the courts. The Canadian Parliament adopted this model when it passed the *Canadian Charter of Rights and Freedoms* in 1982.

The effects of judicial supremacy in Australia can be seen in the changing federal balance of power caused by High Court interpretations. See: Chapter 9. The discovery of implied rights in our constitution also illustrates the power of judges when interpreting constitutional law. See: Chapter 10. The High Court is the final arbiter in these matters; there is no possibility of a democratic check on judicial power short of a referendum — which rarely pass.

Parliamentarianism

Countries with a strong tradition of parliamentary government based on the British model have been much less enthusiastic about



■ Figure 15.7 – Canadian Charter of Rights and Freedoms. Source: Marc Lostracci, *Every Canadian needs a copy*, 2007, CC BY 2.0, <<https://commons.wikimedia.org/w/index.php?curid=4522975>>

⁵ *Second Amendment*, Wex, Legal Information Institute, <https://www.law.cornell.edu/wex/second_amendment>.

judicial supremacy over rights. Australia is an example. These countries take the view that the parliament is the people's legislature and must remain sovereign and supreme. It must never be subject to the will of judges. The assumption is that the people's own parliament is the best guarantor of peoples' rights because the people would not allow their legislature to abuse them.

Westminster systems embody the principle of parliamentary sovereignty. Australia's resistance to a constitutional or even a Commonwealth statutory bill of rights stems from a strong belief in the supremacy of parliament.

In the modern era, parliamentary supremacy is not the guarantee of rights it may once have been. The rise of executive dominance over parliament weakens its power over the government. The decline of parliament caused by executive dominance has led supporters of parliament to propose 'constrained parliamentarianism'. In this model, judges may scrutinise law and policies, drawing attention to problems with rights. However, judges cannot strike down laws. By allowing courts to alert parliament to rights issues, 'constrained parliamentarianism' offers the solution to keeping the executive in check while preserving the leading role of parliament.

Pressuring parliament to uphold rights can be achieved by a 'declaratory' bill of rights which allows judges to declare human rights issues in other statutes. A human rights bill of this type creates a 'dialogue via judicial review' between the courts and the parliament. The dialogue between these two branches of government is the factor which constrains the parliament.

The Victorian, Australian Capital Territory (ACT) and Queensland statutory bills of rights and human rights Acts work this way. They do not grant the judiciary power to invalidate laws; courts can only declare other laws to be incompatible with human rights. A court issued declaration of incompatibility constrains parliament because it makes it accountable for either amending the offending law or explaining why it is incompatible with human rights.

Students should note that parliament retains the ultimate power.



■ Figure 15.8 – The Victorian Charter of Rights does not grant the judiciary power to invalidate laws of the state's parliament.

Source: Donaldytong, *Parliament of Victoria*, 2009, Public Domain, <<https://commons.wikimedia.org/w/index.php?curid=2128423>>

Statutory rights in Australia and the United States

Statutes are laws made by elected legislatures — that is, by parliaments and congresses. Statutes securely protect rights because elected legislatures represent the people. A people's parliament will not enact laws that oppress the people.

The statutory approach to rights protection is a strong feature of the British system and has significantly influenced Australia's attitude to rights.

Statutory rights give legislatures ultimate power in respect to rights, solving the problems of judicial supremacy over constitutionally entrenched rights.

Australia and the US both rely on statutes to protect rights. However, Australia is more reliant on this more flexible form of law than the US. There are several Commonwealth anti-discrimination statutes, a human rights law, statutes protecting property and native title rights. Other legislation encodes human rights protection. An example is the *Migration Act 1958* which incorporates the freedom of movement and rights to seek asylum. Two Australian states and one of the territories have statutory bills of rights. Statutory bills of rights are ordinary legislation that focus specifically on rights and establish mechanisms for preventing abuses and providing remedies.

The *Civil Rights Act 1964* is the most significant rights statute in the US. Congress passed this Act following decades of activism against segregationist and racist laws — the so-called 'Jim Crow' laws. Martin Luther King Jr is the most famous civil rights activist whose leadership and speeches led to the *Civil Rights Act 1964*. King was assassinated in 1968.

Rights	Australian statutes	US statutes
Civil rights to equality	- Racial Discrimination Act 1975 - Sex Discrimination Act 1983 - Disability Discrimination Act 1992 - Age Discrimination Act 2004 - Australian Human Rights Commission Act 1986 See: Background information: The Australian Human Rights Commission	- Civil Rights Act 1964 - Americans with Disabilities Act 1990 - Equality Act — passed by the House in 2019 and awaiting Senate approval in 2020
Legal rights	Crimes (Torture) Act 1988	
Civil and political rights	- Human Rights Act 2004 (ACT) - Charter of Human Rights and Responsibilities 2006 (VIC) - Human Rights Act 2019 (QLD)	Civil Rights Act 1964

■ Table 15.6 – A selection of statutes protecting human rights in Australia and the United States.
Source: Stephen King, 2020

Table 15.6 lists statutory rights in Australia and the US. Students will note the significance of statutory rights in Australia compared to the US. Neither list is exhaustive and there are other statutes which are not included.

Note also that the *Australian Human Rights Commission Act 1986* creates the Australian Human Rights Commission (AHRC). It does not explicitly protect rights itself. Instead, the legislation creates the AHRC as a body to educate people and organisations about rights and to resolve complaints. See: *Background information: The Australian Human Rights Commission*.

“the ICCPR has the status of legislation in some state and territory jurisdictions”

Table 15.6 lists state and territory human rights legislation – that is, they are bills of rights. These bills of rights enact rights from the UN International Covenant on Civil and Political Rights (ICCPR) into domestic law. Therefore, the ICCPR has the status of legislation in some state and territory jurisdictions. Note how the Commonwealth’s human rights statutes are specific to particular rights — for example, racial and sex equality. There is no Commonwealth bill of rights legislation protecting human rights in a way comparable to the state and territory bills of rights adopted by Victoria, ACT and Queensland.

The Commonwealth *Australian Human Rights Commission Act 1986* establishes the Australian

Human Rights Commission (AHRC). Emeritus Professor Rosalind Croucher is the Australian Human Rights Commissioner in 2020. Seven specialist commissioners work in the AHRC. The commissioners uphold the various anti-discrimination laws by investigating and attempting to resolve human rights complaints using conciliation. They aim to prevent rights abuses and solve rights complaints without courts becoming involved. The Federal Court may hear human rights cases that the AHRC has been unable to resolve. See: *Background information: The Australian Human Rights Commission*.

Background information: The Australian Human Rights Commission

The *Human Rights and Equal Opportunity Act 1986* created the Human Rights and Equal Opportunities Commission (HREOC). The parliament intended HREOC to act as a court and make decisions in human rights cases. In *Brandy v Human Rights and Equal Opportunity Commission [1995] HCA 10; 127 ALR 1* (Brandy’s Case), the High Court severely limited the power of HREOC by declaring it was not a Chapter 3 federal court. Since then, human rights have lacked enforcement in a dedicated human rights court.

HREOC became the Australian Human Rights Commission (AHRC) when the *Australian Human Rights Commission Act 1986* was passed. The AHRC deals with complaints about human rights abuses. The AHRC is led by the Australian Human Rights Commissioner — in 2020, Emeritus Professor Rosalind Croucher. Its role is to protect and promote human rights in Australia. Much of its work comes from implementing various anti-discrimination and other pieces of rights

legislation enacted by the Commonwealth. It also educates Australians and private and public organisations about human rights.

Complaints are dealt with by specially appointed anti-discrimination commissioners for age, disability, race and sex. There are also commissioners for Aboriginal and Torres Strait Islander social justice, human rights and children. These specialist commissioners implement the various anti-discrimination statutes listed in Table 15.6. Educating people and organisations — including government — about human rights is a significant part of their role. Education and advice help prevent human rights abuses.

Individuals can make a human rights complaint to the relevant commissioner. In most cases, commissioners use conciliation — a form of alternative dispute resolution — to help resolve complaints. Conciliation is a less formal, less costly approach than litigation in a court. Conciliation by the AHRC resolves many human rights issues without contractual agreements between the parties and no legally binding judgments.

If conciliation cannot resolve a complaint, the complainant may have to bring a case to the Federal Court for judicial remedy. The system is designed to make court the last resort and is an example of minimising the role of judges and courts in rights matters.

The existence of the AHRC and the public role it plays help raise human rights awareness. Its existence helps prevent abuses in the first place.

Advantages of statutory rights

Statutes are a form of ordinary law — they are inferior to constitutions and superior to common law. Statutes are enforced by the executive and apply universally within a jurisdiction — Commonwealth, state or territory.

Statutory rights are responsive and adaptable because parliaments are elected and make legislation which represent the will of the majority. Statutory rights are, therefore, under the people's control through their representative legislatures. In contrast, constitutional rights are under the control of unelected judges in constitutional courts.

Statutes are flexible. Adding new rights and removing out of date rights is relatively easy. Statutes

reflect the changing values and attitudes of a society more accurately than a constitution because they are responsive to the will of the people.

Parliaments are accountable through elections. See: Chapter 11. Using statute law to protect rights is based on the assumption that a representative legislature will automatically protect people's rights because it represents the people. Any parliament whose laws infringed human rights would be held accountable by the people at the ballot box. Relying on parliament instead of courts to protect rights is termed 'parliamentarianism'. See: *Background information: Who oversees rights? Judicial supremacism v parliamentarianism*.

Courts interpret statutes, including rights statutes such as a statutory bill of rights. However, parliament is superior to courts. Parliamentary sovereignty means the legislature can override court interpretations of statutory rights.

Parliament can also decide how much power judges and courts have over rights by the way it constructs the statute. For example, a human rights Act of parliament may:

- give power to judges to *strike down* other Acts which infringe rights; or
- limit judges' role to merely *declaring* other Acts are inconsistent with human rights.

The second option above keeps parliament firmly in control of rights. Its strength is in allowing judicial review of Acts and policies to highlight human rights concerns, thereby alerting parliament to rights issues in its laws or the way the executive is carrying them out. Parliament must then decide to either amend rights infringing statutes or clarify why limits to rights are necessary. The public may then hold parliament to account for how it handles rights when it faces the next election.



■ Figure 15.9 – The Australian Human Rights Commission deals with complaints regarding the violations of human rights including those of the LGBTIQ and Muslim communities.

Source: Matt Golding, *Australians aren't very good at multi-skilling*, 2017, author's permission, <www.threefingers.com.au>

The second option also creates a dialogue between courts and parliament; that is, they create a form of conversation between the courts and parliament. For instance, when judges declare a law has a human rights problem the parliament responds. Judges are limited to declaring laws in breach of rights; they cannot invalidate a law. See the section on state and territory bills of rights.

Australian parliaments — Commonwealth and state/territory — tend to adopt the second option listed above when making rights statutes. For example, the state/territory human rights Acts listed in Table 15.6 adopt this approach, limiting courts to highlighting rights issues in law or government policies.

The US Congress has been reluctant to legislate rights based on international agreements like the ICCPR. Consequently, the US has a less significant body of rights legislation than Australia. However, the American public's awareness of rights is exceptional compared to Australia. Most US statutory rights are the result of domestic public campaigns for civil rights springing from an engaged and active citizenry. The most well-known is the Civil Rights Movement of the 1950s and 1960s led by Dr Martin Luther King Jr. The extremely significant *Civil Rights Act 1964* was the result. The contemporary Black Lives Matter movement is a similar campaign which may lead to rights reform through legislation.

Disadvantages of statutory rights

Statutory rights are less well protected than constitutional rights because they can be changed, watered down or removed relatively easily. Political systems in which the executive dominates the legislature are especially vulnerable to this weakness. Australia is an example. Recall the decline of parliament thesis, which adequately explains the risk of relying on parliament to check the executive's potential for abusing rights. The US is less vulnerable to this weakness because of the strict separation of legislative and executive branches.

Unicameral legislatures such as the Queensland Parliament lack the checks on executive power that an upper house provides. They are especially vulnerable to rights problems. In 1970s and 1980s Queensland, for example, there were high levels of corruption and abuses of basic rights by the executive branch that remained unchecked by a subservient parliament. Police used excessive force on street demonstrators during this time.

Rights usually impose limits and obligations on governments. When governments are in control of parliament, statutory rights are at a higher risk of governments seeking ways around them.

The problem of listing — and therefore limiting — rights is a feature of statutory rights as much as it of constitutional rights. Rights not listed in legislation are not protected and may be regarded as inferior, undermining the principle of indivisibility. See: *Background information: Rights are universal, interdependent, indivisible and inalienable*.

Finally, in spite of parliament's superiority over courts' interpretation of rights, there is still the argument that statutory rights make unelected judges too powerful. Those committed to parliamentarianism regard parliament as entirely sufficient to guard rights. They find the empowerment of judges by bills of rights problematic.

Common law rights in Australia and the United States

Common law is judge made law created in courts. The doctrine of precedent governs the creation and evolution of common law. Parliament may override common law, which is inferior to legislation.

Most common law rights are legal rights. Legal rights are negative first generation rights. Examples include the rights to silence, to the presumption of innocence and to a fair trial. Legal rights protect an accused against their accuser, who bears the burden of proof. In criminal cases, the accuser is the State, represented by the executive branch of government. The State is a powerful party against whom common law legal rights protect an accused person.

Australia and the US are both common law countries with a shared English legal heritage. As a result, there is significant similarity between the two countries. A key difference, however, is that the US has elevated some legal rights from common law to constitutional status. The Fifth and Sixth Amendments are examples.

Australia relies on common law for some political rights. For example, freedom of speech and association are common law rights in Australia. In the US, they are constitutional rights.

The rules of statutory interpretation are a critical aspect of common law rights. The principle of legality — whereby courts assume that parliament never intends to infringe rights or limit liberties — is an essential safeguard against parliament overriding rights. Moreover,

the courts assume parliament knows judges interpret statutes in this way, so courts make few exceptions for poorly drafted or unclear statutes. One element of the principle of legality is the presumption against retrospectivity — that is, courts assume that parliament never intends legislation to apply from a date in the past. Backdating laws is a serious threat to the rule of law and human rights, so courts reject it unless parliament expresses a retrospective intent with absolute clarity. See: *Background information: Does Australia have a “common law bill of rights”?*

Note that retrospective legislation is unconstitutional in the US — this is another example of the US preference for constitutional rights and another point of difference between it and Australia.



■ Figure 15.10 – The ‘golden thread of justice’ is a fundamental component of procedural fairness.

Source: John Strudwick, *A golden thread*, 1885, Public Domain, <<https://commons.wikimedia.org/w/index.php?curid=15350363>>

Background information: Does Australia have a “common law bill of rights”?

Former judge and Governor of New South Wales James Spigelman argues that common law rights and the principle of legality comprise a “common law bill of rights” that applies in Australia in the absence of a statutory bill of rights.⁶

Courts have long guarded rights and freedoms against accidental infringement by the other two branches of government.

The principle of legality is a common law rule of statutory interpretation that assumes parliament does not intend to infringe rights and liberties. If parliament intends to do so, it must express the intention in absolutely clear and unambiguous terms in legislation. In *Potter v Minahan* (1908) 7 CLR 277, Justice O’Connor said that:

It is in the last degree improbable that the legislature would overthrow fundamental principles, infringe rights, or depart from the general system of law, without expressing its intention with irresistible clearness.

Justice Gleeson clarified the principle of legality in *Electrolux Home Products Pty Ltd v Australian Workers’ Union* (2004) HCA 40; 221 CLR 309. Since 2004, the principle of legality extends to:

- a presumption against retrospectivity;
- a right of access to the courts;
- equality of all before the law;

- the core elements of a fair trial — that is, due process; and
- clear and accessible statutes.

The principle of legality protects rights and freedoms from the imprecise or ambiguous language that sometimes occurs in statutes. It makes interpreting statutes in ways that preserve rights the default position of the courts.

Table 15.7, overleaf, lists common law rights in Australia and the US. Note Australia’s reliance on common law rights compared to the US which protects many of the same rights in its constitution.

Advantages of common law rights

Common law rights are flexible because they can be adapted by courts and overridden by parliament.

The courts’ default position is to protect rights. Adversarial trial procedures embody legal rights through due process. For instance, the reliance on quality evidence, high burdens of proof in criminal cases, the impartiality of judges and the equal opportunities for the parties to present their cases all protect legal rights. Moreover, natural justice and fairness is the ‘golden thread’ that runs through the common law.

The principle of legality places the onus squarely upon parliament to carefully consider the rights impact of legislation. Parliament must be crystal clear if it wishes courts to produce an interpretation that diminishes rights. If parliament overreaches, it will be clear to all because its law must be written clearly. Parliament is accountable through elections, so it will bear the consequences if it goes too far

⁶ Spigelman, James, ‘The common law bill of rights’, *Statutory interpretation and human rights: McPherson Lecture Series, Vol 3*, University of Queensland Press, 2008, <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1806775>.

Rights	Australian common law	US common law
Legal rights	• Right to silence • Presumption of innocence • Fair trial — natural justice and due process	• Fair trial — natural justice and due process
Civil and political rights	• Freedom of speech • Freedom of association • Freedom of assembly • Personal liberty	
Principle of legality	• An Australian “common law bill of rights” according to Spigelman. See: <i>Background information: Does Australia have a “common law bill of rights”?</i> • Presumption against retrospective laws • Protects legal, political and civil rights	• Protects legal, political and civil rights not protected by the Bill of Rights

■ Table 15.7 – Common law rights in Australia and the United States.
Source: Stephen King, 2020

by diminishing rights and liberties. Thus, rules of statutory interpretation support the idea that parliament is sufficient to protect rights — that is, parliamentarianism.

The *Human Rights (Parliamentary Scrutiny) Act 2011* requires every Commonwealth Parliament to form a Parliamentary Joint Committee on Human Rights (PJCHR). The PJCHR evaluates legislation for compliance with human rights. The establishment of the PJCHR is partially a response to the courts’ insistence that parliament respect human rights when drafting legislation.

See: *Background information: Who oversees rights? Judicial supremacy v parliamentarianism.*

Disadvantages of common law rights

The most significant disadvantage of common law rights is their vulnerability. Executive dominated parliaments — which are typical of modern Westminster style legislatures in Australia — are prone to override common law rights in times of populist pressure for policies that are tough on crime. Crises such as terrorist attacks may produce public fear and popular demands to override common law rights. Permanently diminished legal rights may result. For example, Australian anti-terror laws made in the wake of the 2001 Al Qaeda terrorist attacks in the US overrode the right to silence and the presumption of innocence.

Some parliaments have stepped in to protect legal rights in response to the erosion of common law rights. Legal professional privilege is the right of a client to discuss matters in confidence with their lawyer. The Evidence Acts of various states now protect this legal law right in statute.

International law in Australia and the United States

International law is law made between nations or by international organisations. Treaties, covenants, conventions and optional protocols can influence domestic law in Australia and the US. Optional protocols are supplements to other international agreements.

Executives agree to these international laws, and legislatures may ratify and legislate them into domestic law. International law may also influence judges if there are gaps in common law or where Australian statutes are unclear.

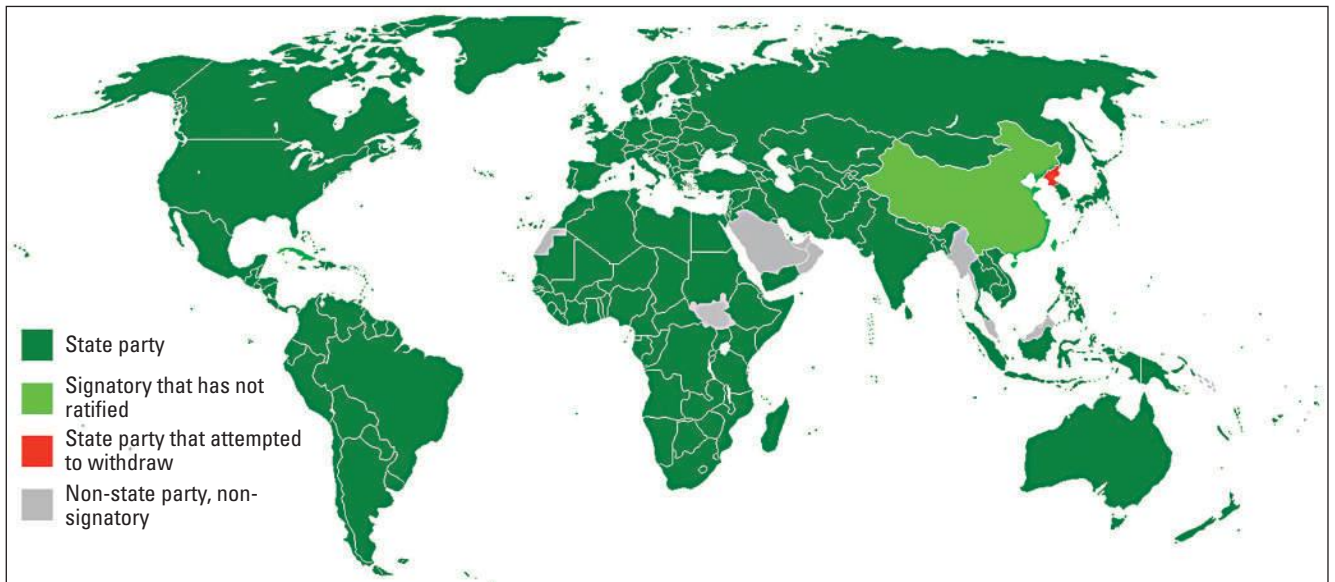
Australia and the US have very different approaches to international human rights law.

Australia relies on treaties, covenants and protocols as a source for human rights legislation. Australian governments have agreed to many UN human rights treaties, covenants and protocols. The Commonwealth Parliament has enacted some of these agreements into legislation, giving them the status of Commonwealth statute. Without legislation, treaties, covenants and protocols are not legally binding in Australia. See: *Background information: The status of international law, treaties, covenants and protocols in Australia.*

Victoria, ACT and Queensland use the ICCPR as the basis for their statutory bills of rights.

Australian courts have been guided by international law, even when Commonwealth or state law does not incorporate it. According to former High Court Justice Michael Kirby, in the absence of a Commonwealth bill of rights plaintiffs in human rights cases have used international law as a “peg on which to hang arguments designed to persuade Australian courts”.⁷

⁷ Kirby, Hon Justice Michael, ‘Domestic implementation of international human rights norms’, presented at Conference on



■ Figure 15.10 – Signatories of the International Covenant of Civil and Political Rights.
Source: Jacky Holland, Direction Design, 2020

The High Court uses international human rights jurisprudence, especially since 1980 when Australia agreed to the Optional Protocol to the ICCPR. The Optional Protocol is a separate agreement that links the ICCPR to a set of mechanisms for monitoring a country's compliance with the ICCPR. The Optional Protocol opens international remedies to Australian individuals by enabling Australian courts to apply the ICCPR's legal mechanisms.

The influence of international law over Australian courts can be seen in the landmark *Mabo v Queensland No 2* [1992] HCA 23. Mabo overturned the discriminatory common law doctrine of terra nullius. In his reasons for deciding, Justice Brennan of the High Court said:

*The expectations of the international community accord in this respect with the contemporary values of the Australian people. The opening up of the international remedies to individuals pursuant to Australia's accession to the Optional Protocol to the International Covenant on Civil and Political Rights brings to bear on the common law the powerful influence of the Covenant and the international standards it imports.*⁸

State and territory courts in Victoria, the ACT and Queensland — which each have a statutory bill of rights — are influenced by the jurisprudence of the European Court of Human Rights.

The US has resisted most international human rights law. It has not signed key UN human rights treaties and covenants since 2002. For example, only two countries — Somalia and the US — have not signed the *Convention on the Rights of the Child*. The US is a superpower and fears tying itself to international laws would make it vulnerable to its potential enemies and rivals. Its adversaries might use international law as a tool for strategic competition with the US by bringing legal actions against it at the International Criminal Court (ICC). The ICC sits at The Hague in the Netherlands and hears cases concerning crimes against humanity and other serious human rights abuses.

In the US, treaties are self-executing — that is, they do not need Congress to pass legislation to give them effect. Congress has little role in making treaties legally binding in the US.

Background information: The status of international law, treaties, covenants and protocols in Australia

International treaties, covenants and protocols may have different statuses within the Australian political and legal system. They may be:

1. agreed to by Australia;
2. adopted into Commonwealth law;
3. adopted into state and territory law; and/or
4. used in human rights cases before the courts.

implementing international human rights, ANU, December 1997, <https://www.hcourt.gov.au/assets/publications/speeches/former-justices/kirbyj/kirbyj_inthrts.htm>.

⁸ Kirby, Hon Justice Michael, 'Domestic implementation of international human rights norms', presented at Conference on implementing international human rights, ANU, December 1997, <https://www.hcourt.gov.au/assets/publications/speeches/former-justices/kirbyj/kirbyj_inthrts.htm>.

	International law	Commonwealth statutes	Acts administered by
1	<i>The Convention on the Elimination of All Forms of Racial Discrimination (CERD)</i>	<i>Racial Discrimination Act 1975</i>	Race Discrimination Commissioner
2	<i>The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)</i>	<i>Sex Discrimination Act 1983</i>	Sex Discrimination Commissioner
3	<i>The International Covenant on Civil and Political Rights (ICCPR)</i>	<i>Australian Human Rights Commission Act 1986</i>	The Australian Human Rights Commission
4	<i>The Convention on the Rights of the Child (CRC)</i>	<i>Australian Human Rights Commission Act 1986</i>	The Australian Human Rights Commission
5	<i>The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)</i>	<i>Crimes (Torture) Act 1988</i>	Australian Federal Police
6	<i>The International Covenant on Economic, Social and Cultural Rights (ICESCR)</i>	Not adopted into Australian law • <i>The Australian Human Rights Commission Act 1986</i> delegates power to the Aboriginal and Torres Strait Islander Social Justice Commissioner • <i>The Native Title Act 1993</i> delegates powers to the ATSISJC	The Aboriginal and Torres Strait Islander Social Justice Commissioner has some powers to protect and promote the human rights of indigenous Australians
7	<i>The Convention on the Rights of Persons with Disabilities (CRPD)</i>	<i>Disability Discrimination Act 1992</i>	Age and Disability Discrimination Commissioner
8	<i>Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief</i>	<i>Australian Human Rights Commission Act 1986</i>	The Australian Human Rights Commission
9	<i>Declaration on the Rights of Mentally Retarded Persons</i>	<i>Australian Human Rights Commission Act 1986</i>	Age and Disability Discrimination Commissioner
10	<i>Convention Relating the Status of Refugees</i>	<i>Migration Act 1958</i>	Minister for Home Affairs

■ **Table 15.8** – The status of international laws, treaties, covenants and protocols at the Commonwealth level, including the specialised agencies which administer them.

Source: Stephen King

Australia is a party to seven core international covenants and conventions, and several others covering specific rights by both 1 and 2 above. For example:

- *The International Covenant on Economic, Social and Cultural Rights (ICESCR)* is agreed to by Australia, but not enacted in legislation; and
- the *Racial Discrimination Act 1975* legislates the *Convention on the Elimination of All Forms of Racial Discrimination (CERD)* into domestic Australian law. The parliament enacts international agreements into Commonwealth legislation under Section 51(xxix) — that is, the external affairs power — of the Australian Constitution.

Once enacted, international law can alter the constitutional federal balance of powers.

Recall the Koowarta Case (1982). See: *Case study: Increasing Commonwealth Power: 1971 to contemporary times—Koowarta 1982*.

Victoria, the ACT and Queensland are examples of point 3 above. They are parties to the ICCPR through their statutory bills of rights. The relevant state and territory laws are the:

- *Human Rights Act 2004* (ACT);
- *Charter of Human Rights and Responsibilities Act 2006* (VIC); and
- *Human Rights Act 2019* (QLD).

Australian courts — point 4 above — are influenced by the:

- Optional Protocols for a range of international covenants and conventions; and

- jurisprudence of international courts, notably the European Court of Human Rights, the most influential in the states and territories which have bills of rights — that is, Victoria, ACT and Queensland.

Table 15.8 lists most major international laws which are legislated or to which Australia has agreed. It also contains a list of prominent Commonwealth statutes implementing these agreements. Note that the first seven are the core international treaties and covenants to which Australia is bound by agreement or by law made by the Commonwealth parliament.

The *Human Rights (Parliamentary Scrutiny) Act 2011* established the Parliamentary Joint Committee on Human Rights (PJCHR). The PJCHR is a standing committee of parliament that scrutinises all bills and delegated legislation introduced into the Commonwealth Parliament for compatibility with the first seven of the international treaties, covenants and conventions listed in Table 15.8.

The PJCHR publishes a report to both houses of parliament each sitting week. Its reports inform parliament of the committee's concerns about bills and regulations currently in the parliament. The PJCHR cannot, however, scrutinise migration bills against international standards agreed to by Australia because the *Refugee Convention 1951* is exempt from PJCHR. Instead, the Minister for Home Affairs has broad ministerial discretion regarding these matters. It is probably no coincidence that most of Australia's human rights issues stem from its treatment of asylum seekers and refugees. See: *Case study: Australia's treatment of asylum seekers and refugees*.

State and territory parliaments have similar committees. However, the parliamentary human rights committees of the Victorian, ACT and Queensland Parliaments are more influential because they have the legislative support of bills of rights.

Advantages of international human rights law

International law allows for the adoption of rights which develop internationally. They also allow Australia to promote human rights internationally through involvement in drafting UN treaties, covenants and protocols. When Australia adopts international human rights, it raises the profile of human rights both in Australia and internationally. See: *Background information: The United Nations and human rights*.

International law provides a yardstick by which to evaluate a country's human rights performance. It is a measure against which Australia and the US's human rights record can be assessed.

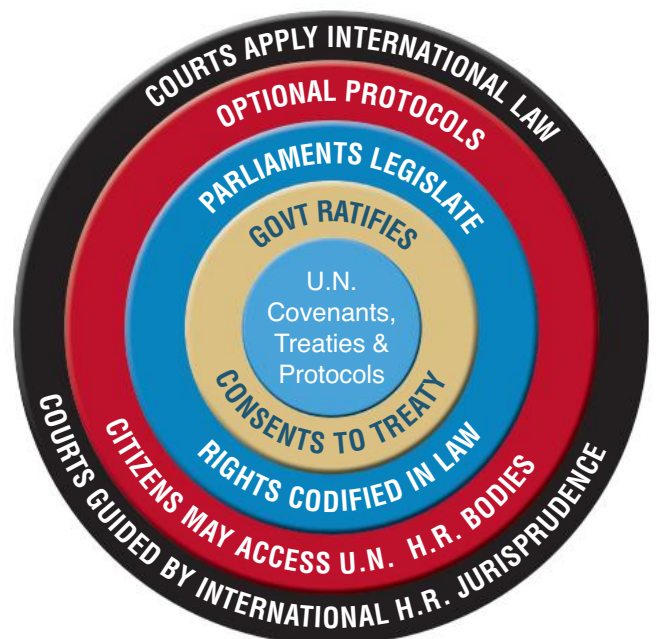
As noted by Justice Brennan in *Mabo v Queensland No 2* [1992], international law aligns Australian human rights practice with the expectations of the international community of similar democratic nations.

Disadvantages of international human rights law

International law is unenforceable in any jurisdiction. It has moral force, but no legal force unless agreed to or adopted by a nation state which then upholds the law within its jurisdiction. Many nations agree to international laws, but refuse to bind themselves to it. Others sign up to the principles and promote them, but do not agree to the Optional Protocols that allow their citizens access to international tribunals and standards.

International law must be agreed and legislated into domestic law to be truly effective. Ratification and legislation convert an unenforceable international law into an enforceable domestic law. This gives treaties, covenants and protocols the status of a legislated statute, with all the advantages and disadvantages of statutory rights described above.

Ideally, Optional Protocols should be agreed to as well. Optional Protocols provide citizens with legal rights to communicate their human



■ Figure 15.11 – The status of international law in Australia. The inner rings are lower status, the outer rings are higher status. The outermost ring indicates that courts may be guided by human rights law from any of the inner rings, and may interpret rights statutes.

Source: Stephen King 2020



■ Figure 15.12 – The Australian Government has been reluctant to accept human rights norms such as the protection of refugees. Source: Matt Golding, *Peter Dutton stating the bleedin' obvious*, 2017, author's permission, <www.threefingers.com.au>

rights concerns to international bodies like an international court or the UNHCR. They invite international scrutiny to a nation's human rights record.

Australian governments have sometimes been reluctant to embrace international human rights norms. The most prominent example is the rights of asylum seekers and refugees. In this case, Australia rejects UN criticism of its offshore detention policies. Together with the exemption of the *Refugee Convention 1951* from scrutiny by the PJCHR, it illustrates the weakness of international law when a government is determined to sidestep its international human rights obligations.

The US simply refuses to participate in international human rights law. It does so for political and strategic reasons. However, that



■ Figure 15.13 – The United Nations General Assembly with flags. Source: Yerpo, *Row of flags in front of the UN General Assembly building*, 2010, CC BY-SA 3.0, <<https://commons.wikimedia.org/w/index.php?curid=11776051>>

does not mean the US fails to uphold human rights; it simply means it will not subject itself to international scrutiny of its treatment of human rights.

Background information: The United Nations and human rights

The UN is the world's largest and most influential international organisation. It formed in the aftermath of World War 2, a conflict which witnessed the worst violations of human rights in the modern era. The UN has several key objectives, including maintaining international peace and security, upholding international law and promoting human rights.

Most of the world's nations are UN member states. All member states have a seat in the General Assembly, a representative body in which each nation has an equal voice and vote no matter its population or power. The most important body at the UN is the Security Council. The Security Council is a body of 15 nations, five of them permanent, with the other ten on two-year rotations. The five permanent members of the Security Council are the US, Russia, China, Britain and France. They all have the power to veto decisions of the Security Council. Two of these nations — Russia and China — have problematic human rights records. The Security Council can make resolutions authorising the UN to take action — including military action — to prevent human rights abuses and end conflicts.



■ Figure 15.14 – Public hearing at the International Court of Justice. Source: International Court of Justice, *Public hearings of the Court*, 2006, Public Domain, <<https://en.wikipedia.org/w/index.php?curid=5127164>>

The UN has a dedicated human rights body called the UN Human Rights Council (UNHRC), with a membership of 47 countries. The UNHRC is a forum for promoting human rights. The Office of the High Commissioner for Human Rights (OHCHR) is the primary UN agency promoting human rights internationally.

The OHCHR appoints Special Rapporteurs, Expert Investigators or Working Groups to travel to places where human rights abuses may be occurring and to investigate them. These specialised UN appointed investigators advise and report to the OHCHR. This system allows the UN to highlight human rights abuses and bring pressure to bear on nations committing them.

There are other UN agencies with specific mandates to investigate and report on human rights abuses in particular areas such as asylum and refugee policies. The system of Special Rapporteurs has led to investigations, criticisms and public reports into Australia's asylum and refugee policies by the UN High Commissioner for Refugees (UNHCR). The UNHCR is the agency focused on the rights of those fleeing persecution and seeking refuge in other countries.

Despite its capacity to make international laws and to investigate cases of human rights abuses, the UN and its agencies cannot directly intervene in the affairs of sovereign nation states. Thus, the UN cannot enforce its international laws. The UN and international law have moral — not legal — force.

Nations can submit themselves to international law by agreeing to and enacting them into domestic law. Agreeing to Optional Protocols gives individuals within a country

the right to communicate their complaints to the UNHCR. The country's courts may then apply international law in human rights cases.

International courts

There are two international courts which have a role in human rights:

- the International Court of Justice, which is one of the six bodies of the UN. It mostly settles disputes between nations. These disputes do not often involve human rights issues, but they may feature in some instances; and
- the International Criminal Court (ICC), created through the Rome Statute. The ICC focusses on human rights and has achieved convictions of former national leaders found guilty of human rights abuses and crimes against humanity. Its website states its role as follows:

The International Criminal Court (ICC) investigates and, where warranted, tries individuals charged with the gravest crimes of concern to the international community: genocide, war crimes and crimes against humanity.⁹

Australia was a foundation member of the UN and a driving force in its first human rights declaration — that is, the *UDHR 1948*. As a significant middle rank power and well-established democracy, Australia helped establish the international rules based order that evolved after World War 2. Australia has been committed to international law, but its enthusiasm to meet its international obligations waxes and wanes according to the issues and the politics of the day.

State and territory bills of rights

Australia is the only liberal democracy which does not have a bill of rights at the national level. Australia has bills of rights at the state and territory level in Victoria and the ACT. Queensland adopted a bill of rights in 2019, and other states are considering them.

The relevant state and territory laws are the:

- *Human Rights Act 2004 (ACT)*;
- *Charter of Human Rights and Responsibilities Act 2006 (VIC)*; and
- *Human Rights Act 2019 (QLD)*.

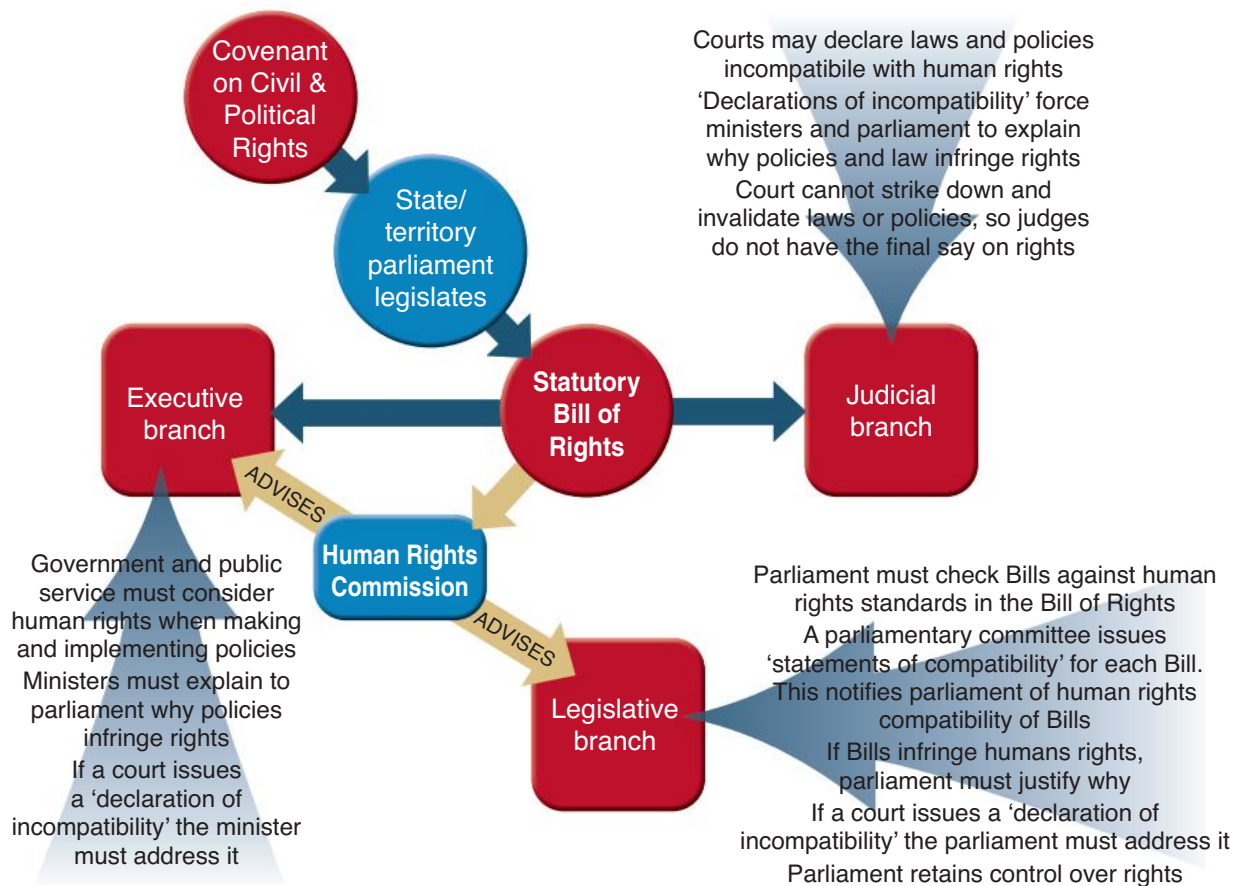
They are all statutory bills of rights.

The state and territory statutes above follow the practice of the British *Human Rights Act 1998*. All these Acts respect the British parliamentarianism principle — that is, that parliament — not judges — should be sovereign over rights. These Acts permit courts to declare laws or policies inconsistent with human rights, but not to strike laws or policies down. A court issued 'declaration of incompatibility' draws parliament's attention to a human rights issue concerning a statute or government policy. The laws require the Attorney-General to respond to

⁹ Homepage, International Criminal Court, <<https://www.icc-cpi.int/about/Pages/default.aspx>>.

State and territory statutory bills of rights		
Purpose of bills of rights	Prevention rather than remediation of human rights abuses	Constructed to create a human rights culture within the political and legal system rather than provide an avenue for legal action in human rights matters
Three branches of government		
Branch of government	Requirements imposed by bill of rights	Explanation
Legislatures	- Must review legislation for compatibility with human rights - Standing committees on human rights review bills and issue 'statements of compatibility' with human rights for each bill - May override the bill of rights, but must explain why	- Makes parliament accountable for human rights - Reserves sovereignty over rights to parliament
Executives	- Bills found to be incompatible with human rights must be explained by the Attorney-General before parliament can pass them - Attorney-General must respond in parliament to a court issued 'declaration of incompatibility' - Public servants must consider human rights when formulating policies - Police must consider human rights	- Imposes a duty on Cabinet to consider human rights in government bills - Imposes a duty on ministers to consider human rights when exercising ministerial discretion - Makes human rights a priority in public service decisions
Judiciary	- Must interpret statutes in a manner consistent with human rights - Supreme Court may issue 'declarations of incompatibility'	- Bound by the bill of rights when interpreting statutes - Limited to issuing 'declarations of incompatibility' - Cannot invalidate laws on human rights grounds - Cannot hear human rights complaints unless they are part of another legal action
Human rights commissions		
Human Rights Commissions	- Established by the bills of rights - Reviews laws - Advises Attorney-General - Educates public servants - Hears human rights complaints - Use conciliation – a form of alternative dispute resolution (ADR) – to resolve complaints	- Acts of Parliament establish human rights commissions - Independent statutory agencies - Employ commissioners to resolve human rights complaints - Employ human rights experts to advise the government and parliament about human rights
Individuals		
Plaintiffs and complainants	- Bring complaints to the human rights commission - Attempt resolution by conciliation aided by the human rights commission - Bring a human rights case to court as a last resort	- ADR resolves human rights issues without costly legal action - Court action cannot use a bill of rights alone – it must be part of another action – discourages the use of courts to resolve complaints

■ Table 15.9 – How state and territory statutory bills of rights protect human rights.
Source: Stephen King, 2020



■ **Figure 15.15** – State and territory legislated bills of rights adopt the rights included in the International Covenant on Civil and Political Rights. The bills of rights imposes burdens upon all three branches of government to uphold human rights within their spheres of power. Each branch has a role in checking the other branches. The judiciary is limited to declaring laws or policies incompatible with human rights. The parliament retain ultimate power over rights. The model is referred to as “constrained parliamentarianism”.
Source: Stephen King 2020

the court declaration in parliament. It is then up to parliament to deal with the matter.

It is correct to describe Australia’s state and territory bills of rights as examples of ‘constrained parliamentarianism’ because they enable courts to check but not override parliament in matters of human rights. See: *Background information: Who oversees rights? Judicial supremacy v parliamentarianism*.

The ACT, Victorian and Queensland statutory bills of rights legislate 20 civil and political rights contained in the ICCPR. Table 15.9 summarises how the bills of rights protect human rights in these jurisdictions. The table illustrates the requirements imposed on the three branches of government, the creation and purpose of human rights commissions, and the ways individuals may use bills of rights to address human rights issues.

Advantages of state and territory bills of rights

State and territory bills of rights have a strong focus on prevention. They are a positive influence on the relationship between the government and citizens. Some examples include:

- improvements in government service delivery;
- the high number of disputes settled out of court using the bills of rights as a guide;
- fostering a positive human rights culture;
- increased awareness of human rights amongst public servants and the public;
- government agencies include human rights training for their personnel; and
- audits by the Human Rights Commission have led to improvements. For example, there has been an improvement in the treatment of women prisoners in Victorian jails.

Disadvantages of state and territory bills of rights

Critics of the Victorian, ACT and Queensland bills of rights use the same arguments that apply to all statutory and constitutional bills of rights. The main objection is that these bills or charters give too much power to judges. Judges are unaccountable officials. The fact that the state and territory bills of rights are based on the principle of parliamentarianism does not satisfy some critics.

Others argue that weakening the courts' role weakens the bills of rights themselves. They argue that courts have a legitimate role in the accountability of the parliament and government through the process of judicial review. Moreover, courts have long defended human rights. Excluding courts from robustly reviewing human rights ignores their legitimate role in accountability. For more on the courts' role in robust judicial review and upholding rights, see Chapters 11 and 12, and *Background information: Does Australia have a "common law bill of rights"?*

The bills of rights do not provide remedies; they are focused on prevention. They are therefore of limited use for someone seeking redress and compensation for a violation of human rights.

Another limitation of these bills of rights is that no one can bring an action to court using the bills of rights alone. They must 'piggyback' their human rights complaint on to another dispute. A plaintiff can only make a human rights case when they bring another action to court.

Summary

The ways human rights are protected in Australia, including in the Constitution, common law, statutory rights, and charters of rights

- Human rights are universal claims to certain freedoms and to certain entitlements which ensure the dignity, equality and respect of each human being.
- Human rights recognise the value of each person and are universal to all humanity.
- Human rights are classified as:
 - negative and positive rights; or
 - first, second, third and fourth generation rights; or
 - civil, political, economic, social, cultural and legal rights.
- Laws protect human rights. The rule of law ensures that human rights will be respected.
- Australia uses different types of law to protect rights:
 - Australia's Constitution contains a limited number of specific and implied rights;
 - statutes protect a range of civil, social and political rights. Legislation is the most commonly used form of law for protecting rights;
 - common law protects legal rights and some political rights. Courts use the principle of legality to protect common law rights; and
 - international law is used as the basis for much of Australian human rights legislation at Commonwealth and state/territory levels.
- Australia is the only liberal democracy in the world not to have a statutory or constitutional bill of rights.
- Australian parliaments have been reluctant to give judges and courts too much power over rights.
- Bills of rights have been enacted in Victoria, ACT and Queensland.

The ways human rights are protected in one other country

- The US relies principally on a constitutional bill of rights.
- statutes are used to protect rights. The most significant is the Civil Rights Act 1964.
- Common law rights have been elevated to constitutional rights by inclusion in the US Bill of Rights.
- US courts use similar doctrines of interpretation as Australian courts. They read laws in ways that protect rights.
- US citizens are aware of their rights and are more likely to use courts to defend them than Australians.
- Because many rights are constitutional, the US Supreme Court is extremely influential over rights. The US system relies on 'judicial supremacy'.

continued overleaf

The status of international covenants, protocols and treaties in protecting human rights in Australia

- International law is the source of most of Australia's human rights legislation.
- Governments sign treaties, covenants and protocols, agreeing to abide by their standards. Australia has signed many international laws.
- Parliaments may enact treaties, covenants and protocols into domestic law. Many — but not all — international laws have been legislated. Legislation gives international law the status of Australian domestic law.
- Optional Protocols — which are related to, but separate from treaties and covenants — provide mechanisms for citizens to access international remedies and courts. They empower Australian courts to apply international law.
- The *International Covenant on Civil and Political Rights* has the status of a statutory bill of rights in Victoria, the ACT and Queensland.
- The Victorian, the ACT and Queensland bills of rights follow the principle of 'constrained parliamentarianism' because they enable judges to hold parliaments to account for human rights yet preserve parliamentary sovereignty over rights.

Exam practice questions

Short answer

- 1a) Define the term 'common law' as it applies to human rights.
- 1b) Outline **three** specific statutes that protect human rights in Australia.
- 1c) Discuss the effectiveness of constitutional law in upholding human rights in **one** country other than Australia.
- 2a) Explain what is meant by a 'bill of rights'.
- 2b) Distinguish between positive and negative rights.
- 2c) Discuss **one** argument for and **one** argument against the proposition that 'statute law provides adequate protection of human rights in Australia'.
- 3a) Identify **two** international conventions, protocols and/or treaties that are a source of legislation protecting human rights in Australia.
- 3b) Distinguish between constitutional and statutory rights.
- 3c) Discuss the impact of **one** High Court decision on the development of implied rights in Australia.
- 4a) Identify **two** constitutional rights that are expressed in the Commonwealth Constitution (Australia).
- 4b) Explain the relationship between human rights and liberal democracy.
- 4c) Discuss **one** argument for and **one** argument against the proposition that 'statutory charters of rights are effective in protecting human rights in Australia'.

Source analysis

Read the source below and answer the questions that follow.

The source is adapted from: Michelle Bennett, 'Scathing UN report calls for Nauru and Manus centres to be evacuated immediately'.¹

The International Covenant on Economic, Social and Cultural Rights Committee announced its alarm at the Australian Government's punitive treatment of refugees and people seeking asylum in its five-yearly report on Australia's compliance with the foundational treaty.

Amy Frew, a lawyer with the Human Rights Law Centre, said, "Australia's abuse of refugees is an ongoing stain on our record. This ugly chapter in our history does not close until every single man, woman and child suffering at our government's hand on Nauru and Manus is safe. No one can be left behind."

The Committee urged the Australian Government to reunite families indefinitely torn apart by offshore processing.

"One of the cruellest parts of our Government's refugee policy is the indefinite separation of husbands from wives, mothers from children. Families are permanently separated simply because they arrived and sought Australia's protection on different dates. It's our Government who must reunite them and allow them to rebuild their lives, and they must do so immediately."

Human rights abuses by companies involved in the detention of asylum seekers on Manus Island and Nauru were also under the spotlight.

continued overleaf

¹ Michelle Bennett, 'Scathing UN report calls for Nauru and Manus centres to be evacuated immediately', News, Human Rights Law Centre, 29 June 2017, <<https://www.hrlc.org.au/news/2017/6/29/un-calls-for-nauru-and-manus-centres-to-be-evacuated>>.

“Yet again, the United Nations has found that companies operating Australia’s overseas detention centres are responsible for serious human rights violations. These findings should serve as a clear warning to companies and investors alike to steer clear of Australia’s disgraceful offshore detention regime,” added Ms Frew.

- 5a) Explain the term ‘optional protocol’
- 5b) With reference to the source, explain in your own words, **two** of the United Nations’ criticisms of the Australian Government’s treatment of asylum seekers and refugees.
- 5c) Discuss the impact of **two** High Court decisions on establishing and/or protecting human rights in Australia.
- 5d) Evaluate the status of international covenants, protocols and treaties in protecting human rights in Australia.

Essay

- 6) ‘Relative to the constitutions of other liberal democracies, the Australian Constitution is weak in protecting human rights. However, this deficit is compensated for in the form of statutory and common law protections’.

Assess this claim with reference to the Commonwealth Constitution (Australia) and the constitution of one other country that you have studied.

- 7) Analyse the way in which constitutional and statutory rights are protected in Australia and in **one** other country that you have studied.

Investigation

- 1) Human rights encompass civil, political, economic, cultural and social rights. Distinguish between these various rights.
- 2) The protection of human rights is achieved through a patchwork of different methods.
 - a) Complete the table below in relation to Australia:

Method of human rights protection in Australia	Overall evaluation of effectiveness, with reference to examples
Constitutional law	
Statute law	
Statutory charters of rights	
Common law	
International law – covenants, protocols and treaties	

- b) Complete the table below in relation to a country other than Australia:

Method of human rights protection in another country	Overall evaluation of effectiveness, with reference to examples
Constitutional law	
Statute law	

- c) Consider the extent to which some methods of human rights protection are more effective than others in upholding human rights in both Australia and a country other than Australia, respectively.

For further exam practice questions see page 446



The political and legal rights experience of Australia's First Nations Peoples

Syllabus point:

- The changing experience of a particular group with respect to their political and legal rights in Australia

Rights experiences of groups

Within a multicultural society such as Australia's there will be groups outside the mainstream. The further a group's *way of life* or *set of beliefs* are from those of the mainstream, the higher the likelihood the group will have poor rights experiences. In short, 'out groups' tend to suffer discrimination.

In Australia the groups most likely to suffer from discrimination have been Indigenous groups, religious minorities and non-Caucasian racial and ethnic communities. These groups have *ways of life* and *sets of beliefs* that diverge from the mainstream. There are historical factors that may aggravate a group's negative experience of rights, as is the case with Australia's Indigenous peoples.

Political and legal rights

Political rights are those that enable participation in government. The right to self-determination, freedoms of speech and association, and the rights to vote and run for public office are examples.

Legal rights protect people from the arbitrary use of state power. Equality before the law is the main legal right. Access to a fair trial and legal representation are examples. The rights to silence and presumption of innocence are legal rights protecting people in legal jeopardy.

However, rights are not only universal; they are also indivisible and interdependent. Therefore, it is not possible to consider a group's experience of political and legal rights without at least addressing its experience of other rights. In particular, the rights to education, an adequate

standard of living and health care are important. Without these rights it is not possible to fully exercise political and legal rights. For example, being unable to read and write severely limits a person's ability to exercise their right to political communication — a form of free speech — to understand their rights, or to know how to demand them. Inadequate living standards undermine a person's ability to devote time and resources to political participation or to access the legal system. Poor health undermines active engagement in political action.

This chapter will focus on political and legal rights. It will include discussion of other rights where they are essential for the exercise of political and legal rights.

Overview of the Indigenous rights experience

Aboriginal Australians lost sovereignty¹ in 1788 without gaining the political and legal rights of British subjects. The history of Aboriginal people since 1788 can be examined by looking at different phases which mark changing experiences of political and legal rights for them as a group.

These include:

- dispossession;
- segregation and assimilation;
- integration; and
- the move to reconciliation and recognition

Dispossession — First contact

Australia is home to the world's oldest living culture. Having an ancient heritage in a young society means Aboriginal peoples have a way of life and set of beliefs that do not sit well with mainstream Australian life.

Evidence indicates a human presence in Australia from about 55,000 years ago, perhaps longer. Millennia of an almost completely

isolated cultural evolution in diverse Australian environments has created an incredibly rich and distinct set of human societies. Traditional Aboriginal ways of life and sets of beliefs were profoundly different from those emerging in Europe in the 1700s, where a rapid transformation was underway during its Enlightenment and industrialisation. European culture was literally and figuratively a world away from Australia's Aboriginal peoples.

Britain was at the leading edge of the transformations in Europe. By the 18th century,

¹ *The Uluru statement from the heart* notes that "Aboriginal and Torres Strait Islander tribes were the first sovereign Nations of the Australian continent and its adjacent islands, and possessed it under [... their] own laws and customs". See: <<https://fromtheheart.com.au/uluru-statement/the-statement/>>.



■ Figure 16.1 – Evidence such as the discovery of these human remains found at Lake Mungo date Aboriginal occupation in Australia from about 55,000 years ago. Source: James M Bowler, *Mungo Man*, CC BY-SA 3.0, <<https://commons.wikimedia.org/w/index.php?curid=6416874>>

it was using its maritime power to expand its influence in the New World. It was not the first European power to find the continent now called Australia, but it was by far the most important for the Aboriginal occupants.

In 1788 a British penal settlement was established at Port Jackson in Sydney Cove. From the outset, there was no recognition of Aboriginal laws or government. In the first act of discrimination, the British deemed Aboriginal societies too primitive to be owners and sovereigns of the land.² British leaders did not recognise any authority or political organisation with whom they could negotiate. The sophistication of Aboriginal cultures was incomprehensible to the 18th century British mind coming from very different systems of law and governance. Their gross misjudgement of the Aboriginal peoples 'enabled' the British to justify the legal principle of *terra nullius*.³ *Terra nullius* was a profound wrong that would underpin European settlement



■ Figure 16.2 – In 1788 the First Fleet of Europeans arrived to settle in Port Jackson, Sydney Cove. Source: E Le Bihan, *Lithograph of the First Fleet entering Port Jackson 26 January 1788*, 2013, Public Domain, <<https://commons.wikimedia.org/w/index.php?curid=29765211>>

of Australia for 204 years and reduce Aboriginal people to the status of humans without rights, regarded as little more than part of the native fauna.

In 1770 Lt. James Cook took possession of the eastern two-thirds of the Australian continent for Britain and named it New South Wales. The 1788 settlement that followed was — in legal terms — an assertion of the 1770 claim to British sovereignty. In its *Mabo* 1992 judgment, the High Court of Australia (High Court) held that from that date forward there was only one sovereignty and one system of law in Australia. The High Court declared the British formed one "supreme, irresistible, absolute, uncontrolled authority"⁴ over the lands claimed for the Crown. The effect of settlement was to extinguish Aboriginal political and legal rights. Aboriginal people would henceforth have to rely on the rights that came with being subjects of the British Crown.

Australasian contrast — The Māori experience

The Australian Aboriginal peoples' experience differed from the New Zealand Māori peoples' experience. Under the terms of the 1840 Treaty of Waitangi,⁵ the Māori surrendered their sovereignty over New Zealand. In return, Māori people obtained rights to ownership of their land and resources, and were granted the political and legal rights and privileges of British subjects, placing them on a relatively equal rights footing with British New Zealanders. While the Māori peoples' experience has not been free of discrimination, they have been able to assert their rights with greater success in recent times, including the reserving of Māori seats in parliament.



■ Figure 16.3 – The experience of rights for the New Zealand Māori people was very different from that of Aboriginal and Torres Strait Islander Australians. Source: Sydney Parkinson, 'Maori Chief 1784', in *A journal of a voyage to the South Seas*, 1784, Public Domain, <<https://commons.wikimedia.org/w/index.php?curid=1924116>>

2 Council for Aboriginal Reconciliation, 'Briefing paper. Terra nullius and sovereignty', *Documents of reconciliation*, <<http://www5.austlii.edu.au/au/orgs/car/docrec/policy/brief/terran.htm>>.

3 *Terra nullius* means land belonging to no one and is a legal principle based on the assumption that 'primitive' peoples could not own land or possess sovereignty because they lacked systems of law and government.

4 Blackstone, William, cited in Council for Aboriginal Reconciliation, 'Terra nullius and sovereignty' in *Documents of Reconciliation Briefing paper*, <<http://www5.austlii.edu.au/au/orgs/car/docrec/policy/brief/terran.htm>>.

5 A treaty is a legally binding agreement between two sovereign peoples. It recognises the sovereignty of both parties as the basis for the agreement, ensuring respect for the rights of each.

Denial of sovereignty, livelihood, life, and political and legal equality

In Australia, the absence of a treaty meant political and legal power passed absolutely to the British without granting the rights of British subjects to Aboriginal people.

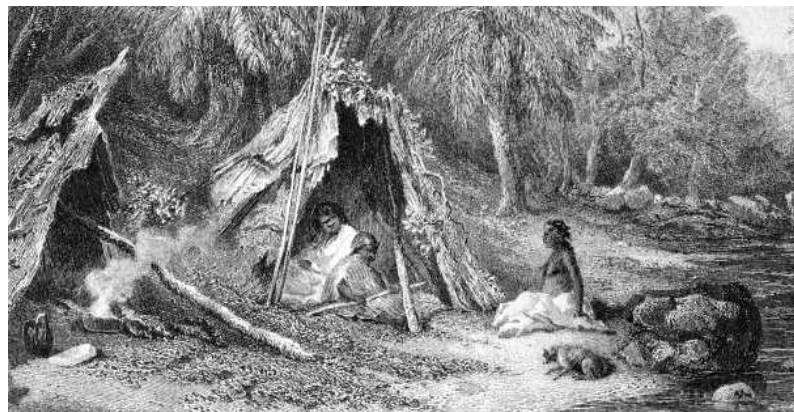
British political and legal power was reinforced by technological and demographic power exercised without restraint for much of the late 18th century and the entire 19th century. Aboriginal populations were decimated by British weapons and diseases. Introduced domestic animals and crops undermined their hunting and gathering economy. European populations grew, supported by expanding agriculture. Within a generation, British colonial society was utterly dominant in the temperate, more habitable parts of the continent. Gold rushes opened new frontiers inland and led to mass immigration, which greatly enlarged the non-Aboriginal population.

Aboriginal peoples — weakened by disease and unable to resist European expansion into their country — were systematically dispossessed. Worse, some were massacred⁶ and driven off country which was destined for the plough, the merino and the mine.

Nomadic hunting and gathering ways of life conflicted with settled farming. The laws of both groups were an expression of different sets of beliefs about economic, religious and other rights. Attitudes about access to land and resources were fundamentally at odds, leading to armed conflict on the frontier.

The decimation of Aboriginal peoples and the rapid growth of British colonial society created a new British-Australian 'mainstream'. With profoundly different ways of life and sets of beliefs, this new society was hostile to Aboriginal people. The remnants of Aboriginal groups were pushed to the edges of colonial society and marginalised.

The proclamation of the *Commonwealth of Australia Constitution Act 1900* (the Constitution) in 1901 formalised the marginalisation of Aboriginal peoples. Section 127 excluded them from the population by prohibiting their numbers being counted in the census. Section 51(xxvi) as it was originally written specifically excluded them from the powers



■ Figure 16.4 – European settlement disrupted the traditional hunter-gatherer lifestyle of Indigenous Australians.

Source: Skinner Prout, 'Native encampment', in Edwin Carton Booth et al, *Australia illustrated*, 1876, Public Domain, <<https://commons.wikimedia.org/w/index.php?curid=5989795>>

of the new Commonwealth Parliament, rendering lawmaking for 'the Aboriginal race' a residual power, and thus the domain of the states. Constitutional racial discrimination was entrenched — all races were the responsibility of the Commonwealth, except the Aboriginal race which was a matter for individual states.⁷

When the Commonwealth began legislating for old age and invalid pensions, it could not include Aboriginal people in the welfare payments because of Section 51(xxvi). Moreover, the states proceeded to embark on race based policies of segregation and assimilation, using their residual power to make discriminatory laws for Aboriginal people. Further, Section 41 of the Constitution made eligibility to vote in federal elections conditional on being enrolled on a state electoral roll. The states barred their Aboriginal populations from enrolling on their electoral rolls, automatically denying them voting rights for the Commonwealth parliament.

⁶ The Myall Creek Massacre in 1838 is a rare example of European perpetrators being held to account.

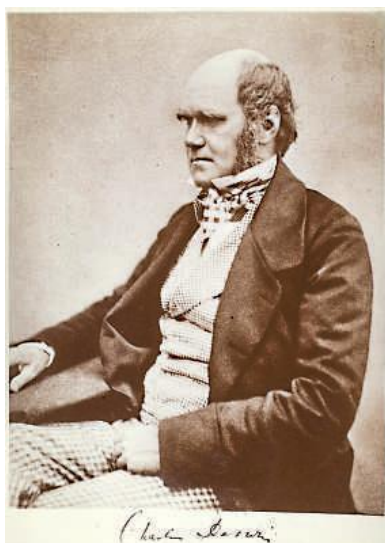
⁷ Prior to the passage of the *Constitution Alteration (Aboriginals) 1967*, Section 51(xxvi) read: "the people of any race, other than the aboriginal race in any State, for whom it is deemed necessary to make special laws".

Segregation and assimilation

Segregation

Nineteenth century Australian mainstream beliefs, values and attitudes were products of their time. There was a belief in the superiority of European civilisation founded on the notion of racial superiority. Aboriginal peoples were viewed as an inferior race, childlike and incapable of adaptation to modern ways of life. They were seen as unworthy of any political and legal rights, or any other rights. They were a race thought to be doomed to extinction.

Darwin's theory of evolution — popularly known as 'survival of the fittest' — had shaken the foundations of science and belief in the 19th century. It created a new paradigm. Darwin's theory was strictly a biological principle explaining the evolution of species by natural selection. However, it was adapted to explain and justify the supposed superiority of races.⁸ Proponents of social Darwinism argued that only the 'fittest' races would survive. When superior and inferior races came into contact, 'science' declared there could only be one outcome — the extinction of the inferior race. Belief in social Darwinism led to colonial and state government policies aimed at managing Aboriginal decline so that extinction would occur 'humanely'. The policy was to segregate the Aboriginal race from the European race. Only the most basic provisions were made to support Aboriginal communities. No education or health care was provided to create equal opportunities. Relations



■ Figure 16.5 – Charles Darwin's Theory of Natural Selection was adapted by Europeans to explain and justify the supposed superiority of races.
Source: Henry Maull and John Fox, *Charles Darwin*, circa 1854, Public Domain, <<https://commons.wikimedia.org/w/index.php?curid=5859501>>

⁸ According to Darren Curnoe — Associate Professor and Chief Investigator, ARC Centre of Excellence for Australian Biodiversity and Heritage, UNSW — "The worst error in the history of science was undoubtedly classifying humans into the different races". See: Curnoe, Darren, 'The biggest mistake in the history of science', *The Conversation*, 20 December 2016, <<https://theconversation.com/the-biggest-mistake-in-the-history-of-science-70575>>. The term and concept 'race' is used here because is it relevant to the legal framework and policies directed at Aboriginal people in the periods under discussion.

between the races — such as marriage — were discouraged because it was believed they would reduce the vigour of the European race and slow the natural extinction of the Aboriginal race.

Negative first generation rights require the restraint of government to prevent its interference in an individual's life. There was no constitutional, legal or moral restraint on state governments making laws that grossly violated Aboriginal rights in the name of segregation. Government authorities systematically denied rights to movement, marriage and family, economic independence and equal treatment micromanaging "every, waking moment of their lives".⁹

Positive second generation rights oblige the government to provide essential services to satisfy entitlements to education, health and a minimum standard of living. Segregation was not just physical separation on outback reserves. It was also legal segregation, with Section 51(xxvi) denying federal benefits such as invalid and old age pensions, maternity allowances and further government assistance other people were entitled to under Commonwealth law. State governments did not provide equivalent support.

Through their policies, state governments suppressed any attempt by Aboriginal people to exercise political and legal rights and denied them other rights that may have empowered them to fight for basic rights. In so doing, state governments created powerlessness, misery, poverty, dependence and exclusion. For a more in depth discussion of rights and their classification, see Chapter 15.

Assimilation

The West Australian Newspaper of 27 June 1934 reported on:

*the deplorable condition of half-caste and quarter-caste children and young people who, it is understood, are rapidly increasing in number ... These unfortunate and very sensitive people, as far as possible, should be advanced to the standard of the white, instead of being thrust back to the increasing misery and degradation of the aboriginal.*¹⁰

The population of mixed race people grew rapidly despite segregation. Termed 'half-castes', they represented a failure of segregation.

⁹ McKenna, Mark. 'Moment of truth. History and Australia's future', *Quarterly Essay*, 69, 2018.

¹⁰ *The West Australian Newspaper*, 27 June 1934, p 19.

The government solution was assimilation. Assimilation is the absorption of a minority group into the mainstream, causing that group to disappear over time. Mixed race children were to be removed from their Aboriginal cultures and assimilated into European culture. Segregation would continue alongside assimilation, with 'full-blood' Aboriginal people separated from European society by continuing restrictions on their liberties and freedoms. In unison, the two policies intensified government interference in Aboriginal lives.

Australia's state governments officially adopted assimilation following the 1937 Aboriginal Welfare Conference of Commonwealth and State Authorities. The policy would remain in force until the early 1960s, causing decades of suffering through the denial of fundamental rights. The denial of political and legal rights limited the capacity of Aboriginal people to change these policies via political or legal action.

Example: State paternalism in Western Australia

The Western Australian *Aborigines Act 1905* established the Chief Protector of Aborigines, a position whose purpose was to manage every aspect of the lives of Western Australian Aboriginal people. The law remained until 1963. Chief Protector A O Neville was the legal guardian of Aboriginal people until they were 16 years old. **State paternalism** displaced Aboriginal parental rights. The Chief Protector could make all decisions concerning the welfare of children. He could remove them from their parents and communities, and transfer them to state or church institutions,



■ Figure 16.6 – To encourage assimilation state governments removed Aboriginal children from their parents and placed them in missions such as the Gnowangerup Mission in Western Australia.

Source: State Library of Western Australia, *Gnowangerup Mission*, 1941, Public Domain, <<https://commons.wikimedia.org/w/index.php?curid=65171268>>

such as camps or missions. The Chief Protector could call on the resources of other state government departments — such as the police — to enforce the Act.

The Moseley Royal Commission of 1934 was set up to examine proposals to extend the powers of A O Neville — the Chief Protector of Aborigines — and the social policy of removing children from their parents. Agitation by critics and the resulting media coverage had drawn attention to the *Native Administration Act 1905* (WA) as amended in 1911, and to actions by Neville.

A series of submissions detailed accusations of child slavery, abuse and mistreatment, and evidence was given by mothers of children who had been removed from them. The commission produced a report citing problems with the current policy, but concluded that the recommendations of Neville be followed.

By depriving Aboriginal people of the political right to self-determination, assimilation destroyed cultures, languages and traditions. The aboriginality of 'half-castes' had to be extinguished *for their own good*.

Western Australia's Stolen Generations were taken from their families under this Act. Other states made similar legislation under Section 51(xxvi) which made the 'Aboriginal race' a residual power. In Western Australia, people needed the permission of the Chief Protector to spend their own money, travel, enter towns, to marry and make many other decisions that were part of every non-Indigenous person's private sphere of life.

The Act lawfully removed mixed race children to state run institutions or church missions, often hundreds of kilometres from their country. In these places, Aboriginal children were prohibited from using language and practising culture. They were trained in domestic or other menial skills and then prevented from returning home by strict residential permits. The standard of education and training they received in these facilities was well below that of the regular school system.

Because rights are indivisible and interdependent, the denial of the right to an adequate education undermined the development of political and legal rights for 'assimilated half-castes' and perpetuated their powerlessness. In fact, there was no Aboriginal person with a university qualification until Margaret Williams-Weir earned a Diploma of Physical Education from the University of Melbourne in 1959. Thus,

despite the aim of absorbing mixed race people into the mainstream population, the denial of rights to education undermined their capacities to exercise any political or legal rights and participate in the broader society. Assimilated Aboriginal people lived in a political and legal limbo between cultures for decades, part of neither community — the Stolen Generations.

The practice of removing mixed race Aboriginal/European children from their families was advocated at the time as part of a plan to “breed out the colour”¹¹ by having those children brought up as though they were white. The idea was that they would marry people with light and lighter skin tones over successive generations, until there would be no Aborigines in Australia at all. At the time it was believed that full-blood Aborigines were dying out.

In 1937, A O Neville declared:

*Are we going to have one million blacks in the Commonwealth or are we going to merge them into our white community and eventually forget that there were any Aborigines in Australia?*¹²

During these times Aboriginal people were not even allowed to serve their country in the armed forces, could not get jobs in post offices or other government departments and were paid in rations — not money — for work on stations. They were denied entry into hotels and other public places and had to camp on the outskirts of towns. They bore unbearable indignities and discrimination. Many Aboriginal men served in the armed forces during World War 1 despite the *Defence Act 1909* prohibition on non-Europeans serving. Even more Aboriginal men fought in World War 2 for a country that treated them as non-citizens.



■ Figure 16.7 — Indigenous man Chris Saunders served in the Australian Imperial Forces during World War 2. Source: Australian War Memorial, *Portrait of an Aboriginal serviceman, Private Walter Christopher (Chris) George Saunders*, circa 1916, Public Domain, <<https://commons.wikimedia.org/w/index.php?curid=19252357>>

Breaking the ‘cult of forgetfulness’ and the ‘great Australian silence’

In 1968 Australian anthropologist Bill Stanner developed the term ‘the great Australian silence’ “to describe a ‘cult of forgetfulness’ that had seen Aboriginal people virtually ignored in the writing of Australian history”.¹³ What does the average Australian of non-Aboriginal descent know about the history of the world’s oldest living culture? Even today the average Australian is not well informed about this culture. Did they just accept what was done to them by governments?

Aboriginal Australians did not just accept that their rights were taken away. There was armed resistance on the frontier, even from the earliest days. After federation — and surviving under the harsh paternalistic segregation and assimilation policies of state governments — Aboriginal people sought to organise themselves to change the laws that so seriously interfered in their lives. The lack of civil, social and economic rights hampered their efforts. There had always been Australians of non-Aboriginal decent troubled by the way their governments treated Aboriginal people. Over time, more people actively supported their Aboriginal fellow Australians in the fight for rights.

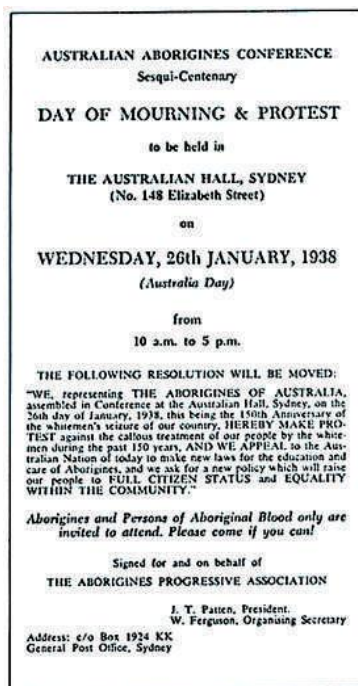
In the 1920s Aboriginal groups formed to highlight injustices by boycotting Australia Day celebrations. These groups included the Australian Aborigines League (AAL) and the Aborigines Progressive Association (APA). These groups were the genesis of the present day National Aborigines and Islanders Day Observance Committee (NAIDOC), a very active organisation today. In Western Australia, for example, NAIDOC week is a popular celebration in schools and local government districts.

On 26 January 1938 the AAL and the APA organised a National Day of Mourning to mark the beginning of white occupation of Australia which they described as a ‘seizure’ of their country. As pressure groups, the AAL and APA illustrate an Aboriginal claim to the **political rights of association and communication**. Cummeragunja man William Cooper founded the AAL. The AAL had already exercised an ancient English political right by **petitioning** King George V to grant Aboriginal people representation in parliament. The Commonwealth Parliament blocked the petition.

11 Manne, Robert, ‘Sorry business: The road to the apology’, *The Monthly*, March 2008, <<https://www.themonthly.com.au/monthly-essays-robert-manne-sorry-business-road-apology-823#mtr>>.

12 Neville, A O, *Australia’s coloured minority : Its place in the community*, 1947, Currawong Publishing Co., Sydney.

13 Allbrook, Malcolm, ‘Indigenous lives, the ‘cult of forgetfulness’ and the Australian Dictionary of Biography’, *The conversation*, 1 November 2017, <<https://theconversation.com/indigenous-lives-the-cult-of-forgetfulness-and-the-australian-dictionary-of-biography-86302>>. Anthropologist W E H Stanner coined the term ‘the great Australian silence’ in his 1968 Boyer Lecture. It one of the most quoted terms in Australian historical literature.



■ Figure 16.8 – The National Day of Mourning was called to protest the 150 years of European colonisation.
Source: Unknown, *Poster announcing details of the Day of Mourning, 1938*, Public Domain, <<https://commons.wikimedia.org/w/index.php?curid=347066>>

Aboriginal people took **direct action** in 1939 when station workers went on strike. In the Cummeragunja Walk Off Aboriginal workers walked off the New South Wales (NSW) Cummeragunja Station and moved across the state border into Victoria, in violation of NSW Protection Board regulations. The Walk Off was the first mass strike by Aboriginal people. The strike was more than economic; it was political, too. Deliberately breaking laws is a form of non-violent political protest — called **civil disobedience** — that would later be made famous by India's Mahatma Gandhi. The men who walked off exercised the political right to express a grievance — that is, **freedom of speech** — and inspired other strikes such as a 1945 Port Hedland strike and the 1949 walk off

Integration

Aboriginal people seize political and legal rights

By the 1960s, post-war migration had made Australia a multicultural country. Migrant groups from Italy, Greece and other places — called 'new Australians' — were expected to integrate into Australian mainstream culture. Cultural change — mostly led by young people — created a new Australian society and also changed the attitudes of many Australians to Aboriginal people. They, too, could be integrated.

from Lake Nash Station. These actions inspired the later more famous 1966 Wave Hill Walk Off led by Vincent Lingiari. Lingiari began a nine-year **lobbying** quest for the return of traditional lands that would culminate in the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) and a famous ceremony in which Prime Minister Gough Whitlam symbolically poured the red sands of Gurindji land into the hands of Lingiari.

Exemption Certificates¹⁴ were introduced in 1943. They allowed certain Aboriginal people the right to vote, drink alcohol and move freely. These rights were in response to Aboriginal members of the armed forces **advocating** equal treatment alongside their fellow non-Aboriginal soldiers. Many non-Aboriginal soldiers supported the demands of their comrades in arms.

To fight and die for your country is the greatest sacrifice a citizen can make. Aboriginal participation in the World Wars — even against the law — was an assertion by every individual Aboriginal soldier of his right to **citizenship**. A post-World War 2 indication that the tide was turning for Aboriginal rights occurred when the *Citizenship and Nationality Act 1948* **granted citizenship to all Aboriginal Australians**. However, Section 51(xxvi) still barred the Commonwealth from legislating for Aboriginal people, so the practical effects of gaining citizenship were limited by the benevolence or otherwise of the different states.

Despite progress, violations of rights continued. The Queen — in Australia on a royal tour — signed into law the *Aborigines Welfare Ordinance 1954* (ACT) that ensured the removal of all Aboriginal people from the ACT. The 1957 Maralinga nuclear tests drove Central Desert peoples from their lands, many of whom were still living traditional lifestyles relatively free from interference by their state government.

Integration replaced segregation and assimilation as official government policy in 1965. By reducing state paternalism, integration achieved essential rights, such as the rights to life, family and personal autonomy. Integration aimed to assist Aboriginal people to participate more fully in society. However, it did not seek to reconcile or right past wrongs or recognise cultural rights inherent to Aboriginal peoples.

¹⁴ Exemption Certificates exempted Aboriginal people from the controlling state laws.

Before Federation, more progressive colonies such as South Australia allowed their Aboriginal men to vote. South Australia even allowed Aboriginal women to vote. This right was withdrawn for federal elections by the *Commonwealth Electoral Act 1902*. In 1949 the Commonwealth Parliament formally recognised every Aboriginal soldier's right to citizenship by granting the **right to vote** to all who had served in the armed forces. In 1962 the Menzies Government amended the *Electoral Act 1902* to allow Aboriginal people to enrol on the Commonwealth electoral roll. The Act disregarded the voting rights at the state level and gave every Aboriginal person the right to vote in federal elections. Voting was compulsory for Aboriginal people, but enrolment was not — perpetuating discrimination since every other Australian citizen had to enrol. If you do not enrol you cannot vote. Queensland was the last state to introduce compulsory enrolment, thus completing the piecemeal recognition of the right to vote for Aboriginal people in federal elections.

The story of the Aboriginal right to vote is emblematic of the plight of Indigenous rights during the era when legislating for the 'Aboriginal race' was a residual state power. Each state could — and did — treat its Aboriginal people differently, which meant Aboriginal inhabitants of more progressive states — for example, South Australia, Victoria and New South Wales — experienced advancement of their rights at a faster rate than those in more conservative states — for example, Queensland and Western Australia. Not only were Aboriginal people treated differently from other races, they were also treated differently from each other depending on where they lived.



■ Figure 16.9 – The Freedom Ride of 1965 was a significant event in the history of civil rights for Indigenous Australians.
Source: State Library of New South Wales, *Student action for Aborigines' bus outside the Hotel Bogabilla, 1965*, Public Domain, <<https://commons.wikimedia.org/w/index.php?curid=42549266>>

In 1965 Charles Perkins — an Aboriginal man — led a 'freedom ride' through NSW modelled on a similar protest in the United States of America (US). The freedom ride was another example of direct action and the political right to free speech. It received widespread television and news coverage and raised awareness of the issue of rights. It added to growing momentum for change.

Momentum for change

A key development on the road to change was the 1958 establishment of the Federal Council for the Advancement of Aborigines and Torres Strait Islanders (FCAATSI). The FCAATSI laid the groundwork for a referendum to remove the discriminatory Sections 51(xxvi) and 127 of the Constitution. Such a change would remove the prohibition on the Commonwealth legislating for Aboriginal people and repeal Section 127 entirely from the Constitution. Joe McGinness — of the Northern Territory Kungarakana language group — was its president for most of the years from 1961 to 1978. His work with FCAATSI demonstrates Aboriginal use of political rights in the struggle for equality.

At the Aboriginal Welfare Conference of 1961 all states and territories agreed to remove discriminatory laws restricting Aboriginal employment and recognised the need to educate all other Australians about Aboriginal culture. It marked the point at which the issue of Aboriginal rights became a mainstream issue.

Together, FCAATSI and the 1961 conference would create the conditions for the most successful referendum in Australian constitutional history. Two things were happening: Aboriginal political action was changing mainstream attitudes and beliefs, and this activity created political pressure for constitutional change. But the bar was high — a successful referendum outcome needed a double majority.

Petitions written on bark were accepted by the Commonwealth Parliament as early as 1963. The Yirrkala Bark Petitions were the first documents which recognised Aboriginal entitlements to rights. The process of petitioning parliament is a political right.

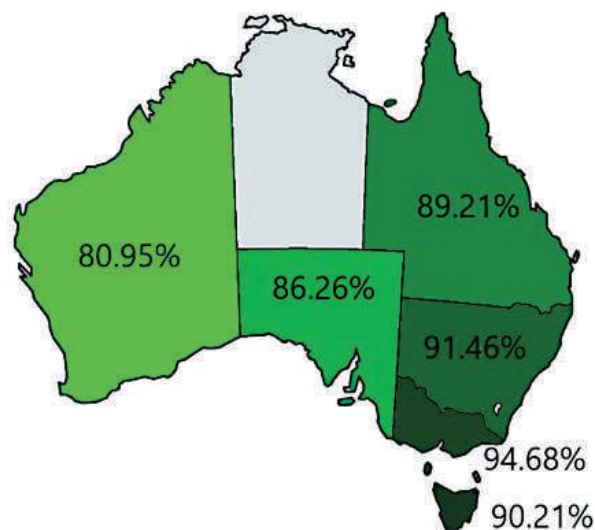
International conditions were changing, too. The Civil Rights Movement was gaining momentum in the US. The momentous US *Civil Rights Act* was passed in 1964. The social and cultural revolution of the 1960s was sweeping away old attitudes and installing new ways of life and sets of beliefs in liberal democracies, including Australia.

The 1967 referendum, external affairs and the High Court

In 1967 Australians voted overwhelmingly to repeal Section 127 and amend Section 51(xxvi) of the Constitution. The effect of these changes would erase constitutional discrimination against Aboriginal people. The Commonwealth Parliament's power to legislate for 'any race' now included the 'Aboriginal race'. The success of the referendum meant the states lost the power to make separate laws for their Aboriginal populations. The legal right of equality before the law had finally been achieved, but it would take many more years for the practical benefits to flow through.

In 1972 a group of four Aboriginal protesters erected an umbrella and signs on the lawn opposite Old Parliament House. They founded the Aboriginal Tent Embassy that has remained a prominent feature in the heart of Canberra's political landscape ever since. The Tent Embassy is one the world's longest-running actions demanding freedom of speech and assembly in the name of Aboriginal rights.

In an important move for the furthering of Aboriginal rights, the parliament ratified the International Convention on the Elimination of All Forms of Racial Discrimination (CERD) by passing the *Racial Discrimination Act 1975*. The parliament's power to **legislate against racial discrimination** came from the external affairs power in Section 51(xxix) of the Constitution. The external affairs power expanded Commonwealth legislative power to override discriminatory state laws under Section 109 of the Constitution. The federal balance of power in matters relating to Aboriginal affairs shifted decisively in favour of the Commonwealth. From then on, if any state residual power¹⁵ was applied in a discriminatory way it could be found invalid by the *Racial Discrimination Act 1975*.



■ Figure 16.10 – Map of Australia showing votes in favour of the 1967 Referendum by state.

Source: Nicol Davis, 2020, Public Domain

A test of the *Racial Discrimination Act 1975* occurred in 1982. John Koowarta — an elder of the Wik people — sought to acquire land in his ancestral homelands. He wished to return to traditional lands and graze cattle. To do so he would need to lease land. He was assisted by the Aboriginal Land Fund Commission¹⁶ set up by the Whitlam Government in 1974 as part of its integration policy. The Queensland Government denied Koowarta's lease application because it was not in favour of Aboriginal people acquiring large areas of land. Koowarta challenged the Queensland Government, arguing its decision breached the *Racial Discrimination Act 1975*. *Koowarta v Bjelke Petersen* [1982] HCA 27, 153 CLR 168 was a landmark case with reference to both the federal balance of power — which had shifted to the Commonwealth in matters relating to discrimination law — and advancing Aboriginal rights. This case was a milestone in the advancement in the legal right of Aboriginal people to access justice through the courts and equality before the law.

The move towards reconciliation and recognition

Reconciliation means the restoration of good terms — it is healing. Recognition means acknowledgement of validity — it is the restitution of rights. Integration granted the political and legal rights necessary for wronged Indigenous peoples to participate in society. Reconciliation goes further by acknowledging past wrongs and accepting the burden of restoring better relations. It requires accepting responsibility for past injustices, and apologising

and compensating for harm caused by the denial of rights. Recognition can be symbolic or substantive. Either can be achieved through constitutional change.

¹⁵ For example, state land management powers could not be applied in a discriminatory way.

¹⁶ The Aboriginal Land Fund Commission — created by the *Aboriginal Land Fund Act 1974* — is an example of the new Commonwealth power to legislate specifically for the benefit of Indigenous people following the transfer of the 'aboriginal race' power to the Commonwealth in 1967. It was the predecessor to the Aboriginal Development Commission.

Reconciliation

In 1985 the Hawke Government returned Uluru (Ayers Rock) and surrounding areas to its traditional owners, the Anangu people. The Anangu received legal ownership of Uluru and Kata Tjuta (the Olgas) and then leased the sites back to the Australian Parks and Wildlife Service for 99 years. They gained **land rights** to Uluru that gave them a say in the sacred site's management, and **economic rights** in the form of income and jobs from tourism. The return of Uluru righted a wrong inflicted by land confiscations and compensated the traditional owners with decision making powers and financial benefits from tourism that will underpin political and legal rights in the future.

Legal rights and native title

In 1992 Eddie Mabo — a Torres Strait Islander man — used his legal rights to challenge a Queensland law¹⁷ that denied him and his people native title rights. He used his legal right to access the justice system in order to claim a right unique to Aboriginal and Torres Strait Islander people — the right to native title to their land. Native title is a profoundly significant right. The High Court righted a wrong committed at the time of settlement 204 years earlier, a wrong that underscored so many others.

In sweeping away *terra nullius*, the Court did more than give Mabo and his Meriam people special title to their island of Mer. It sent shock waves through the Australian political and legal system, forcing the Commonwealth Parliament to clarify native title. The parliament passed the *Native Title Act 1993* to legislate the new common law principle of native title and establish



■ Figure 16.11 – In 1985 the Hawke Government returned Uluru and surrounding areas to its traditional owners, the Anangu people.

Source: Huntster, *Helicopter view of Uluru/Ayers Rock*, 2007, Public Domain, <<https://commons.wikimedia.org/w/index.php?curid=5323279>>

17 The *Coastal Islands Declaratory Act 1985* asserted the state government's claim to all Crown land. It was based on the doctrine of *terra nullius*. In ruling against the *Coastal Islands Declaratory Act 1985* the High Court overturned *terra nullius*.

■ Figure 16.12 – Eddie Mabo used his legal rights in 1992 to challenge a Queensland law that denied him and his people native title rights.

Source: Department of Education and Communities, NSW and Charles Sturt University, *Eddie Mabo portrait*, Fair use, <<https://en.wikipedia.org/w/index.php?curid=38839198>>



mechanisms for Aboriginal and Torres Strait Islander peoples across the country to claim back their traditional lands. Federal courts and the Native Title Tribunal have heard many other native title cases since the Mabo decision. Some cases have extended the concept of native title. For example, 2016 *Griffiths v Northern Territory of Australia (No 3)* [2016] FCA 900 established a common law right to compensation for native title that had been extinguished by other forms of land title.¹⁸

Native title is an example of a third generation right. Third generation rights include cultural rights and rights belonging to groups — not just individuals, as is the case for first and second generation rights. Mabo was a watershed moment in the rights experience of Aboriginal and Torres Strait Islander groups because it advanced the rights of a whole group and restored their dignity. Furthermore, it encouraged others — like Griffiths — to exercise their legal rights. Four hundred and thirty-two native title claims have been successful since the *Native Title Act 1993*¹⁹ was passed. Aboriginal groups now hold about 32 per cent of the Australian land mass, claimed under native title. Native title rights support political and legal rights by providing negotiating power when Aboriginal peoples deal with governments and private companies

18 Prokuda, Henry, 'Compensation for extinguishment or impairment of Native Title: The Federal Court Timber Creek Decision 24 August 2016', *Insights*, Corrs Chambers Westgarth, 4 October 2017, <<http://www.corrs.com.au/publications/corrs-in-brief/compensation-for-extinguishment-or-impairment-of-native-title-the-federal-court-timber-creek-decision-24-august-2016/>>.

19 The *Native Title Act 1993* was passed under Section 51(xxvi) – the race power. State laws that are designed to extinguish native title have proven to be in breach of the *Racial Discrimination Act 1975* and, therefore, invalid under Section 109 because they conflict with the Commonwealth legislation. This is evidence of the fundamental change in the experience of rights since 1967.

who wish to use their land. Native title rights also give Aboriginal peoples legal standing to take court action to defend or advance their rights.

In 1992, shortly after the Mabo decision, Prime Minister Paul Keating made a speech at Redfern, NSW, acknowledging the responsibility of the colonial settler society in the dispossession of Aboriginal peoples from their lands, destruction of their traditional life, massacres and other wrongs committed since 1788. The Redfern Speech was a milestone in the reconciliation process.

Following the tabling of the *Bringing Them Home* report in the parliament in 1998, National Sorry Day has become an annual commemoration. Held on 26 May every year, National Sorry Day 'gives people the chance to come together and share the steps towards healing for the Stolen Generations, their families and communities'.²⁰ These words emphasise 'coming together' and 'healing' — both acts of reconciliation. Political momentum generated by National Sorry Day led to **the apology** given by Prime Minister Kevin Rudd on 13 February 2008 on behalf of the Commonwealth Parliament for past wrongs and harms.

International law

In 2009 the federal government announced its support for the United Nations *Declaration on the Rights of Indigenous People* and established the office of the Aboriginal Social Justice Commissioner (ASJC) as part of the Human Rights Commission. Aboriginal people now have the protection offered by international law — supported by Australia — and a dedicated Commissioner with powers to mediate disputes where Aboriginal people's rights have been infringed. If the mediation process fails to resolve disputes, Aboriginal people can go to the Federal Court to obtain a legally enforceable ruling supporting their claims. The ASJC provides an inexpensive and accessible way for Aboriginal people to exercise their legal rights.

Rights in the twenty first century — A complex experience

Several controversial government policies seemed to set back progress on rights. In 2007 following the *Little Children are Sacred Report* the Commonwealth Government exempted its *Northern Territory National Emergency Response* — also known as the Intervention — from the *Racial Discrimination Act 1975* to enable the armed forces to enter and take control of remote Northern Territory Aboriginal communities where violence against women and child sexual



■ Figure 16.13 — 'Prescribed Area' signage was put up to prevent alcohol and pornography being brought into Aboriginal areas as a result of the Northern Territory Intervention. Source: Michael Coghlan, 'Prescribed area' signage, 2010, CC BY-SA 2.0, <<https://commons.wikimedia.org/w/index.php?curid=19252794>>

abuse was reportedly widespread. Exempting the Intervention from the *Racial Discrimination Act 1975* was deemed necessary so action could be taken to protect the rights of women and children in the communities.

The Intervention illustrates the issue of conflicting rights. To not be discriminated against is a fundamental right of any group. However, individuals within that group have rights to security and safety. Where there are threats to the security and safety of people within the group itself and government needs to act, it becomes a thorny and complex rights issue. Intergenerational trauma caused by dispossession and the inadequate provision of civil, social and economic rights can facilitate social dysfunction that produces rights violations against vulnerable women and children. For government to protect individual rights, it may need to suspend the protection of a group to allow a race-based intervention.

Reconciliation through cooperative federalism and the three arms of government

COAG agreed in 2008 to the **Closing the Gap** initiative. Seven 'gaps' have been identified as existing between the mainstream and Aboriginal communities and targeted for government action. Every year the Prime Minister delivers a Closing the Gap report to parliament detailing progress on advancing Aboriginal and Torres Strait Islander people's welfare. The seven 'gaps' address health, education and

²⁰ Time and Date AS, 'National Sorry Day in Australia', <<https://www.timeanddate.com/holidays/australia/national-sorry-day>>.

economic outcomes. The initiative is a government attempt to remediate the deficits caused by past policies of neglect of the civil, social and economic rights of Indigenous people. As a COAG initiative, Closing the Gap represents cooperative federalism at work in the advancement of Indigenous rights.

By the time of the Closing the Gap initiative, all three arms of the Commonwealth Government had acknowledged and taken steps towards reconciliation. The High Court led with *Mabo* and subsequent cases, the Parliament with the *Racial Discrimination Act 1975*, the *Native Title Act 1993* and other statutes, the Commonwealth Government with Prime Minister Keating's Redfern Speech, Prime Minister Rudd's apology and the creation of the Aboriginal Social Justice Commissioner.

Australia's federal system had become engaged through COAG's Closing the Gap programs. By this time state governments had also passed laws protecting Aboriginal heritage sites and they also required surveys of vacant land for sites of Aboriginal significance as part of their approvals processes for land developments.

The amount spent annually on programs aimed specifically at redressing the gaps in rights such as education and health for Indigenous people is approximately \$5.6 billion.²¹ Indigenous people also benefit from welfare spending of \$30.3 billion aimed at the general population. Several Closing the Gap targets are not being achieved, and some are worsening despite such high spending. A criticism of the current approach to improving education, health and other outcomes is that much of the money is absorbed by the public service and private contractor costs — that is, the administration of the programs is far too costly. Another criticism is that they're not developed in consultation with Indigenous people and not delivered by Indigenous people.

Recognition

Recognition centres around formal legal and constitutional recognition of Aboriginal and Torres Strait Islander peoples as Australia's First Nations peoples.

Three hundred and eighteen thousand Indigenous people and non-Indigenous



■ Figure 16.14 – In spite of its good intentions the *Closing the Gap* initiative has not yet achieved the desired outcomes.

Source: Alan Moir, *Closing the Gap — 10 years on*, 2018, author's permission, <www.moir.com.au>

Australians²² were active together in the pressure group Reconciliation Australia, which organised the *Recognise* campaign. The campaign worked to bring conversations about constitutional reform and recognition into the mainstream, and engaged the broader community on why reform is needed.

Recognition can take two forms: symbolic and substantive.

Symbolic recognition

A preamble is a statement before a statute or a constitution, but is not part of the law itself. The Australian Constitution has a preamble. The Preamble to the Australian Constitution outlines its sources of *authority* — the people, God and Crown — and *purposes* — to create 'one indissoluble federal commonwealth'. Adding *recognition* of First Nations peoples to the Preamble would have no legal impact on power or protection of rights.

However, formal recognition in the Preamble could *imply* prior ownership, sovereignty and rights. Implications can be persuasive in High Court constitutional interpretation. There is precedent for the discovery of implications in the Constitution stretching back to the 1910s. In this way, a non-legal Preamble may influence the nation's fundamental law.

Amendment of the Preamble to include recognition of Aboriginal occupation of Australia is symbolic recognition. There have been referendum proposals for such an amendment.

21 Productivity Commission, cited in 'FactCheck Q&A: Is \$30 billion spent every year on 500,000 Indigenous people in Australia?', *The Conversation*, 5 September 2015, <<https://theconversation.com/factcheck-qanda-is-30-billion-spent-every-year-on-500-000-indigenous-people-in-australia-64658>>.

22 Brennan, Bridget, 'Recognise campaign ends after making "significant contribution"', *ABC News*, 11 August 2017, <<http://www.abc.net.au/news/2017-08-11/recognise-campaign-wound-up/8797540>>.

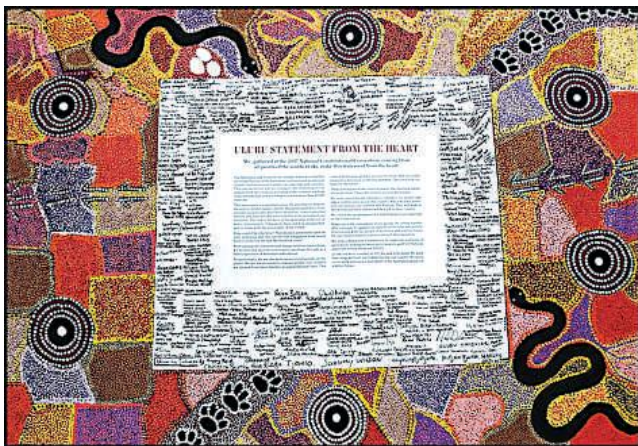
Substantive recognition

Substantive recognition alters the nature of power within the system of government. Reconciliation Australia — a pressure group led by Aboriginal people — organised the *Recognise* campaign. The campaign was a form of political communication and free speech and advocated for the removal of Sections 25 and 51(xxvi), the addition of a new Section 51A to recognise Aboriginal people, a new Section 116A to ban racial discrimination by government and a new Section 127A recognising the languages of First Nations' peoples.

In a separate initiative in 2017, more than 250 Aboriginal and Torres Strait Islander tribes' representatives from First Nations around Australia gathered at Uluru. The First Nations National Constitutional Convention debated the constitutional changes Indigenous people wanted. It debated options put forward by the Referendum Council, which had been established by the Prime Minister and the Leader of the Opposition to give Indigenous people a voice in constitutional change.

The Convention was expected to propose constitutional changes similar to those suggested by the *Recognise* campaign. However, the final recommendations contained in a document called the *Uluru Statement from the Heart* went much further than the changes proposed by Reconciliation Australia and the *Recognise* campaign.

The *Uluru Statement from the Heart* claimed that Aboriginal sovereignty had never been ceded and that it co-exists with the sovereignty of the Crown. It described the past and present relationship between Indigenous groups and the mainstream society as “the torment of



■ Figure 16.15 – The *Uluru Statement from the Heart* claimed that Aboriginal and Torres Strait Islander sovereignty had never been ceded and that it co-exists with the sovereignty of the Crown. Source: BrownHoneyAnt, *Uluru statement from the heart*, 2019, CC BY-SA 4.0, <<https://commons.wikimedia.org/w/index.php?curid=85507351>>

our powerlessness” — a profound statement that sums up in a few words the Aboriginal experience of rights over the last two centuries.²³ Drawing attention to a persistent inequality in legal rights, the *Uluru Statement* referenced the enormous imbalance in incarceration rates, with Aboriginal people overrepresented in prison statistics across Australia.²⁴

The *Uluru Statement from the Heart* proposed a First Nations Voice to Parliament enshrined in the Constitution. It also proposed a Makarrata²⁵ — a truth-telling commission similar to the post-Apartheid Truth and Reconciliation Commission in South Africa. The Voice to Parliament would be a representative body elected by First Nations peoples to consult with the Commonwealth Parliament on First Nations issues. Makarrata would promote healing through open truth-telling about the real history of dispossession, segregation, assimilation and integration.

After being presented to the government, the *Uluru Statement from the Heart* was criticised by some. One objection — articulated by then Deputy Prime Minister Barnaby Joyce — was that the First Nations Voice to Parliament might be like a third chamber of parliament and too significant a change to our constitutional system.

Contemporary issues

Many rights problems remain undealt with, despite great progress towards reconciliation and some progress towards recognition. One contemporary problem is overpolicing of Aboriginal youth. Western Australian Police Commissioner Chris Dawson²⁶ made a formal apology to Western Australia's Aboriginal people for past racism and present ‘unconscious biases’ in policing that have led to high rates of arrest, court appearances and incarceration of Aboriginal people. Such biases undermine Aboriginal people's legal right to be treated equally before the law and to receive fair treatment.

23 *Uluru statement from the heart*, 2017, <<https://fromtheheart.com.au/uluru-statement/the-statement/>>.

24 In August 2018, 100 per cent of juveniles in detention in the Northern Territory were Aboriginal — a gross imbalance of the legal rights to due process and equality before the law. The treatment of Dylan Voller in the Don Dale Detention Centre sparked the Royal Commission into the Protection and Detention of Children in the Northern Territory. No criminal charges were laid against prison officers who carried out the abusive treatment.

25 A Yolngu word meaning ‘a coming together after a struggle, facing the facts of wrongs and living again in peace’. See: Department of Tourism, Sport and Culture, *Makarrata Agreement*, Northern Territory Government, <<https://dtsc.nt.gov.au/arts-and-museums/northern-territory-archives-service/cabinet-records/1981-records/makarrata-agreement>>.

26 Carmody, James and staff, ‘Police Commissioner Chris Dawson apologises to WA Aboriginal people for past mistreatment’, *ABC News*, 12 July 2018, <<http://www.abc.net.au/news/2018-07-12/wa-police-commissioner-apologises-to-aboriginal-people/9984154>>. Commissioner Dawson acknowledged biases in the enforcement of laws by police.

Deaths in custody have been a significant concern. The Royal Commission into Aboriginal Deaths in Custody established in 1987 to inquire into 99 such deaths found none was caused by violence inflicted by police or prison officers. It made recommendations about standards of care and supervision in custody. The deaths of Cameron Doomadgee on Queensland's Palm Island in 2004 and Ian Ward in a Western Australian police van in 2008 were two incidents that again drew attention to the issue. In August 2018 the *Guardian Newspaper* began highlighting the ongoing issue with a series of special reports. You can find out more at the following site: <https://www.theguardian.com/australia-news/ng-interactive/2018/aug/28/deaths-inside-indigenous-australian-deaths-in-custody>.

The establishment of the Western Australian Aboriginal Legal Service was an attempt to overcome systemic problems by providing specialist legal advice to Aboriginal people to assist them in exercising their legal rights. Other states and territories have similar legal aid services. Many legal aid services are underfunded by governments, reducing their capacity to help people exercise their legal rights.

A very recent development is the use of artificial intelligence (AI) for identifying suspects. NSW police are using AI in a program called the Suspect Targeting Management Plan (STMP). STMP makes assessments of individuals' likelihood of future offending. It uses risk factors to predict 'future crime' suspects. The risk factors come from historic data sets. The way the STMP algorithm uses the data to identify suspects is secret. The fear is the data sets contain biases because they are based on past policing that is known to be biased.²⁷ Forty-four per cent of suspects identified by STMP are Aboriginal, yet only 3.3 per cent of the NSW population is Aboriginal.²⁸ The legal rights of a minority group that has suffered discrimination may be threatened if automated systems in policing and justice use data sets that perpetuate historical biases. A system such as STMP undermines the legal right to be presumed innocent. It especially targets Aboriginal youth and is thus a threat to their legal rights, in particular. The STMP system is run internally by the police with no oversight by parliament or the courts. Victoria, the Australian Capital Territory (ACT) and Queensland have

specific human rights legislation that requires all parliamentary statutes and government policies to be compliant with 20 human rights listed in the United Nations Covenant on Civil and Political Rights. The ACT's *Human Rights Act 2004* and the *Victorian Charter of Human Rights and Responsibilities Act 2006* are statutory bills of rights that aim to prevent human rights abuses. They require police and other government departments to prioritise human rights when developing policies and training their personnel. Other states are considering similar legislation; the Rudd Government attempted to introduce a federal equivalent after the 2007 election. If NSW had such a bill the STMP system would probably not be implemented because the police would have to ensure the system did not perpetuate biases that undermine legal rights and the NSW Government would now be reluctant to introduce such a system after the federal government's 'Robodebt' debacle.

27 Note the apology given by Western Australian Police Commissioner Chris Dawson mentioned previously.

28 Faruqi, Osman, 'NSW Police are using a secret algorithm to target children who might commit a future crime', *Junkee*, 26 October 2017, <<https://junkee.com/nsw-police-stmp-children/132545>>.

Summary

Dispossession Phase

- The British claim to sovereignty extinguished Aboriginal rights to self-determination. The absence of a treaty and the declaration of *terra nullius* permitted the outright destruction of life, economy, society and culture.
- The Constitution entrenched the denial of political and legal rights by excluding Indigenous people from the census.
- Lawmaking for Indigenous people was made a residual power. Voting rights were denied. Legal rights were almost entirely absent.
- The experience of Australia's Indigenous people of their rights contrasts markedly with that of the Māori in New Zealand.

Segregation and assimilation phase

- Indigenous people experienced a denial of their political and legal rights.
- Social Darwinism and constitutional discrimination entrenched in Section 51(xxvi) and Section 127 deepened state paternalism.
- The failure to respect the civil, social and economic rights of Indigenous people undermined their capacity to develop political and legal rights.
- Despite these barriers, Indigenous people began asserting political and legal rights by forming pressure groups and taking direct action.
- Under pressure from Indigenous and non-Indigenous people, governments relaxed their strict segregation and assimilation policies, granting exemptions to some Indigenous people

Integration phase

- Significant progress was made in the advancement of Indigenous rights.
- A distinctive feature of the period was Indigenous people seizing the initiative and taking political and legal action. Their political activity lifted the silence on Indigenous discrimination and led to profound change with the overwhelming success of the 1967 Referendum.
- International human rights agreements, the expansion of Commonwealth legislative power under Sections 51(xxvi) and (xxix), Acts of the Commonwealth parliament — in particular the *Racial Discrimination Act 1975* — all promoted equality of rights. Other factors include High Court precedents resulting from Indigenous people exercising their legal rights.
- Despite progress in making the 'cult of forgetfulness' and 'the great Australian silence' a thing of the past, many of the wrongs of the past were still not acknowledged.

Reconciliation and recognition phase

- There has been substantial progress made in achieving Indigenous rights since the move towards reconciliation and recognition. Indigenous issues have firmly entered mainstream Australian consciousness.
- Full equality of political rights has been attained, but legal rights still lag, with ongoing issues of bias in law enforcement, high incarceration rates and deaths in custody. COAG's Closing the Gap initiative is attempting to address various civil, social and economic rights.
- Indigenous people are engaged in political activity through pressure groups. The Commonwealth has supported Indigenous consultation on constitutional change, but dismissed the proposals contained within the *Uluru Statement from the Heart*. The future of rights may be enhanced if more states, territory and the federal jurisdictions adopt statutory bills of rights similar to those in the ACT, Victoria and Queensland.

Exam practice questions

Short Answer

- 1a) Define the term 'rights'.
- 1b) Explain **one** implication of the 1967 referendum on bringing about change for Indigenous Australians.
- 1c) With reference to **one** example, discuss how the legal rights of Indigenous Australians can be undermined.
- 2a) Explain the term 'repeal' as it applies to the Commonwealth Constitution (Australia).
- 2b) Distinguish between 'political rights' and 'legal rights'.
- 2c) With reference to the experience of Indigenous Australians, discuss the effectiveness of the *Racial Discrimination Act 1975*.
- 3a) Explain the purpose of the Closing the Gap initiative.
- 3b) Outline **three** legal rights of a group in Australia.
- 3c) Discuss **one** argument for and **one** argument against the proposition that 'now more than ever, there is a need for more substantive recognition of Indigenous Australians in the Commonwealth Constitution (Australia)'.
- 4a) Explain what is meant by 'unconscious bias'.
- 4b) Explain **one** criticism of the Closing the Gap initiative.
- 4c) Discuss the impact of **one** political or legal right on the experience of Indigenous Australians.

Source Analysis:

Read the source below and answer the questions that follow.

The source is adapted from: Chelsea Bond, 'The 'new' Closing the Gap is about buzzwords, not genuine change for Indigenous Australia'.¹

Anyone who has spent any amount of time in Indigenous affairs would be familiar with the buzzwords used in the announcement of the new Closing the Gap targets.

As Prime Minister Scott Morrison said, the national Closing the Gap agreement is supposedly "practical" and "ambitious." Minister for Indigenous Australians Ken Wyatt described it as a "new approach" to Indigenous disadvantage.

The big solution we are told – both in the press conference and the partnership agreement – is "data." Data is offered both as a priority reform, as well as a strategy in and of itself. Each Closing the Gap target is outlined in a table that lists how it will be monitored.

We are not offered a sense of the complexity of the problem being addressed or even a strategy. Instead, we are told what data should be collected in relation to the goals.

It seems the strategy for addressing Indigenous disadvantage is to find better ways to monitor other forms of progress incrementally. Yet the focus here is largely on Black bodies and behaviours. There is little to no analysis of the institutions and systems responsible for the production of the racialised disparities that Indigenous peoples experience.

There is also little that is new about increased surveillance of Indigenous people as a policy measure – which is what this is. There is, however, a strong evidence base that tells of the long history of failure of such "interventions."

continued overleaf

¹ Bond, Chelsea, 'The 'new' Closing the Gap is about buzzwords, not genuine change for Indigenous Australia', *The Conversation*, 31 July 2020, <<https://theconversation.com/chelsea-bond-the-new-closing-the-gap-is-about-buzzwords-not-genuine-change-for-indigenous-australia-143681>>.

The issue is the failure – or rather, refusal – to commit to structural reform that meaningfully attends to the relationship between Indigenous peoples and the state. Such reform demands recognition of the unique rights of Indigenous peoples, not simply more data on disadvantage and supposed Indigenous deviance.

Yet we are now being offered a partnership approach with government-funded Aboriginal and Torres Strait Islander organisations. Few have noted the power imbalance at the heart of this relationship. As Roy Ah-See, co-chair Uluru dialogues at UNSW's Indigenous Law Centre has said, "You are never going to bite the hand that feeds you, so how can these organisations be representative if they only received resources from government?"

And, it is most telling that while Indigenous peoples on the streets are still fiercely proclaiming "sovereignty never ceded" amid a pandemic, the peaks that represent them have signed up to an agreement in which sovereignty was never mentioned.

- 5a) Define the term 'human rights'.
- 5b) With reference to the source, explain in your own words **two** issues that the 2020 Closing the Gap agreement has highlighted.
- 5c) Discuss **two** ways in which statutory rights are protected in Australia.
- 5d) Evaluate the experience of a particular group in Australia in terms of its legal rights.

Essay:

- 6) 'Indigenous Australians have experienced changes to their political and legal rights, but further reform still needs to be undertaken'. Evaluate this claim.
- 7) With reference to the experience of a particular group, evaluate the effectiveness of the protection of this group's rights in Australia.

Investigation

- 8a) Expert Group Activity: Teacher is to divide the class into six expert groups. Students are to use the internet to investigate the changing experience of political and legal rights of Aboriginal Australians since federation. Each expert group is to create a timeline that focusses on how these have evolved/changed over time. Ensure that supporting evidence is included. Expert group topics include:

the right to vote	the right to stand as candidates for parliament	the right to advocacy
freedom from racial discrimination	the expansion of land rights	the right to a fair trial

- 8b) Teacher is to disperse students into new 'numbered groups'. Students are to take it in turns to share their 'expert knowledge' with their new group.
- 8c) Class discussion:
 - To what extent has the 'popular participation' of Aboriginal Australians improved since federation?
 - Aboriginal Australians have seen limited 'political representation'. Discuss the validity of this claim.
 - Discuss two positives and two negatives of the Aboriginal Australian experience regarding 'natural justice'.



Australia and the United States — Evaluating democracy in practice

Syllabus point:

- **The ways in which Australia and one other country can both uphold and/or undermine democratic principles, with reference to:**
 - **political representation**
 - **popular participation**
 - **the rule of law**
 - **judicial independence**
 - **natural justice**

Introduction

Politics and Law Unit 1 began with the operating principles of liberal democracy. These include the equality of political rights, majority rule, political participation and political freedom. Unit 1 also covered the rule of law and judicial independence — both democratic principles.

Australia and the United States of America (US) are both democracies. Both countries uphold democratic principles. Nevertheless, political compromises, conflicting values and the need for security may undermine democratic principles in both countries.

Australia is a relatively young country, but is also one of the world's oldest and most stable democracies. The US was considered the world's greatest example of democracy from 1918 to recent times. Our shared British heritage influences the nature of our democratic institutions and practices. Nevertheless, both countries have distinctive histories resulting in different ways each practices democracy.

“Democracy is a process, not a destination. It is a project that is never complete.”

Two democracies: Australia and the United States

Australia and the US share democratic values, philosophies and principles. Both are Western nations whose political cultures trace back to Ancient Greece. Both share a British heritage that has endowed them with Enlightenment philosophies such as liberalism, rights and political and legal principles which enable full democracy.

Democracy is a process, not a destination. It is a project that is never complete. The Australian and US democracies both keep evolving, adapting and changing. Sometimes changes are improvements; sometimes they are not.

This chapter examines how Australia and the US uphold or undermine the following democratic principles:

- political representation;
- popular participation;
- the rule of law;
- judicial independence; and
- natural justice.

Political representation

Australia and the United States

Political representation is essential for two of the three branches of government:

- the legislature — which has the role of representing the people in a representative democracy; and
- the executive — which must express the principle of majority rule — that is, political representation in government.

The legislatures of Australia and the US — which are both federations — have two classes of representatives in their legislatures:

- people's representatives; and
- state representatives.

The executives of each country are fundamentally different in the way they uphold political representation and achieve majority rule in government:

- the party with a majority of seats in the lower house — that is, the people's house — forms Australia's parliamentary executive; and
- the people directly elect the US presidential executive in a separate election.

See: *Background information: Elections and political representation.*

Background information: Elections and political representation

Representative democracies use elections to select representatives to assemble in a parliament or congress. Representatives are delegates or trustees of those who elect them. In modern representative democracies, political parties are the primary vehicles

■ Figure 17.1 – Representative democracies use elections to select representatives to assemble in a parliament or congress.
Source: jiron, *Parliament House, Canberra*, 2008, GFDL 1.2, <<https://commons.wikimedia.org/w/index.php?curid=7559635>>



that facilitate political representation in parliaments and congresses.

The system of majority rule is political representation in government. The convention that the party commanding a majority in the lower house forms government is the Westminster method of achieving majority rule in government. An alternative is the direct election of the executive branch by the people, as in the US.

Because elections are so important in representative democracies, electoral systems are critical to how a democracy upholds or undermines political representation.

Example: 2019 Australian federal election and the 2018 United States Congressional election

The Australian federal election took place on Saturday, 18 May 2019. Although polls suggested that this was the ‘unlosable election’ for Bill Shorten and the Australian Labor Party (ALP), the Morrison coalition was returned to government. Australia’s electoral compromise allows the major parties to dominate the House of Representatives. However, proportional representation used

in the Senate results in greater diversity and representation of various political parties.

The US midterm Congressional election took place on Tuesday, 6 November 2018. The first past the post voting system used in the US results in the two major parties — the Republicans and the Democrats — winning nearly all seats, limiting the representation of minorities in Congress. The 2018 midterm election confirmed an historical trend of the party not in control of the White House making gains in Congress.

	House of Representatives	Senate
Republican	199	53
Democrats	235	45
Independent		2
Libertarian	1	
TOTAL	435	100

■ Table 17.1 – The 2018 midterm election results for the US Congress.

Source: Stephen King, 2020

Table 17.2 summarises the ways Australia and the US both uphold and undermine political representation.

Political representation			
Australia		United States of America	
Upholds	Undermines	Upholds	Undermines
High diversity of political parties, many with good prospects of winning seats	Two-and-a-half party system entrenched in the lower house		Two party system entrenched across all legislatures and executives — state and federal
- Blended preferential voting (PV) in the lower house and proportional voting (PR) in the upper house creates an ‘electoral compromise’ to balance forms of representation - Vote splitting eliminated and vote wastage reduced, increasing the effectiveness of individual votes - Secret ballot	Complexity of Senate voting confuses electors. Electors tend to vote above the line and surrender the choice of candidates to parties	- First past the post (FPP) is simple to understand and use - Secret ballot	- No ‘electoral compromise’. FPP in congressional and presidential elections - FPP suffers high vote wastage and vote splitting reducing the effectiveness of individual votes

table continued overleaf

table continued from previous page

• Compulsory enrolment and voting reduce the influence of prominent minorities	• Compulsory voting undermines individual liberty and makes the votes of apathetic electors count	• Voluntary enrolment and voting emphasises individual liberty	• Voluntary voting allows prominent minorities to influence election outcomes unduly Example: National Rifle Association • Strict voter registration denies many the right to vote
• One vote, one value in the House of Representatives	• Malapportionment in the Senate		• Gerrymanders in many electoral districts
• House of Representatives' three-year electoral cycle renews representation frequently	• Senate's six-year electoral cycle weakens renewal of representation • Senate has a veto over all bills from the more representative lower house	• Short, two-year electoral cycle renews representation frequently	• Senate has a veto over all bills from the more representative lower house
• Absolute majorities and one vote, one value expresses the will of the majority — i.e. majority rule in the House of Representatives • House of Representatives uses single member electorates which support delegate/trustee style of representation and accountability	• Preferential voting disadvantages minor parties and reduces minority representation in the House of Representatives • Weak links between senators and constituents reduce the quality of delegate/trustee representation and accountability	• Single member electorates in both houses mean all members of congress have strong delegate/trustee links to constituencies • Accountability of representatives is high	• Candidates can win without an absolute majority of votes if there are three or more candidates — undermines majority rule principle
• Minorities achieve representation in parliament	• Social, cultural and economic diversity of Australia not well represented in the House of Representatives or the ministry <i>See: Example: Is the Commonwealth Parliament a "white men's club"?</i>	• Many public offices elected — including school boards and police chiefs — increasing representativeness of public services • Seven states elect judges	• FPP limits the representation of minorities in congress • Social diversity is not well represented • Electing public servants can politicise the administration of law • Electing judges can undermine the independence of the judiciary and the rule of law
• One law governs federal elections; one system for elector qualification and methods of casting a ballot • Low levels of corruption in the electoral processes because of strong electoral laws • Independent election administration by the AEC • Judicial review of electoral processes by the Court of Disputed Returns	• Increasing levels of popular disengagement from politics, especially among the young • Increasing influence of foreign powers in elections • Social media undermines electoral advertising laws	• Spectrum of representative diversity within the two major parties — the Democrats and the Republicans Example: Democrats in the conservative and rural south are similar in outlook to Republicans in the liberal and urban north	• Federal elections governed by state laws. Voter registration and methods of casting ballots vary from state to state • Lacks an effective electoral commission. The Federal Electoral Commission can only investigate political donations, not electoral processes • Increasing influence of foreign powers in elections • Social media undermines electoral advertising laws

	Weak political donations laws allow the undue influence of wealthy interests		- Since the Citizens United Case political donations are unlimited - Citizens United led to the formation of Political Action Committees (PACs) and 'SuperPACS' which raise and spend millions to influence electoral outcomes
- History of electoral reform to improve the electoral system - House of Representatives - FPP — 1901–1918 - PV — 1918–present - Senate - FPP — 1901–1918 - PV — 1918–1949 - PR — 1949–present - Compulsory voting — 1924 - Senate PR system reformed in 1984 and 2016			Limited electoral reform

■ **Table 17.2 – How Australia and the United States uphold and undermine political representation.**
Source: Stephen King, 2020

Example: Is the Commonwealth Parliament a “white men’s club”?

Table 17.3 shows the diversity of the Commonwealth Parliament.

	Australian community (%)	46th Parliament (%)
Women	51	35.7
Overseas born	30	9.7
Non-European parent	20	4.0
Indigenous	3.3	2.2

■ **Table 17.3 — Diversity of political representation compared to diversity within the Australian community.¹**
Source: Stephen King, 2020

Popular participation

Australia and the United States

Australia has a diverse range of major, minor and micro political parties. Between 75 and 80 per cent of electors support the major parties. Minor and micro parties attract the rest of the popular vote, with the Greens and the Nationals being the two dominant minor parties.

Voting is the defining act of popular participation. Therefore, effective electoral systems are essential for popular participation. However, there are many other avenues for the public to participate in their government. Political parties, pressure groups, petitioning, protesting and writing submissions and letters offer other avenues of participation.

Party membership is a measure of popular

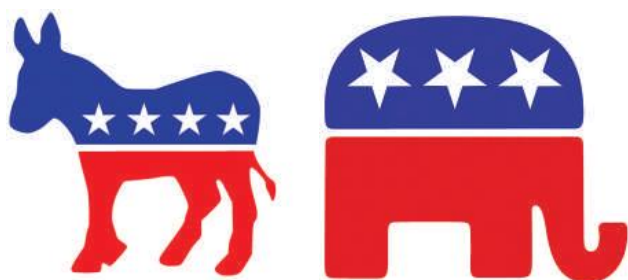
participation. Australia has many political parties. Between five and seven parties regularly gain seats in parliament. The leadership of the Liberal and Labor parties in Australia control candidate selection, leaving almost no role for popular participation in choosing who will run for office. Political party membership has been in decline for decades and Australia has one of the lowest rates of mass membership of political parties amongst the world’s major democracies.

Because of its electoral system, the US has only two parties that can achieve electoral success. American electors who support minor parties simply waste their votes. Arguably, high vote wastage diminishes the value of popular participation through elections. A strength of

¹ Compiled with data from SBS and ABS.

the US party system is the use of primaries and caucuses, which allow ordinary party members a role in choosing candidates.

See: Background information: Popular participation.



■ **Figure 17.2** – There are only two major parties in the United States — the Democrats and the Republicans. The Democrats are represented by the donkey and the Republicans by the elephant.

Source: Steven Braeger, *Old Democratic logo*, 2017, CC0 1.0, <<https://commons.wikimedia.org/w/index.php?curid=61644820>>; and Republican Party (United States), *Republican logo*, 2011, Public Domain, <<https://commons.wikimedia.org/w/index.php?curid=38889019>>

The ability of citizens to participate meaningfully in their country's political system is correlated strongly with wealth. Minorities — especially racial and indigenous minorities in both countries — are disadvantaged in terms of popular participation.

Background information: Popular participation

Participation in government is almost the definition of democracy. Citizens are active — if they choose to be — in the political decisions affecting their lives.

Citizens participate in the formation of public policy by exercising their political freedoms and rights. They can speak, communicate, organise groups, take direct action and use the courts to influence their representatives and governments.

Equality of political rights and freedoms is a critical factor in popular participation. Therefore, any factor that undermines equality of political rights and freedoms also undermines popular participation. Wealth and race are factors which undermine the equality of political rights and freedoms in Australia and the US.

Most popular participation occurs through:

- elections;
- political parties; and
- pressure groups.

Table 17.4 summarises how the Australian and the US systems uphold and undermine popular participation. Recall that factors undermining political freedoms and rights also undermine popular participation.

Popular participation			
Australia		United States of America	
Upholds	Undermines	Upholds	Undermines
• Common law protects the equality of political rights and freedoms • Constitution implies a right to freedom of political communication • State and territory statutory bills of rights — Victoria, Queensland, ACT • Anti-discrimination statutes such as the Racial Discrimination Act 1975 support popular participation by reducing disadvantage	• Common law the weakest type of law; most political freedoms and rights are common law rights • Implied constitutional right to freedom of political communication not equivalent to a right to freedom of speech • Equality of political rights and freedoms depends on wealth, race, religion and other criteria • No statutory or constitutional federal bill of rights • Most states lack statutory bills of rights	• US Constitutional Bill of Rights protects political freedoms and rights • Statutes like the Civil Rights Act 1964 protect other political rights and freedoms and facilitate equality	• Equality of political rights and freedoms depends on wealth, race, religion and other criteria

Senate's PR electoral system enables parliamentary participation of a range of parties with diverse ideologies and beliefs	Participation of Indigenous Australians limited by social, cultural, economic and geographical barriers		- Electoral system disenfranchises some groups - Voter suppression practised in some states to reduce political rights of African Americans and other minorities
Cultural expectations of political freedom and rights	Cultural expectations are no guarantee	- Robust rights culture - History of rights activism keeps political rights and freedoms on the public agenda	Overpolicing of African Americans and other minorities suppresses participation
- Signatory to the United Nations International Covenant on Civil and Political Rights (ICCPR) - Parliamentary Joint Committee on Human Rights (PJCHR) evaluates bills for compliance with ICCPR political freedoms and rights - State parliaments have equivalent committees	Reliance on parliament to protect political freedoms and rights leaves rights and freedoms vulnerable to the executive — which dominates parliament		Does not sign or ratify international rights conventions, including the ICCPR
	- Absence of 'shield laws' protecting journalists from prosecution if they do not reveal sources; discourages whistle-blowers. <i>See: Example: AFP raids on journalists — Effects on freedom of the press and speech</i> - Partisan media can undermine facts and truth in political debate — no 'truth in political advertising' laws - Defamation laws are amongst the most restrictive in the world, inhibiting some political freedoms	Media unrestricted except by defamation laws	Partisan media can undermine facts and truth in political debate — no 'truth in political advertising' laws
Statutes can only limit political freedoms and rights where justified — the PJCHR monitors compliance	Statutes may infringe political freedoms and rights if deemed necessary by parliament	Statutes and executive orders cannot diminish political freedoms and rights protected by the Bill of Rights	
A range of political parties representing the full spectrum of political ideologies — membership is unrestricted		- No restrictions on formation of political parties - The two main parties are tolerant of diverse views — dependent on geography	Only two political parties are viable

table continued overleaf

table continued from previous page

• Communist Party Case (1951) ruled laws banning political parties unconstitutional	• Cost of court action defending rights is prohibitive	• Citizens can use courts to defend constitutionally guaranteed rights enabling participation	• Cost of court action defending rights is prohibitive
• Political parties that receive 4%+ of the primary vote receive public funds • Broad spectrum of viable political parties facilitates the participation of a diversity of Australian opinion	• Membership of political parties has fallen by up to 75% in the post-World War 2 era • Party executives mostly select candidates, therefore less role for rank and file party members in candidate selection	• High levels of political party membership in the two main parties — the Democrats and Republicans • Primaries and caucuses give rank and file party members dominant role in candidate selection for the two major parties; 28.5% of eligible voters involved in candidate selection for 2016 presidential election • Donald Trump the popular candidate, overruling the wishes of the Republican Party leadership	• No public funding of political parties
• A free and fair electoral system • Compulsory voting strongly encourages electoral participation — very high levels of voter turnout — 2019 federal election = 91.9% • Campaigns such as School Strike 4 Climate Change and Black Lives Matter are increasing popular participation amongst young people • New media — i.e. social media — increases young people's access to participation by removing barriers to mass communication and mass organisation, and circumventing powerful interests and gatekeepers <i>See: Example: School Strike 4 Climate Change, Extinction Rebellion and Black Lives Matter in the United States and Australia</i>	• Declining interest in popular participation and faith in democracy • Laws limiting political donations are relatively ineffective — caps are low, but laws fail to prevent multiple donations by a single donor	• Free electoral system • Campaigns such as School Strike 4 Climate Change and Black Lives Matter are increasing popular participation • Popular participation in elections increased since 2016 election of Trump Administration • New media — i.e. social media — increases young people's access to participation by removing barriers and gatekeepers	• Electoral system is not always fair — gerrymanders, race, class and wealth distort effectiveness of electoral participation • Low levels of voter turnout for congressional and presidential elections — 2016 presidential election = 55% and 2018 congressional elections = 49.3% — highest in a century • Electoral College distorts popular vote in presidential elections; Hilary Clinton won the popular vote, but Donald Trump won the Electoral College in 2016 • Unreliable voting machines used in some states for federal elections

- Pressure groups operate freely - Since 2008 a Lobbying Code of Conduct and a Register of Lobbyists has increased the transparency of pressure group activity and its influence over lawmaking in parliament and government.	- Some pressure groups are highly influential because of financial resources and who they represent Example: powerful interests such as mining, business and unions <i>Corporatism</i>² distorts democracy due to influence of powerful groups in electoral processes and government	Pressure groups operate freely	- Some pressure groups are very influential because of financial resources and who they represent Example: National Rifle Association - Corporatism distorts democracy due to influence of powerful groups in electoral processes and government - Citizens United Case removed caps on political donations
		Individuals can influence lawmaking in the congress and the courts	<i>Elitism</i>³ distorts the role of very wealthy individuals who distort popular participation Example: Koch brothers, Mark Zuckerberg

■ Table 17.4 – How Australia and the United States uphold and undermine popular participation.
Source: Stephen King, 2020

Example: School Strike 4 Climate Action, Extinction Rebellion and Black Lives Matter in the United States and Australia

School Strike 4 Climate Change

The School Strike 4 Climate Action is a global movement initiated by Greta Thunberg, a Swedish schoolgirl. The movement involves students of all ages, from cities, towns and regional hubs, striking from school to demand politicians take the future of our planet seriously and treat climate change as a crisis. Numerous waves of protests have happened across Australia since November 2018, with hundreds of thousands participating. Peaceful protest methods such as rallies, sit-ins and 'die-ins' have been utilised by those involved. Marches to the Commonwealth, state and territory parliaments have been used to urge political action to deal with our climate crisis. Australian businesses have participated by closing their doors or allowing their employees to walk off the job in protest.

Extinction Rebellion

Extinction Rebellion is a global movement whose core strategy is the mass disruption of city centres through non-violent civil disobedience. Their focus is aimed at achieving political change to combat Australia's climate and ecological crisis. Extinction Rebellion



■ Figure 17.3 – Greta Thunberg was the instigator of worldwide school strikes for climate action.
Source: Anders Hellberg, *Greta Thunberg outside the Swedish Parliament*, 2018, CC BY-SA 4.0, <<https://commons.wikimedia.org/w/index.php?curid=77270098>>

wants the government to act now to stop biodiversity loss and reduce greenhouse gas emissions to net zero by 2025. Examples of civil disobedience used by Extinction Rebellion

- Corporatism describes the process by which powerful industrial and professional groups influence government decision making.
- Elitism refers to the situation in which a few exceptionally powerful individuals impact on government decision making.

include hanging off bridges, protestors locking themselves to gates, vehicles and cement blocks, and creating human blockades. Tens of thousands of Australians have participated in these tactics.

Black Lives Matter

Black Lives Matter is an activist movement which began as a hashtag #BlackLivesMatter in 2013. On 25 May 2020 George Floyd died after being arrested by police outside a shop in Minnesota, USA. Footage from the arrest showed a police officer kneeling on Floyd's neck while he was pinned to the floor telling the officer he could not breathe. Floyd's death sparked widespread outcry and worldwide protests against police brutality and systemic racism. At the end of May over 450 major protests were held across the US in response to Floyd's death. Protestors marched through the streets, hung signs on buildings and places of worship, and performed walkouts to raise awareness of the systemic racism in the US. By the end of August 2020 more than 10,600 Black Lives Matter protests had happened across the US.

In Australia, thousands of people took part in Black Lives Matter protests and marches across the country. Australia's protests were used to call for an independent investigation into the more than 400 Aboriginal deaths in custody recorded in the past 30 years and an end to racial profiling by police.

The Black Lives Matter movement showcased both popular participation in the demonstrations and the message being portrayed — that race is a factor that can undermine participation in a society.



■ Figure 17.4 – Raids by the Australian Federal Police on the home of a NewsCorp journalist and the offices of the ABC were seen by many as an attempt by the government to interfere with press freedom in Australia.

Source: Alan Moir, *Dutton and the enemy within*, 2019, author's permission, <www.moir.com.au>; and *Behind the lines*, <<https://behindthelines.moadoph.gov.au/2019/what-happens-on-tour/dutton-and-the-enemy-within>>

These examples highlight the various methods used by young people to participate in our political system. The use of new media — particularly social media — allow these organisations to bypass traditional gatekeepers of communication and organisation, giving hundreds of thousands of Australians the opportunity to actively participate.

Example: AFP raids on journalists — Effects on freedom of the press and speech

On 4 June 2019 the Australian Federal Police (AFP) raided the Canberra home of News Corp Australia journalist Annika Smethurst 401 days after she had written an article suggesting that the Australian Signals Directorate (ASD) was seeking to broaden its powers to spy on Australians. The article used documents that had been marked 'top secret'. A warrant was issued alleging that the publishing of these classified documents undermined Australia's national security laws. AFP officers raided Smethurst's home, and searched her phone and computer to determine the source of the leak.

On 5 June 2019 the AFP also raided the Australian Broadcasting Corporation's (ABC's) Sydney headquarters sorting through more than 9,000 documents and emails that they hoped would build a case against two ABC journalists — Dan Oakes and Sam Clark — who had produced stories two years earlier known as the 'Afghan Files'. These detailed Department of Defence documents that exposed the clandestine operations of Australia's elite special forces, including incidents of troops killing unarmed men and children. The raid was seen as an attempt to intimidate journalists and discourage whistleblowers. The ABC challenged the validity of the AFP raid. However, it was dismissed by the Federal Court.

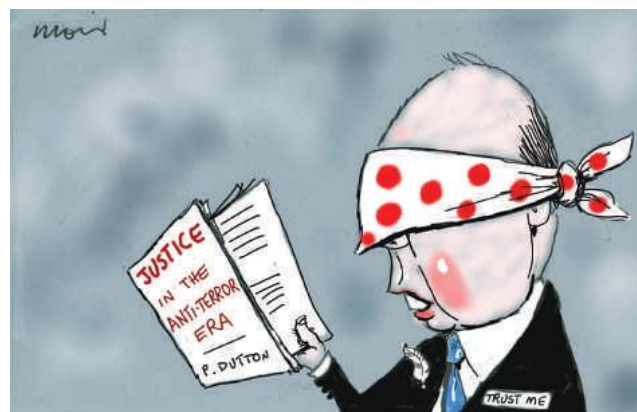
Both examples can be seen as a blow to the freedom of the press and journalists in Australia. Whistleblowers can be left vulnerable and deterred from informing on wrongdoing. Thus, popular participation is undermined.

The rule of law

Australia and the United States

Australia and the US are exemplary examples of the rule of law. Both are robust democracies with constitutional limits to power, separate branches of government with checks and balances, excellent rights protection and independent judiciaries. Their governments are subject to the law. They both have transparent lawmaking processes in representative legislatures. Both countries have transparent legal processes based on English common law and the adversarial system of trial.

Both countries could also improve the rule of law. In Australia, some legislation — such as anti-terror laws, surveillance and data retention laws, mandatory sentencing, retrospective laws and access to justice — raise concerns for the rule of law. In the US, the government's responses to terror and the heavy reliance on the judiciary to 'legislate through interpretation' are persistent issues. The Trump Administration has used executive orders to carry out policies without the consent of Congress. The impeachment of Donald Trump illustrates the politicisation of the definitive check on the abuse of executive power. Meanwhile, the Supreme Court's decision that Trump's yet to be released tax records must be disclosed is an example of judicial independence and executive accountability to law.⁴



■ Figure 17.5 – Both the United States and Australia have relatively good human rights records. However, their responses to terror have raised persistent issues.

Source: Alan Moir, *Justice in the anti-terror era*, 2016, author's permission, <www.moir.com.au>

“robust democracies with constitutional limits to power, separate branches of government with checks and balances, excellent rights protection and independent judiciaries. Their governments are subject to the law.”

Background information: The rule of law

The rule of law is the sum of other principles. The following criteria are necessary conditions for the rule of law to exist:

- constitutional limits to power, such as the doctrine of the separation of powers;
- an independent judiciary — see: the next section of this chapter;
- laws are universally and equally applied, including to those who make the law and the wealthy and powerful;
- government acts according to law;
- laws are coherent, known and capable of being obeyed;
- laws do not target specific individuals or groups;
- legal rights are respected, such as the right to silence and the presumption of innocence;

- laws are not retrospective — that is, they do not apply from a date in the past; and
- trials are fair and based on natural justice — see: the final section of this chapter.

The rule of law is the restraint of arbitrary power by laws. All of the principles above contribute to this aim. It is the opposite of the rule of men — a feature of autocratic political systems.

Table 17.5 summarises how Australia and the US uphold and undermine the rule of law.

⁴ Donald Trump has not made his tax records public, despite disclosure of such records being standard practice for public officials in the US system.

The rule of law			
Australia		United States of America	
Upholds	Undermines	Upholds	Undermines
- Constitutional separation of powers - Westminster conventions separate executive and legislative branches - Judicial checks and balances restrain legislative and executive power Example: Section 44 cases in the 45th parliament and <i>Thoms v Commonwealth</i> 2020	- Executive dominates parliament to an extent that may undermine the separation of executive and legislative power, and diminish checks and balances of the executive - The decline of parliament thesis applies	- Strict constitutional separation of the three branches of government - Robust checks and balances operate between all three branches of government	Increasing partisanship is undermining the checks and balances between congress and the presidency
Judicial independence protected by Section 72 of the Constitution	Executive power to appoint judges is unchecked	- Judicial independence protected by Article 3 of the Constitution - Judicial appointments require the consent of the Senate	Judicial appointment is a politicised process
- Cabinet, the ministry and the public service accountable through parliamentary oversight Example: Senate Standing Committee for the Scrutiny of Delegated Legislation, and the Joint Committee of Public Accounts and Audit - The executive is accountable through judicial review Example: <i>Robodebt</i> - High Court has limited some executive power under Section 61	- Ministerial discretion is excessive in some portfolios Example: Home Affairs - Up to 25% of delegated legislation is exempt from disallowance by parliament - Henry VIII clauses in some statutes undermine the separation of powers - Executive power is expanding	- Congress and courts check Presidential power - Trump Administration frustrated by the power of congress — especially 2018 - House of Representatives impeached President Trump in Dec 2019. The Senate acquitted the President in Feb 2020 - Supreme Court ruled that a grand jury should have access to Mr Trump's tax returns against his will	Possible misuse of the presidential pardon power by President Trump, to pardon convicted political allies
Anti-corruption commissions Example: NSW Independent Commission Against Corruption (ICAC) and the Western Australian Corruption and Crime Commission (CCC)	No federal ICAC	Office of the Inspector General investigates government corruption	Five Inspectors General dismissed by Trump Administration in six weeks in 2020
Courts have a presumption against retrospectivity and will not interpret statutes to apply from a past date unless the law explicitly states it is retrospective	- Parliament can make retrospective laws if it does so explicitly <i>See: Example: M68 v Minister for Immigration undermines rule of law</i> - Mandatory sentencing laws limit the independence of the courts	Constitution prevents Congress from making retrospective laws	

Common law protects legal rights	- Presumption of innocence and the onus of proof are reversed in some cases Example: terrorism offences, NSW bail laws and QLD anti-bikie laws - The expense of accessing legal remedy creates inequality of access to courts and legal rights by race, class and wealth	- Some legal rights Example: the right to silence — are protected by the Constitution - Grand juries of citizens decide if a suspect should be charged in serious indictable cases	The expense of accessing a legal remedy creates inequality of access to courts and legal rights by race, class and wealth
Royal Commission into Aboriginal Deaths in Custody (1987–1991) and the Royal Commission into the Protection and Detention of Children in the Northern Territory (2016–2017) placed executive treatment of Indigenous minority under judicial review	- Overpolicing of Indigenous minorities - Deaths in custody and rates of incarceration of the Indigenous minority have changed little despite judicial review by Royal Commissions	- Policing scrutinised by state governors and congresses since 2020 Black Lives Matter protests inspired by the death of George Floyd - National Commissions of Inquiry (equivalent to Australian Royal Commissions)	- Overpolicing of African American minority - Rates of incarceration of the African American minority - Militarisation of police forces
- Senate Standing Committee for the Scrutiny of Bills identifies and refers bills for examination by Senate legislative committees - Senate can initiate inquiries into the executive and other matters by referring investigations to Senate references committees - Senate Estimates committees scrutinise government actions - Parliamentary Joint Committee on Human Rights oversees human rights impacts of bills	- Meta-data and surveillance laws collect and retain data on all citizens despite a lack of reasonable suspicion - Facial recognition technologies in public places have the potential for over-surveillance without reasonable suspicion - Privacy laws are weak	Legislative and investigative committees of congress scrutinise bills and inquire into executive use of power	<i>PATRIOT Act 2001</i>⁵ increased executive power by removing judicial checks — i.e. warrants — on surveillance of citizens

■ Table 17.5 – How Australia and the United States uphold and undermine the rule of law.
Source: Stephen King, 2020

Example: M68 v Minister for Immigration undermines rule of law

In 2015 the High Court of Australia (High Court) decided a case brought by a Bangladeshi asylum seeker — known as M68. In *Plaintiff M68/2015 v Minister for Immigration and Border Protection & Ors*, M68 alleged that the Australian Government was detaining her on Nauru unlawfully.

On 29 August 2012, the governments of Australia and Nauru entered into a migration agreement. The agreement — called a Memorandum of Understanding (MOU) —

related to the transfer of asylum seekers by Australian authorities to Australian run detention facilities on Nauru. The *Migration Act 1958* did not authorise the Australian Government to make these arrangements at the time the MOU was signed. Without authorisation by statute, the government relied instead on executive powers to sign the MOU with Nauru. It was the validity of the executive powers which M68 challenged.

⁵ The *PATRIOT Act* is the common name for the *USA PATRIOT Act* or the *Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001*.

The High Court held that the Australian Government has the power to participate with Nauru in the detention of M68 — but only if authorised by a valid law of the Commonwealth. While the case was underway, the Commonwealth Parliament hurriedly passed the *Migration Amendment (Regional Processing Arrangements) Act 2015*. The amending Act — passed on 24 June 2015 — inserted Section 198AHA into the *Migration Act 1958* to legally authorise the Australian Government to enter into the MOU with Nauru. The legislation was backdated to 18 August 2012 — that is, before the date the MOU was signed — to ensure the Act covered the agreement. It was a retrospective law.

Retrospective laws undermine the rule of law. Laws should be known and predictable — this is a condition of the rule of law. A person cannot comply with a law which has not yet come into effect and government policies should be lawful at the time of implementation.

Attempts to legislate retrospectively generate debate and discussion because such laws are unpredictable and, therefore, unjust. Australia's political and legal system tolerates retrospective laws.

The High Court ruled in *R v Kidman* [1915] HCA 58 that retrospective laws are constitutional. However, Australian courts resist retrospective law. Courts use the 'presumption against retrospectivity' — a common law principle — to guide statutory interpretation. A statute must be unambiguously retrospective to overcome the courts' presumption against retrospectivity.

In *Director of Public Prosecutions (Cth) v Keating* [2013] HCA 20, the High Court upheld the common law principle of the 'presumption against retrospectivity', citing a leading authority on the interpretation of legislation:

*A person cannot rely on [both] ignorance of the law and [be] required to obey the law. It follows that he or she should be able to trust the law and that it should be predictable. A law that is altered retrospectively cannot be predicted. If the alteration is substantive it is therefore likely to be unjust. It is presumed that Parliament does not intend to act unjustly.*⁶

⁶ Bennion, Francis, Goodal, Kay and Morris, Geoffrey, Bennion on statutory interpretation: A code, LexisNexis, 5th ed, 2008, in Australian Law Reform Commission, A common law principle, 2015, <<https://www.alrc.gov.au/publication/traditional-rights-and-freedoms-encroachments-by-commonwealth-laws-alrc-interim-report-127/9-retrospective-laws/a-common-law-principle-6/>>.

Example: United States Office of the Inspector General and Supreme Court hold President Trump accountable to the law

In the US every President since Richard Nixon (1969–1974) and every presidential nominee of the major parties since 1976 have released their tax returns. Although Donald Trump made numerous assertions that he would release his tax returns, as of 2020 this has not been the case. While there is no law requiring presidential candidates — or the President — to share their tax returns, there is an unwritten understanding that the Office of Presidency requires a certain amount of transparency.

Since 2019 multiple House of Representatives committees have subpoenaed both the accounting firm and banks used by Trump to access his personal financial records in addition to some of his business records. Furthermore, Manhattan District Attorney Cyrus Vance has also issued subpoenas for Trump's personal and business tax returns to investigate claims he paid 'hush money' to two women he had past sexual relationships with. Trump sought to quash the subpoenas in multiple courts. However, Trump was unsuccessful.

On appeal to the US Supreme Court lawyers for Trump argued that a sitting president is immune from any criminal proceedings while sitting as President.

On 9 July 2020 the US Supreme Court handed down two 7–2 rulings. In the first, the court ruled that the Manhattan District Attorney can obtain Trump's financial records and these can be turned over to a grand jury as part of a criminal investigation. In the second case the court prevented the Democrat led House of Representatives committees from obtaining similar documents. Vance claimed that "this is a tremendous victory for our nation's system of justice and its founding principle that no one — not even a president — is above the law".⁷

The *Inspector General Act (1978)* established twelve Federal Offices of Inspectors General (OIG). Since then this number has grown to 73. The primary role of each OIG is to identify, audit and investigate allegations of fraud, waste, abuse, embezzlement and mismanagement of any kind within their executive department.

⁷ District Attorney Cyrus Vance, cited in 'US Supreme Court rules grand jury, but not Democrats, can have Donald Trump's tax records', ABC News, 9 July 2020, <<https://www.abc.net.au/news/2020-07-10/donald-trumps-tax-records-can-be-examined-court/12441276>>.

Inspectors General are appointed by the President and confirmed by the Senate. Over a six-week period from April to May 2020, President Trump used his position to remove five Inspectors General, namely from the Intelligence Community, Department of Defence, Department of Health & Human Services, Department of State and Department of Transport.

As Inspector General of the Intelligence Community, Michael Atkinson handled the whistleblower complaint which triggered Trump's impeachment. Steve Linick, Inspector General of the State Department, had been investigating Secretary of State Mike Pompeo for suspected abuse of office.

Perceptive students should note that the firing of these Inspectors General highlights the undermining of the executive oversight apparatus. House Speaker Nancy Pelosi described Trump's actions as a "dangerous pattern of retaliation against the patriotic public servants charged with conducting oversight on behalf of the American people".⁸



■ Figure 17.6 – The independence of the United States Supreme Court enables it to act as a check and balance on the power of the executive and the legislature.

Source: Ken Hammond, USDA, *Supreme Court building, Washington, DC, 2011*, Public Domain, <<https://commons.wikimedia.org/w/index.php?curid=45999>>

Judicial independence

Australia and the United States

The court systems of Australia and the US are wholly separate and independent. Legislatures and executives are the political branches of government. The judiciary must be apolitical and impartial to uphold the rule of law. The constitutions of both countries create a strict separation between the judiciary and the political branches of government, upholding the rule of law.

Australia and the US inherited the separation of judicial power and the adversarial trial from Britain. A shared characteristic between the countries is federalism, which means Australia and the US have federal and state judiciaries.

Chapter 3 of the *Commonwealth of Australia Constitution Act 1900* (the Constitution) and Article 3 of the US Constitution perform the vitally important role of separating the courts in each country from their political branches of government. See: *Background information: Judicial independence*.

Background information: Judicial independence

Judicial independence is the separation of the judiciary from the legislative and executive branches of government, thus protecting it from interference and intimidation. It is one of the essential features of the separation of powers and the rule of law.

Judicial independence is essential for effective judicial review. The High Court may rule statutes unconstitutional. Intermediate and superior courts declare the law when interpreting statutes. In these ways, an independent judiciary checks and balances the powers of the legislature.

An independent judiciary also checks the executive. Statutes are the vehicle for carrying out the executive's policies. Statutes are broad, giving governments the flexibility to implement them in different ways. Courts may have to decide if a government's policies are permissible under the law. Courts can limit a government's freedom of action by declaring its policies unlawful. An independent judiciary is able to make checks and balances on the powers of the executive.

⁸ Speaker of the House, Nancy Pelosi, Pelosi statement on late-night firing of State Department Inspector General, 2020, <<https://www.speaker.gov/newsroom/51520-2>>.

Table 17.6 summarises how Australia and the US uphold and undermine judicial independence.

Judicial independence			
Australia		United States of America	
Upholds	Undermines	Upholds	Undermines
• Constitution establishes a strict separation of the federal judiciary • High Court interpreted Section 71 narrowly, preserving the independence of Chapter 3 courts • Cases: Boilermakers Case (1956) and Brandy's Case (1995)		• Constitution establishes a strict separation of the federal judiciary	
• Constitution Section 72 separates the powers of appointment and dismissal of judges • Executive appoints judges; Legislature dismisses judges	• Executive appointment of judges unchecked	• Constitution Article 2 requires consent of the two political branches of government – President nominates judges; – Senate confirms judges; – Congress impeaches and removes judges — see below	• Appointments can become a political contest between the President and the Senate Example: Justice Brett Kavanaugh nominated by President Trump but resisted by Democrats in the Senate <i>See: Example: Justice Brett Kavanaugh — The politicisation of judicial appointment in the United States</i>
• Constitution Section 72(ii) provides for the removal of federal judges by parliament on the grounds of "proved misbehaviour or incapacity" • Wording of Section 72 (ii) promotes the accountability of parliament for any motion to remove a federal judge Example: Justice Lionel Murphy <i>See: Example: Justice Lionel Murphy, Chapter 14</i>		• Constitution Articles 1 and 2 provide for the impeachment of federal judges • Constitution Article 3 says judges hold office "during good behaviour" • Impeachment is a two-step process: – House of Representatives passes Articles of Impeachment – Trial by the Senate hears the case against an impeached judge and may remove them with a two-thirds majority vote – Requirement for a Senate super-majority enhances judicial independence and reduces partisanship in judicial accountability	

Similar constitutional arrangements in states and territory jurisdictions to the Commonwealth, protecting judicial independence		Similar constitutional arrangements in state jurisdictions to the federal level, protecting judicial independence	- Seven states elect supreme court judges by popular vote - Elected judges are potentially subject to political influence because they must compete for election or re-election - Note: These seven states have statistically higher rates of executions <i>See: Example: Electing judges can undermine judicial independence</i>
	Legislation can diminish judges' discretion to interpret the law Example: Acts Interpretation Acts and Mandatory Sentencing Acts	- Constitutional Bill of Rights empowers judiciary to a greater extent than in Australia - Courts have final say over many rights	

■ Table 17.6 – How Australia and the United States uphold and undermine judicial independence.
Source: Stephen King, 2020

Example: Justice Brett Kavanaugh — The politicisation of judicial appointment in the United States

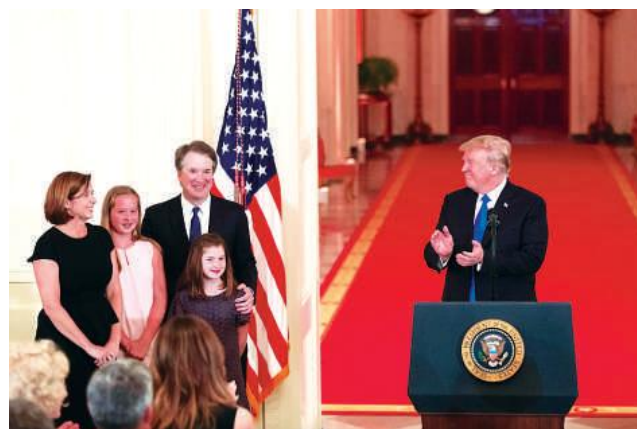
The power of the President to appoint justices to the US Supreme Court is one of the most consequential decisions a president can make. Since 2010 all Supreme Court nominations have been based on political ideologies creating a court that is often split along partisan lines.

In July 2018 President Donald Trump nominated Brett Kavanaugh to the Supreme Court to replace the retiring Justice Kennedy. Kavanaugh is a conservative judge who worked as a counsel for the White House during the Bush Administration.

Supreme Court nominations require confirmation by the Senate. The Senate Judiciary Committee plays a key role in reviewing each nomination. Kavanaugh faced approximately 48 hours before the Senate Judiciary Committee, answering more than 1,200 questions. During the committee hearings sexual assault allegations emerged against Kavanaugh, requiring further investigation. On 28 September 2018 the Senate Judiciary Committee voted 11–10 to send the Kavanaugh nomination to the full Senate with a favourable nomination. All Republican members voted for the motion and all Democrat members voted against the nomination.

On 6 October 2018 the Senate voted 50–48 to confirm Kavanaugh's nomination. All Democrats bar one voted against his nomination. At his confirmation, President Trump apologised to Kavanaugh and his family for the “terrible pain and suffering you have been forced to endure” and called the Senate hearing a “campaign of political personal destruction”.⁹

Justice Kavanaugh's appointment to the Supreme Court highlights the political contest that can ensue between the President and the Senate.



■ Figure 17.7 – The appointment of Justice Kavanaugh by Donald Trump was controversial.
Source: The White House, *The Kavanaugh family and Donald Trump*, 2018, Public Domain, <<https://commons.wikimedia.org/w/index.php?curid=70709109>>

9 ‘Donald Trump apologises to Brett Kavanaugh for “terrible pain”, says assault allegations were a “hoax”’, ABC News, 9 October 2018, <<https://www.abc.net.au/news/2018-10-09/trump-says-allegations-against-kavanaugh-hoax/10354254>>.

Example: Electing judges can undermine judicial independence

Electing judges exposes them to political processes. In many people's minds, 'politics' is synonymous with bias. Politics and bias — even the perception of bias — undermines the most fundamental quality of a judge — impartiality.

Some states only elect justices in the first instance. Others elect them to subsequent terms. Elected judges who must face re-election may lack independence because they need to please a majority of electors if they wish to maximise electoral support. Electing judges can lead to populism infecting the judiciary.

Supreme court judges are elected in:

- Alabama;
- Illinois;
- Louisiana;¹⁰
- New Mexico;
- Pennsylvania;
- Texas; and
- West Virginia.

Of these, Alabama, Louisiana, Texas and West Virginia require the re-election of judges for subsequent terms. Three of these states have high prisoner execution rates — Texas (1st), Alabama (7th) and Louisiana (13th) — possibly because elected judges must be tough on crime to satisfy public opinion.

Natural justice

Australia and the United States

Australia and the US use the centuries old adversarial trial system. Its processes and procedures uphold natural justice. See: *Background information: Natural justice*.

Also, revise:

- Chapter 14 — Table 14.2 in for an overview of the stages of the adversarial trial and how they uphold natural justice;
- Chapter 14 — *Background information: Natural justice and public confidence; and*
- Chapter 12 — *Background information: What is a tribunal?*

The features of the adversarial trial related to natural justice are:

- impartial judges and juries passively adjudicate;
- parties actively present their cases;
- strict rules of evidence ensure the quality of evidence; and
- courts are open to public and media scrutiny.

Access to the courts and equality before the law are aspects of natural justice. In both countries, the adversarial trial is expensive, time consuming, dependent on strict procedures and reliant on legal expertise. These factors undermine access to justice and equality before the law.

Both countries have complemented trials with alternative dispute resolution (ADR)

mechanisms, especially since the 1970s. See: Chapter 12 — *Background: What is a tribunal?*

Australia uses ADR in tribunals such as the Administrative Appeals Tribunal (AAT). In Western Australia, civil pre-trial procedures require compulsory mediation between the parties to reduce the need for costly trials. The US has many ADR processes as well. See: *Background information: Alternative dispute resolution*.

In both countries, ombudsmen act on complaints made against public services. While Ombudsmen can make recommendations, they cannot enforce a decision. They can help achieve natural justice by increasing access to dispute resolution.

Background information: Natural justice

The Ancient Athenian philosopher Aristotle thought that certain things were fair and just 'by their nature'. For him, justice came from nature, not from man. For Aristotle, no rule of law is necessary to decide what is just. Instead of relying on law for justice, following Aristotle we need to ask, "Is this law just?", rather than accept "it is just because it is lawful".

The best way to think about natural justice is to think of fairness. If something seems fair, then it possesses the quality of natural justice. In legal terms, natural justice refers to fair

¹⁰ Louisiana was a French colony and retained the inquisitorial system of trial. It is an interesting case study because of its elected judges, inquisitorial system and high rates of execution.

methods of dispute resolution, including fair legal processes and fair trials.

In English common law, natural justice involves:

1. impartiality or a rule against bias — in Latin: *nemo iudex in causa sua*; and
2. the right to a fair hearing — in Latin: *audi alteram partem*.¹¹

In modern times the concept of natural justice has been extended to a general duty to act fairly. All decision makers in government have this duty. In addition to the two principles above, the duty to act fairly also includes:

3. basing decisions on evidence; and
4. open and transparent processes; that is, open courts and tribunals.

Note that Australia and the US use common law and adversarial trial systems. Units 1 and 2 of the Politics and Law course covered these topics. Students are encouraged to revise their understandings of common law and the adversarial trial process.

Background information: Alternative dispute resolution

Alternative dispute resolution (ADR) upholds natural justice by improving access to justice and equality between parties.

ADR uses a range of different processes depending on the circumstances. They include negotiation, mediation, conciliation and arbitration. Negotiation is the process of talking through issues and coming to a mutual resolution — there is no third party. Mediation requires a neutral third party to help resolve disagreements by clarifying issues and presenting alternative solutions. Conciliation brings parties together to achieve a compromise. Arbitration is similar to conciliation except that the compromise between the parties is a formalised agreement.

ADR is cheaper, quicker and less formal, and does not require legal representation. It is also more flexible and can resolve disputes taking into account merit as well as law. Parties retain control of their case when using ADR. ADR can achieve win/win outcomes for both parties. Litigation almost always results in a win/loss outcome.

The *Australian Human Rights Commission Act 1986* requires the Human Rights Commission to use conciliation to resolve disputes. The *Family Law Act 1975* forces parents contesting child custody to use ADR before going to court. Tasmania has an *Alternative Dispute Resolution Act* passed in 2001. These are examples of statutes that entrench natural justice in Australia.

Table 17.7 summarises how Australia and the US uphold and undermine natural justice.

Natural justice			
Australia		United States of America	
Upholds	Undermines	Upholds	Undermines
Adversarial trial processes robustly uphold fairness, due process and natural justice	Barriers to access and equality related to the cost of the adversarial trial system	Adversarial trial processes robustly uphold fairness, due process and natural justice	Barriers to access and equality related to the cost of the adversarial trial system
- Constitutional rights to a jury trial — specified in Section 80 — and legal representation (implied) for federal offences - Legal aid is available for criminal cases on a means test and a merit test	Economic, social, educational and geographical disadvantage reduce access and equality	- Litigious culture and constitutional rights increase awareness of natural justice - Legal aid provided by US Government Legal Services Corporation and state agencies	- Overreliance on litigation increases cost of legal services and leads to culture of lawsuits instead of more reasonable forms of achieving fairness - Economic, social and educational disadvantage reduce access and equality

table continued overleaf

¹¹ *Nemo iudex in causa sua* means 'no one is to be a judge in their own cause'; and *audi alteram partem* means 'to hear both sides'.

table continued from previous page

• Law reform commissions continually review trial and legal processes and recommend reforms to uphold natural justice	• Trial processes are lengthy, and courts have backlogs of cases	• The American Law Institute is an example of independent body promoting the better administration of justice and law reform	• Trial processes are lengthy, and courts have backlogs of cases
• Use of ADR to increase access to justice and equality of parties		• Use of ADR to increase access to justice and equality of parties	
• Legal rights upheld by international agreements signed by Australia Example: <i>International Covenant on Civil and Political Rights</i> – Article 14 — Equality before the courts and tribunals; Right to a fair trial – Article 15 — No one can be guilty of an act which is not a crime – Example: protesting – Article 16 — Right to recognition as a person before the law – Article 17 — Freedom from arbitrary or unlawful interference. – Article 26 — Equality before the law	• Historical and contemporary issues of fairness concerning justice for Indigenous Australians • High incarceration rates of Indigenous Australians	• Constitutional Bill of Rights protects natural justice – 5th Amendment — the right to due process and silence – Other Amendments support natural justice – 4th — Freedom from unreasonable searches and seizures – 6th — Right to a speedy and public trial – 7th — Right to trial by jury in civil cases – 8th — Freedom from excessive bail, cruel and unusual punishments.	• Historical and contemporary issues of fairness concerning justice for Indigenous Americans and other racial minorities • High incarceration rates for African-Americans • Death penalty can still be used for some federal crimes and is still used in some states
• <i>International Covenant on Civil and Political Rights</i> forms the basis of state and territory bills of rights in Victoria, Queensland and the ACT	• No federal bill of rights • No bills of rights in Western Australia, South Australia, Tasmania, New South Wales or the Northern Territory		• US not a signatory of international agreements, including the <i>International Covenant on Civil and Political Rights</i>

■ Table 17.7 – How Australia and the United States uphold and undermine natural justice.
Source: Stephen King, 2020

Summary

Australia and the US are robust liberal democracies. Nevertheless, they approach liberal democracy in different ways. They are quite different in terms of political representation and popular participation. They are quite similar in terms of the rule of law, judicial independence and natural justice.

Political representation — Australia

- Preferential voting for the House of Representatives achieves the political representation of the majority in the legislative and executive branches — that is, the ‘political’ branches of government.
- Minorities can achieve political representation in the Senate through the proportional representation electoral system.
- Parliament and government do not adequately represent Australia’s cultural, social or economic diversity.
- The Australian Electoral Commission is an independent electoral body administering centralised and consistent electoral laws.
- There has been a willingness to undertake electoral reform to improve political representation.

Political representation — United States

- The simple first past the post electoral system is used in all elections. FPP ensures the political representation of a simple majority of electors in the legislative and executive branches of government.
- FPP severely undermines the political representation of minorities.
- Gerrymandering reduces the fairness of political representation in the House of Representatives.
- The lack of independent administration of elections allows the two major parties —the Democrats and the Republicans — to ‘game’ the system for political advantage.
- Decentralisation of electoral procedures — that is, 50 states running elections for one national government — causes inconsistency across the country.
- A lack of effective electoral reform prevents improvement to political representation.
- Congress and government do not adequately represent the US’s cultural, social or economic diversity.

Popular participation — Australia

- Compulsory voting strongly encourages participation by all eligible voters at least every three years federally and every four years in most states.
- Low voter registration amongst the young is problematic.
- Australian political parties offer a diverse range of ideologies and provide vehicles for active citizens to participate more fully.
- Rates of membership of parties are declining for the established parties. However, there is increasing fragmentation of the vote leading to the rise of minor and micro parties which are capable of achieving representation in parliament.
- Pressure groups are common, and many Australians belong to them. They are useful for representing the plurality of interests in society. Nevertheless, they can also distort representation if powerful corporatist groups can lobby decision makers without transparency or openness. A code of conduct and the registration of lobbyists help reduce the overrepresentation of influential groups.

continued overleaf

- Global issues such as climate change and social justice motivate popular participation by young people.
- New media — for example, social media — provide avenues for popular participation unmediated by powerful interests and gatekeepers.

Popular participation — United States

- For active citizens, there is a limited choice of political parties to join with only two parties capable of achieving representation in congress.
- Popular participation is high during the presidential primaries when members of each party campaign and vote for their preferred presidential candidate.
- Participation occurs within the internal debates of the two major parties, which both have broad ideological spectrums offering opportunities for a range of views to be represented within their organisations.
- Pressure groups are influential, especially powerful sectional groups. Corporatism is a feature of US pressure group activity, especially since the removal of limits to political donations.
- Global issues and new media have increased popular participation by young people.

The rule of law — Australia and the United States

- Both countries have a deep respect for their constitutions and the laws created by their legislatures and courts.
- Each country separates the powers of government. They do so in different ways.
- Both have independent judiciaries, and clear and transparent processes for lawmaking.
- Similar problems are shared. Laws designed to counter particular threats such as terrorism or to crack down on crime with mandatory sentencing infringe on the independence of the courts and reverse the rights of accused persons.
- Retrospective legislation is a breach of the principles of the rule of law. Laws should be known and predictable, but cannot be either if they are backdated. The US prohibits retrospective laws in its constitution. Australia's system does not prohibit backdated laws. However, Australian courts presume that parliament does not intend an injustice when they interpret backdated laws.

Judicial independence — Australia and the United States

- There are solid guarantees of independence in terms of appointment, dismissal and remuneration of judges.
- These guarantees protect judges from political and other forms of pressure.
- Some US states elect judges, potentially compromising impartiality because of the intrusion of politics into judicial appointments. Elections expose judges to the popular will, which may not always be just.

Natural Justice — Australia and the United States

- The rules and procedures of adversarial trials reflect the principles of natural justice.
- Legal aid is available to those unable to afford legal representation, but there are limits to how much the aid schemes in both countries can reduce the effects of wealth on outcomes.
- Backlogs and delays reduce the achievement of justice in the courts of both countries.
- Both countries have attempted to improve natural justice through the adoption of cheaper, quicker and less formal ADR processes which can resolve disputes on merit and not merely the law.

Exam practice questions

Short answer

- 1a) Identify **two** features of judicial independence in Australia.
- 1b) Outline **three** elements of the rule of law.
- 1c) Discuss the extent to which popular participation is a reality in Australia.
- 2a) Explain what is meant by the 'separation of powers'.
- 2b) Outline **three** principles of natural justice.
- 2c) Discuss **two** features of political representation in a country other than Australia.
- 3a) Explain the term 'democracy'.
- 3b) Outline **three** ways in which popular participation is practiced in a country other than Australia.
- 3c) Discuss **one** argument for and **one** argument against the proposition that 'the rule of law is not fully upheld in Australia'.
- 4a) Define the term 'natural justice'.
- 4b) Outline **three** ways in which political representation is achieved in Australia.
- 4c) With reference to a country other than Australia, discuss **one** argument for and **one** argument against the proposition that 'the independence of the judiciary is compromised'.

Source analysis

Read the source below and answer the questions that follow.

The source is adapted from: Tom McCarthy, 'Trump's taxes may be released to Manhattan grand jury, supreme court rules'.¹

The Supreme Court has ruled that a Manhattan grand jury may have access to some of Donald Trump's financial documents. Prosecutors in New York had sought the documents as part of an investigation into whether or not Trump had improperly handled hush payments, including one during the 2016 presidential campaign.

"This is a tremendous victory for our nation's system of justice and its founding principle that no one – not even a president – is above the law," Cy Vance Jr, the Manhattan district attorney, said. "Our investigation, which was delayed for almost a year by this lawsuit, will resume, guided as always by the grand jury's solemn obligation to follow the law and the facts, wherever they may lead."

The court affirmed both that Congress had the power to subpoena the documents and that the president had some privilege not to turn them over, and ordered a lower court to reconsider the "significant separation of powers concerns implicated by congressional subpoenas for the president's information."

Gillian Metzger, professor of constitutional law at Columbia University, said before the rulings were handed down that it would be "very concerning" if the court failed to support the congressional subpoenas.

continued overleaf

¹ McCarthy, Tom, 'Trump's taxes may be released to Manhattan grand jury, supreme court rules', The Guardian, 9 July 2020, <<https://www.theguardian.com/law/2020/jul/09/trump-tax-returns-supreme-court-ruling>>.

“Our system of separation of powers requires that Congress be able to exercise its powers, and to do that, it has to be able to get information and to undertake oversight of the executive,” she said.

The congressional subpoena for Trump’s tax records from one of his accountants, Mazars USA, set up a broader separation of powers clash. The House intelligence committee sought the documents as part of its investigation into foreign influence in the 2016 election, while the oversight and reform committee said it was considering rewriting ethics laws to require elected officials to disclose tax documents.

Trump lawyer Patrick Strawbridge argued that “these types of subpoenas are going to be uniquely troublesome and burdensome,” saying that “Congress lacks any power to inquire into the private affairs of any individual.”

- 5a) Explain what is meant by the ‘rule of law.’
- 5b) With reference to the source, explain in your own words, **two** reasons why the decision of the grand jury can be taken to be significant in providing a check and balance on the power of the executive.
- 5c) With reference to **two** examples, discuss the extent to which natural justice is observed in Australia.
- 5d) With reference to at least **one** example beyond the source, evaluate the extent to which the rule of law is upheld in both Australia and **one** other country.

Essay

- 6) ‘Although Australia is a robust liberal democracy, the country still faces challenges in ensuring that democratic principles are fully adhered to.’
With reference to at least **three** democratic principles, evaluate this claim.
- 7) Analyse the extent to which Australia and **one** other country uphold the democratic principles of political representation and judicial independence.

Investigation

- 1) Provide a visual summary of the five democratic principles by completing the table below:

Democratic principle	Definition	Associated elements, features and/or principles
Political representation		
Popular participation		
The rule of law		
Judicial independence		
Natural justice		

- 2) Democratic principles are interrelated and complementary. Explain the relationship between the following pairs of principles:
 - a) Political representation and popular participation
 - b) The rule of law and judicial independence
 - c) The rule of law and natural justice
 - d) Judicial independence and natural justice

For further exam practice questions see page 447

Glossary

Words Definition

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 valid votes.

accountability Being responsible for one's conduct, decisions or (in)actions. Accountability is an essential feature of responsible parliamentary government.

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.

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.

alternative dispute resolution Also referred to as ADR. An alternative to litigation and adjudication, which necessitates court action. A variety of cheaper, quicker ways to resolve disputes and includes negotiation, mediation, conciliation and arbitration.

altruistic groups Cause groups

appeal A review of a 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. Appropriations 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 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 larger portfolios.

Attorney-General A cabinet minister with responsibility for the courts and the judicial system. Legally bound to defend the independence of the judiciary. Referred to as the 'first law officer' of the nation.

audi alteram partem Latin for 'to hear both sides'. It is the principle that parties must know the case against them and be equally able to present their case to a court or tribunal. The procedures of a trial must be designed to allow both parties equality of opportunity in presenting their case. A principle of natural justice. See also: due process.

Auditor General An independent officer of the parliament responsible for performance and financial reviews as well as assurance audits into the public service, other executive agencies and the government. Reports to the parliament on executive performance. A contemporary enhancement of the parliament's responsibility role.

backbencher A member of parliament who is not in cabinet or the ministry — the government front bench — or a member of the opposition shadow front bench.

balance of power The position in which a political party or an individual may use their position and vote to decide the fate of a bill or a motion. Commonly held by minor parties and Independents in the Senate. These parties and Independents are referred to as the Senate cross bench.

balance of power mandate Claimed by the parties or Independents with the balance of power in either house of parliament, but usually the Senate. The justification for amending, passing or repealing bills in the parliament. An extraordinary power they may wield because the Senate is such a powerful chamber.

bicameral A legislature composed of two houses or chambers, an upper house (of review) and a lower house.

bicameralism (strong) A legislature with two houses of equivalent power. Australia and the United States of America 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 Royal Assent to a bill.

bills of rights A codified law containing a list of rights. They may be 'weak' statutory bills of rights designed on the principles of constrained parliamentarianism or they may be 'strong' statutory or constitutional bills of rights designed on the principles of judicial supremacism.

Braddon Blot A concession to the Tasmanian colonial Premier Edward Braddon which saw Section 87 included in the Constitution. The section required the Commonwealth to grant 75 per cent of all revenues it collected from excise — an exclusive financial power of the Commonwealth — to the states during the first 10 years following Federation. The Surplus Revenue Act 1910 enabled the Commonwealth to pay its surplus revenues into trust funds and thus avoid Section 87. The section is defunct.

bureaucratic A system of administration for large organisations. Each person in the organisation has a formal role, a codified set of duties and responsibilities and is set within a hierarchy in which they are accountable to those above and responsible for those below. Detailed procedures and record keeping are features of bureaucracies. They are efficient ways of organising work. Government departments are bureaucratic.

by-election An election held in one 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 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 committee An executive committee composed of a selection of cabinet ministers; for example the National Security Committee of Cabinet.

cabinet secrecy A Westminster convention that the deliberations and discussions of cabinet should be held out of public view. It allows robust and frank discussion within cabinet. It also allows cabinet to reach a single position and present as a united government (cabinet solidarity).

cabinet solidarity A Westminster convention that the Cabinet presents as a united government. All ministers are bound by the convention to publically support the Cabinet's position on all issues. If a Minister cannot publically support Cabinet they are required, by convention, to resign.

casting vote A vote used to break a deadlocked vote. The Speaker of the House of Representatives possesses a casting vote which they may use to vote for or against a motion to resolve it. Contrast with deliberative vote.

casual vacancies Seats in either house of parliament may become vacant in the event of a retirement, criminal conviction, incapacity or death of a sitting member of the House of Representatives or Senator. Casual vacancies are filled differently in each house. As the House of Representatives is the people's house, a vacancy is filled via a by-election. The Senate is the states' house so vacancies in the upper house are filled by a nominee of the parliament of the state concerned.

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 they believe is a general community good. Also known as altruistic or promotional groups.

censure motion A motion to discipline a minister or the government. A successful censure motion in the House of Representatives would — by the conventions of individual or collective ministerial responsibility — require a minister or the government to resign. A key part of the parliament's responsibility role. They are almost always defeated on party lines, which the government will always win. At best they provide the opposition with an opportunity to speak or debate.

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 the individual judges within it.

circular accountability A situation in which two parties hold each other to account. The Prime Minister and Governor-General each hold the power to dismiss the other.

COAG The Council of Australian Governments (COAG) was an institution of Australian federalism. A meeting of the heads of Australian governments; the Prime Minister, the six state Premiers, Chief Ministers from the two territories and the President of the Local Government Association. It was the main forum within which cooperative federalism operated with programmes such as the National Reform Agenda developed within COAG until National Cabinet was introduced during the COVID-19 pandemic.

code of conduct A comparatively recent innovation for the accountability of public officials and those who seek to influence them. There is a ministerial code of conduct, a public service code of conduct and proposals for a judicial code of conduct. There is also a code of conduct for lobbyists.

coercive federalism A federal system in which the central level of government possesses and exercises significantly more power than the regional governments. Australian federalism can be coercive when the Commonwealth uses its legislative and financial powers to direct state policy in areas of residual power.

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. Part of the parliament's 'responsibility function'.

common law Judge made law. Made in courts by judges when deciding cases which give rise to the need for new decisions or precedents. The doctrine of precedent is based on the principle of stare decisis. Precedents may bind lower courts within a hierarchy. They may be persuasive for higher courts, courts at the same level or courts in other common law hierarchies. 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 establishes 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, it debates the important issues of concern to the nation. It is sovereign and the foundation of Australian representative democracy.

conciliation A form of Alternative Dispute Resolution in which a neutral third party — a conciliator — assists two disputing parties to find common ground and resolve their dispute. The focus is to preserve the relationship between the disputing parties. The Australian Human Rights Commission uses conciliation to resolve disputes.

concurrent powers Powers granted by the Constitution to the Commonwealth and state parliaments. They are shared powers. Section 109 invalidates state laws that conflict with Commonwealth laws, to the extent of inconsistency.

conflict of interest A situation in which a decision maker's private or political interests may be in conflict with their public interest duties. Public officials who are elected — members of parliament — or appointed — public servants, judges — must act in the public interest and not use their position to advantage their own personal or political position. Codes of conduct are designed to avoid conflicts of interest. The Westminster convention of individual ministerial responsibility includes a specific requirement that ministers are not "personally or politically corrupt". Both houses of parliament have members' interest committees which monitor members of the House of Representatives and Senators' interests. Members of parliament must declare their assets, investments and other sources of income to avoid accusations of conflicts of interest. A major part of accountability is the check on conflicts of interest.

conservative The right of the political spectrum. The Liberal Party of Australia and the Nationals are considered conservative parties. Conservative parties believe in individual freedom and advocate a smaller role for government.

constitution Rules which govern the governors. A set of fundamental laws or conventions which create and define the institutions of power within a nation. May be in the form of a written document, but may also be a set of conventions.

constitutional bill of rights A bill of rights codified within a nation's constitution. The

strongest form of rights protection, yet can be very inflexible because of the difficulty of constitutional change. Leads to the superiority of the judiciary over rights (judicial supremacism).

constitutional conventions A set of unwritten rules or customs which govern the practices of government in systems derived from Britain's Westminster system.

constitutional crisis Any event in which the normal operations of the Constitution and or the unwritten Westminster conventions fail to resolve fundamental issues of governance. The major constitutional crisis in Australia's history was the dismissal of the Whitlam Government in 1975. In this instance conflict between unwritten constitutional conventions and the black letter law of the Constitution led to the crisis.

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.

constrained parliamentarianism Assigning the ultimate power over rights to the legislature, but allowing the judiciary to monitor and declare statute laws incompatible with rights. A 'declaration of incompatibility' by a court would require the parliament or the minister to explain why it was necessary for a law to infringe rights. It is based on a 'dialogical' approach to rights in which the parliament and the judiciary are in dialogue with each other over the impact of law upon rights. The dialogue is public, enhancing the accountability of the parliament and the executive by exposing policy and law to public debate and scrutiny. It is characteristic of 'weak' statutory bills of rights such as the Victorian Charter of Rights and Responsibilities Act 2006 and the ACT Human Rights Act 2004. The parliament retains ultimate power over rights. It is a modified version of parliamentarianism. See also judicial supremacism.

control order An instrument used by the executive to impose special conditions on criminal suspects (usually associated with terrorism). Controversial because they limit the freedoms of a suspect, not a convicted criminal. Offends the presumption of innocence, which is an important legal right.

convention (international law) Covenant, international law.

conventions Westminster conventions of responsible parliamentary government.

cooperative federalism A federal system in which the two levels of government work together to achieve outcomes. It requires strong institutions of federalism where the two levels come together to cooperate.

coordinate federalism A federal system in which the two levels of government work independently within their own spheres of power. It requires only weak institutions of federalism where the two levels come together to coordinate their relatively autonomous operations.

corporations power Section 51(xx) of the Constitution is a head of power which gives the Commonwealth Parliament the power to pass laws regulating corporations. Corporations are any 'incorporated body'. Incorporation is a very common feature of organisations, not just trading companies. Because of this the power is extremely broad, allowing the Commonwealth to regulate large sections of the economy with laws such as the Trade Practices Act 1974. It was used by the Howard Government to pass the industrial relations laws relating to WorkChoices, to regulate employment in corporations because Section 51(xxv) — the industrial relations power — was too narrow. WorkChoices was challenged in the High Court and upheld. Section 51 (xx) was also used in the Water Act 2000 to bypass state laws regulating irrigation from the Murray River. Because the power is very broad and the High Court seems willing to expand it further — into areas like industrial relations — it has contributed significantly to changes in the federal balance of power and coercive federalism in Australia in recent times.

corporatism A political theory which argues that there are powerful interests — corporates — within society which influence law making and policy in their own interests rather than in the public interest. These groups compete with each other for the attention of government. The media, large companies, sectors of the economy and even government itself can be considered 'corporates'. The theory can be used to explain the activity of some sectional pressure groups. The theory is critical of pressure groups because they may distort democracy.

court hierarchy A ranked order of courts. Courts are arranged in order 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.

covenant Convention (international), international law.

covering the field Section 109 of the Constitution resolves conflicts between Commonwealth and state laws in areas of shared concurrent powers. Section 109 invalidates state law "to the extent of the inconsistency". The Commonwealth may state in its law that it is 'intended to be the only law in the field'. 'Covering the field' was challenged by the states in the High Court, but was found to be valid. It has altered the federal balance of power in favour of the Commonwealth and made Australia a more coercive federation.

crossbench The term used to describe members of a house of parliament who are Independents or are 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.

cross 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 of parliament vote they usually vote with their party, but they may choose to vote against it in exceptional circumstances.

cross vesting Giving state courts the power to hear federal cases and vice versa. The granting of federal jurisdiction to State courts. It is a procedure used under Section 71 of the Constitution. It was more common before the Commonwealth Parliament used its Section 71 power to create additional federal courts, such as the Federal Court of Australia.

declaration of incompatibility A judgment by a court that a statute is not compatible with human rights codified in a statutory bill of rights. The Victorian Charter of Rights and Responsibilities Act 2006 and the ACT Human Rights Act 2004 provide for declarations of incompatibility by the courts. A mechanism of a 'weak' statutory bill of rights. A part of the constrained parliamentarianism approach to human rights protection in which a dialogue between the parliament and the courts ensures adequate public accountability yet retains the power of the parliament over rights.

decline of parliament thesis The argument that the modern parliament is unable to perform its major roles because of the rise of disciplined political parties and the dominance of the executive over the lower house, the house in which it is formed and to which it is theoretically responsible. The argument is countered by the revival of parliament argument.

delegate representative 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 the parliament's 'representative function'.

delegated legislation Lawmaking 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 Standing Committee for the Scrutiny of Delegated Legislation oversees regulations, ordinances and instruments. The Senate may pass 'disallowance motions' which remove from the executive the power to make 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. Contrast with casting vote.

democracy A system of government which is based on popular sovereignty — the will of the majority.

democratic socialism A progressive 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 the basic economic equality and outcomes for all citizens. It believes in socialism through democratic processes and not violent revolution. The early Australian Labor Party (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 form of democracy in which the people participate directly in their own government. The form of democracy developed in Ancient Athens. Used in Australia for referendums proposing formal changes to the Constitution. It is cumbersome and expensive, and has been replaced in modern democracies by representative democracy.

disenfranchise To remove a citizen's rights to vote and participate in government. It can be direct, such as limiting the vote to certain classes of citizen and excluding others. Or it may be indirect, such as through poor education, socio-economic deprivation, remote location or other such factors. The class of citizens most affected by disenfranchisement in Australia are Indigenous people. They were directly excluded by constitutional and ordinary law until the 1960s. Today, their relative disenfranchisement is a product of more indirect factors.

dissolution of parliament The formal end of a parliament by the Governor-General. The Governor-General may dissolve the parliament using powers under Section 28 of the Constitution prior to a normal general election. Section 28 powers are always exercised on the advice of the Prime Minister.

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.

doctrine of implied immunities and prohibitions A doctrine of interpretation developed by the United States Supreme Court and adopted by the High Court of Australia as a persuasive precedent. The doctrine provided a method of constitutional interpretation that allowed the High Court to protect the residual powers of the states. It was necessary because the residual powers are non-justiciable in themselves. The doctrine of implied immunities and prohibitions assumed that state residual powers were intended by the Founding Fathers to be safe from Commonwealth power because they had created a 'federal constitution'. It was used by the High Court from 1904 until 1920.

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 where previous decisions either bind or persuade future judgments where the facts of a case are similar.

doctrine of reserved powers Similar to the doctrine of implied immunities and prohibitions. The doctrine of reserved powers assumed that the Constitution intended to reserve the residual powers to the states because it was a 'federal constitution' and thus implied the states would have substantial power. It was used by the High Court from 1904 until 1920.

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 Minister. 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.

dual federalism Cooperative federalism.

dual voter A voter who votes strategically by voting for a major party in the House of Representatives and another — often a minor party — in the Senate, with the intention of checking government power.

due process Natural justice, duty to act fairly.

duty to act fairly Natural justice, due process.

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'. A maxim of statutory interpretation in which a series of specific terms is followed by a general term. The specific terms establish a 'class' and the general term leaves it open to the courts to decide what else belongs to the class — that is, what is 'of the same kind' as the class created by the statute. Allows statutes to be flexible and adaptable by the courts to changing societal circumstances without the parliament having to amend the law.

Electoral College An elected group of voters who then vote for a candidate for public office. The most prominent example is the Electoral College used to elect the United States President. Each State in the US is entitled to a certain number of Electoral College votes based on its population. If a Presidential candidate wins a state's vote they get all that state's Electoral College votes — except for Nebraska and Maine, which allocate Electoral College votes proportionately. The Electoral College meets some weeks after the popular vote to formally elect the President of the United States. The system was designed to temper the will of the majority, which the US Founding Fathers feared might simply be 'mob rule'.

electoral system A system that translates votes into the desired 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. They are classified as either majoritarian or proportional or a blended compromise of both.

Estimates (Senate) Senate committees that play an important role in the accountability of the executive — both the Cabinet and the public service. They are special sittings of eight legislative/references committees of the Senate that conduct investigations during the budget hearings at which the executive's spending is examined by parliament.

ex post facto Latin for 'after the fact'. Common law is made ex post facto.

excise A type of tax imposed on manufactured goods. Excises were imposed by some Australian colonies on the goods produced in others, creating a barrier to intercolonial trade. The removal of such barriers was one of the main reasons for the joining of the colonies into one federal nation. To prevent the future states imposing anti-trade taxes upon each other, excise was made an exclusive power of the Commonwealth through Section 90 of the Constitution. The word 'excise' has been subject to increasingly broad interpretations by the High Court, effectively expanding the tax collection power of the Commonwealth at the expense of the states, and contributing to the vertical fiscal imbalance (VFI) and the emergence of fiscal federalism in Australia.

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. Section 52 is an example.

EXCO The Federal Executive Council established by Section 62 of the Constitution. The forum through which the Governor-General receives advice from ministers.

executive The branch of government which carries out (executes) the law and makes policy on how law will be implemented. In the Westminster System it is indirectly elected and formed in the directly elected lower house of the parliament. Directly elected by the people in the Washington System. Often referred to as 'the government'. In Australia it is created by Chapter 2 of the Constitution, but mostly governed by unwritten Westminster conventions.

executive dominance The dominance of the executive arm of government over the legislature, in particular the lower house and much less frequently the Senate. It is the combined effect of the Westminster system's formation of the executive government in the lower house of parliament, the emergence of highly disciplined political parties and the use of a majoritarian electoral system which tend to deliver strong majorities. It is the principal cause supporting the decline of parliament thesis.

executive prerogative Powers the executive may exercise without parliamentary approval. A declaration of war is an example. Known in Britain as Crown Prerogative, the Australian executive has inherited similar powers. The Australian Government cannot use prerogative if the parliament has constitutional power to pass law using its own legislative powers.

exhaustive preferential voting A preferential voting system in which an elector must number all the candidates on the ballot paper — they must exhaust the preferences. Exhaustive preferential voting is used in Commonwealth and Western Australian elections.

express powers Powers codified in the Constitution. The Governor-General possesses express executive powers. The Commonwealth Parliament possesses express legislative and financial powers.

express rights Rights codified in written law, either constitutional or statutory.

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. 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.

external affairs Section 51(xxix) is a head of power that allows the Commonwealth Parliament to ratify — pass into law — international agreements such as treaties, trade agreements, and the various conventions and covenants of the United Nations that the federal executive has signed. It has become the increasingly important cause of the expansion of Commonwealth legislative powers since the 1980s. Its use — and the High Court's acceptance of its use — has affected the federal balance of power.

federal balance of power The balance of legislative and financial powers between the central and regional governments with a federation.

Federal Executive Council The formal executive. A council created by Section 62 of the Constitution and comprising the Governor-General and ministers. Referred to by the acronym EXCO.

federalism A system of government in which sovereignty is geographically divided between one central and two or more regional government, each sovereign within their own sphere.

Federation The act of becoming a federation. In Australia this involved the uniting of previously separate colonies into one “indissoluble Federal Commonwealth”, as noted in the preamble to the Constitution.

Federation Chamber A special committee of the House of Representatives. Its membership comprises the whole of that House and therefore all MPs. It passes non-controversial bills with minimal debate or scrutiny and by agreement between the parties. Its purpose is to speed up the passage of bills and free the House of Representatives to consider more contentious or contested bills.

fictional powers Powers of the Governor-General codified in the Constitution, but never exercised. Section 68 is an example.

filibustering The use of obstructive tactics such as exceptionally long speeches by a member of a minority in a legislative assembly to prevent the adoption of a measure generally favoured or to force a decision almost unanimously disliked. The use of the guillotine makes filibustering unusual in the Australian Parliament.

financial powers The power to levy taxes to raise and spend money. The Commonwealth possesses financial powers in specific and enumerated exclusive and concurrent powers — heads of power — in the Constitution. Financial powers include the power to make conditional grants to the States — Section 96. The scope of the Commonwealth's financial powers have increased with the vertical fiscal imbalance (VFI). The scope of the financial powers are justiciable and may be altered by High Court interpretation, thus changing federal balance of power.

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 before 1919. It is used for many local governments elections in contemporary Australia.

fiscal federalism A federal system in which the central level of government possesses and exercises significant financial power that it can use to coerce the regional governments. Australian federalism is sometimes referred to as fiscal federalism because of the strong financial powers of the Commonwealth — a consequence of the vertical fiscal imbalance and the grants power in Section 96 of the Constitution — which may be used to direct state policy in areas of residual power.

floodgating The strategy of introducing a high volume of legislation into the parliament with the aim of passing bills with minimum scrutiny or debate or to apply political pressure to non-government members of parliament.

formal powers Powers of the Governor-General codified in the Constitution and exercisable only on advice from ministers. Sections 28, 57, 64 and 72 are examples.

frontbench The term used to describe the government ministers and the Opposition shadow ministry. They occupy the front benches on either side of the central table of the House of Representatives and the Senate.

fundamental law Constitutional law. Superior law.

gag A motion passed in a house of parliament to curtail further debate.

general mandate A claim by a governing party to have authority to implement policies that reflect its ideology. They are a much less successful form of mandate.

general purpose payments Grants made from the Commonwealth to the states under Section 96 of the Constitution. No conditions are attached and it is up to the states to spend as they think fit. The Goods and Services Tax (GST) is the best known example.

gerrymander The deliberate drawing of electoral boundaries to disadvantage a political opponent. It does not occur in Australia because the Australian Electoral Commission draws the boundaries according to the Electoral Act 1902. A prominent feature of United States 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.

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 Westminster unwritten constitutional conventions. Possesses express formal and reserve powers.

Governor-General in Council The Governor-General in concert with ministers. The Federal Executive Council is created by Section 62 of the Constitution.

Grants Commission (Commonwealth) The Commonwealth Grants Commission is an institution of federalism. It is an independent statutory authority which recommends to government how the revenues raised from the GST should be distributed to states and territories to achieve horizontal fiscal equalisation. It operates under Section 96 of the Constitution

guillotine A motion passed in a house of parliament to impose a time limit on debate.

Hansard The written record of debates in parliament. The official record of the business of parliament. May be referred to by the courts when interpreting statutes to ascertain the purpose of a statute from its second reading speech.

heads of power Specifically codified and enumerated legislative and financial powers allocated to either the Commonwealth Parliament — exclusively — or the Commonwealth Parliament and the state parliaments — concurrently — by the Constitution. The way the Constitution defines — and therefore limits — powers of government.

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 top of the Australian court hierarchy.

horizontal fiscal equalisation (HFE) The requirement that the Commonwealth Parliament use its financial powers to equalise the standard of public service delivery in each state. It requires that some poorer states receive higher per capita grants from the Commonwealth than other wealthier states.

House committee A parliamentary committee formed only of members of the House of Representatives. For example, the House

of Representatives Standing Committee on Procedures.

House of Representatives The lower house of the Commonwealth Parliament. It is created by Section 24 of the Constitution and is “directly chosen by the people”. It is the people's house — representative role — and the house of government — responsibility role. Currently there are 151 members of the House of Representatives.

hung parliament A parliament in which no party wins more than 50 per cent of the seats in the lower house. By convention, the previous government 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 Australian Labor Party (ALP) and a number of Independents who agreed to support the government on confidence motions and supply.

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.

implied rights Rights discovered in the Constitution by the High Court when it interprets the Constitution. They can be controversial because they alter the Constitution without democratic authority. Implied constitutional rights empower the judiciary because only judges can discover and interpret implied rights, which then bind all other institutions within the political and legal system. An example of judicial supremacism.

in futuro Latin for ‘for the future’. Statute law is made in futuro unless it is retrospective legislation.

incentive payments A form of Section 96 grant to the states which is made after a state demonstrates compliance with Commonwealth requirements. The Council of Australian Governments (COAG) used incentive payments as a means of achieving national goals where the Commonwealth lacks the power to make national law. Therefore, they may intrude on state residual power. An example is the COAG Reform Fund, from which payments can be made to states which meet National Reform Agenda targets. Incentive payments stipulate the conditions states must meet before the grant is made. The onus is on the states to prove they have met the conditions. See: tied grants.

independence The quality of being free from interference or influence by others. An essential feature of the judicial arm of government required for the rule of law. Independence is a critical requirement for accountability. For example, the Auditor General is independent of the executive into which they conduct reviews and report to parliament. A lack of independence leads to loss of public confidence in investigative or accountability bodies.

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’.

injunction A civil remedy. A court order preventing a party from carrying a particular action. It has the force of law.

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 which were former European colonies, including Indonesia and many South American countries.

institutions of federalism Any institution in which the two levels of government interact with each other. COAG, ministerial councils and the Grants Commission are examples. They are very important in cooperative federalism, providing the forums within which cooperation is carried out. They are much less important in coordinate, coercive or fiscal federalism because the two levels do not cooperate to a great extent. Their

importance in Australian federalism is dependent on particular governments, issues and periods of history because Australian federalism varies from cooperative to coercive/fiscal at different times and in different circumstances.

instruments Delegated legislation.

international law Laws made through institutions such as the United Nations or between nations. It has no force unless adopted — ratified — by the signatory countries' legislatures and transformed into domestic law. It may have moral, but not legal force if it is not ratified.

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 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.

joint committee A parliamentary committee formed of members of the House of Representatives and Senators; for example, the Parliamentary Joint Committee on Human Rights.

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. 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. A 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.

judicial review The accountability of the parliament and executive to the judicial arm of government. Statutes can be interpreted by courts and struck down by the High Court if they are *ultra vires*. Government policy can be declared unlawful if not within the scope of the law. Executive prerogatives can be declared unconstitutional.

judicial supremacism Assigning the ultimate power over rights to the judiciary. The judiciary is immune from influence by the legislature or the executive. In theory, its impartiality and independence are the best guarantee of rights. It is an alternative to parliamentarianism. The criticism of parliamentarianism is that the legislature represents the democratic will of the people, but a majority of the people may choose to suppress the rights of certain minorities. Further, legislatures can be captured by the political parties that form the executive, giving effective control over rights to the government. It is characteristic of the American approach to rights protection which relies on a 'strong' Bill of Rights as part of its Constitution. See also: constrained parliamentarianism.

judiciary The branch 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. In Australia it is created by Chapter 3 of the Constitution, which strictly separates it from the other two arms of government.

jurisdiction Literally 'where the law speaks'. Refers to the areas of law in which a court can adjudicate.

jury A panel of citizens who judge the facts of a case. They hear evidence and argument presented by the parties to a case and are directed by a judge. They decide the verdict. See: *nemo iudex in causa sua*.

justiciable Capable of adjudication by a court. All written law in the form of constitutions, statutes and the ratio decidendi of previous cases can be adjudicated.

landmark case A court case that makes a significant impact in law or on power within a system of government. They may be constitutional cases or common law cases.

law A set of rules or codes that are enforced by the institutions of a nation's government.

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.

legislative powers The power to make statute law. The Commonwealth possesses legislative powers from the specific and enumerated exclusive and concurrent powers — heads of power — in the Constitution. It may pass statute laws that are not covered by a head of power, but go unchallenged in the High Court — allowing the Commonwealth to expand its legislative power. The scope of the heads of power are justiciable and may be altered by High Court interpretation, thus changing federal balance of power.

legislature The branch of government which makes law by initiating, amending or abolishing statutes via the statutory process. May be unicameral or bicameral. In Australia, the legislature is created by Chapter 1 of the Commonwealth Constitution (Australia).

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.

litigation Court action commenced with the intention of resolving a dispute between two parties.

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 of sectional pressure groups who have access to decision makers.

locus standi The right to bring a case to court. See: standing.

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.

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 an 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 may be considered desirable. These systems disadvantage most minor parties.

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'.

malapportionment This is where the number of electors in an electoral division are not

approximately equal. It can be described as being the opposite of 'one vote, one value'. The Australian Senate suffers constitutional malapportionment.

mandate A claim to power. A claim to the legitimate exercise of power. In a democratic system such as Australia, the only legitimate claim to power is that which is derived from the people or demos.

maxims Rules and legal principles that have developed over a long period time. The maxims of interpretation assist courts in applying consistent methods to the interpretation of statute law.

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 in the pre-trial phase of civil law trials.

members' interests committees Both houses of parliament have committees which hold parliamentarians to account for their assets, income and other interests so as to ensure that no conflicts of interest exist or arise. They are a part of the accountability mechanism of parliament and parliamentarians.

merit based decision A decision which is made based on and according to the worthiness of the argument or evidence. Alternative dispute resolution can result in merit based decisions. Courts cannot make merit based decisions; they may only apply the law to the facts of a case.

MP Member of the House of Representatives. A member of the lower house of parliament.

micro party A political party which may win a seat or only a few 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 and 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 and contemporary 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'.

ministerial councils Meetings of Commonwealth and state/territory ministers in areas of shared portfolios. For example, the Commonwealth Education Minister meets with the state and territory Education Ministers in the Ministerial Council on Education, Employment, Training and Youth Affairs (MCEETYA) to cooperate in education matters. There are many ministerial councils. They are subordinate to COAG and facilitate cooperative federalism in specific areas of government responsibility.

ministerial discretion The freedom a minister possesses to make decisions within a law. Statutes may grant ministers discretion in how they implement a law. It permits flexibility and allows for government to respond to unforeseen circumstances. Parliament gives power to the executive through ministerial discretion. For example, in 'extraordinary' circumstances, the Minister for Immigration and Border Protection may decide to grant a visa to someone not normally qualified to receive one.

ministry The entire collective of ministers, assistant ministers and including the Prime Minister. It is divided into an inner ministry of senior Cabinet ministers and an 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 coalition with other parties to form government — for example, the Nationals — or seek the balance of power in the Senate — for example, the 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 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 (2010) is the most recent federal example.

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 and other social and economic characteristics. Part of the parliament's 'representative function', exhibited mostly by the Senate.

mischievous rule A rule of statutory interpretation in which the court seeks the original purpose of a statute law — that is, the 'mischievous' it sought to prevent — 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.

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. A key part of the parliament's responsibility role. These motions are almost always defeated on party lines, which the government will always win. At best they provide the Opposition with an opportunity to speak or debate.

multimember electorate An electorate represented by more than one representative. The electoral system used for Senate voting uses multi-member electorates.

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.

negotiation A process for resolving disputes where the parties resolve the dispute themselves. There is no third party mediator, conciliator, arbitrator or adjudicator. A form of alternative dispute resolution.

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. See also: duty to act fairly and due process.

nexus clause Latin for 'knot'. Section 24 of the Australian Constitution links the House of Representatives and the Senate by size. It provides that the House of Representatives must be as near as practicable twice the size of the Senate.

non-justiciable Not capable of adjudication by a court. Unwritten Westminster constitutional conventions and the unwritten residual powers of the states are examples. Courts are confined to the law and the fact when adjudicating.

nosce tur 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'. Non-critical judicial reasoning which may be persuasive — non-binding — in future similar cases.

Ombudsman A public official appointed to hear complaints about public services. 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. It's 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.

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 jurisdiction under Section 76.

pairs A convention by which the opposition withdraws one of its own members of the House of Representatives or Senate to match each government member of parliament who is absent for other business or ill. As a convention it can be broken by the Opposition if it wishes to frustrate the government by forcing it to call its members back for a vote. The existence of pairs is a recognition that the government controls the House of Representatives.

parliamentarianism Assigning the ultimate power over rights to the legislature. In theory, the legislature represents the democratic will of the people. It follows that the people would not suppress their own rights. It is characteristic of the British and Australian approach to rights protection. It is an alternative to judicial supremacism. See also: constrained parliamentarianism.

parliamentary commission A special inquiry established by parliament to investigate a particular matter and report to parliament, often with recommendations on action the parliament should take. Parliament may appoint any qualified person to a parliamentary commission and this distinguishes them from parliamentary inquiries, which are conducted by members of parliament. The parliamentary commission into controversial Justice Lionel Murphy on whether parliament should exercise its Section 72 power to remove a judge is an example.

parliamentary committee A subset of parliamentarians formed into a group for a particular specialisation. Some committees are established for the life of a parliament — standing committees. Others are formed for a particular purpose and then disband after reporting to parliament — select committees. They may be formed in either house of parliament — House of Representative committees and Senate committees — or by members of both — joint committees. Committees are essential for the parliament to carry out all its functions, especially the legislative, responsibility and debate functions.

parliamentary inquiry An investigation conducted by members of parliament. Often carried out by a select committee or a standing committee. Parliamentary inquiries are important for holding the executive to account, for achieving good representation in lawmaking and for effective debate of a particular issue. Parliamentary inquiries report to parliament and may make recommendations for action by the parliament or the executive. They are distinguished from parliamentary commissions in that they are carried out by current members of parliament.

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 comments they make in parliament. Essential for the debate, representative, legislative and responsibility roles of the parliament. Members may be held to account for the misuse of parliamentary privilege by the privileges committee of the house in which they sit.

parliamentary secretary A junior executive position. Now known as an assistant minister. They assist senior ministers in larger portfolios. A step on the ladder toward ministerial promotion.

parliamentary sovereignty The concept that the parliament is the representation of the sovereignty of the people. It is the principle upon which parliamentarianism is based. In a pure sense, the parliament should be subject to

no authority other than the people themselves, not even past parliaments. In unitary Britain — whose constitution is unwritten — parliamentary sovereignty is a genuine feature of the political system. In Australia, the concept is diluted by the existence of a written Constitution to which parliament is subject and a judiciary capable of declaring its statutes ultra vires. The Commonwealth Parliament's sovereignty is also shared with sovereign states in a federation — which 'divides sovereignty'. Further, the existence of a small number of express rights in the Constitution leads to judicial supremacism over these rights. The discovery of implied rights and implied immunities and prohibitions in the Constitution by the High Court further undermines the concept of parliamentary sovereignty in Australia.

partisan representative 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 '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. Party rooms may compensate for the decline of parliament.

pluralism A political theory which argues that there is a very wide range — a plurality — of interests within society which try to influence law making and policy. These interests compete with each other for the attention of government. The theory can be used to explain the activity of cause based — altruistic/promotional — pressure groups. The theory regards pressure groups as a legitimate contribution to democracy because they enable popular participation.

policy An action plan for the implementation of laws. Government policy is the plan a government has for implementing and changing law.

policy platform The sum of all a political party's policies. A policy platform is a coherent set of plans about a political party's proposed actions in most or all the areas of government activity. They are often heavily influenced by political ideology, but may also be pragmatic.

political advisor Staff contracted by ministers, members of the House of Representatives (MPs) or Senators to provide advice in areas related to portfolio responsibilities or their roles as representatives and legislators. They are outside the Westminster chain of accountability and can diminish the responsibility of ministers, MPs and Senators by taking the blame if there are allegations of improper conduct.

political donation A financial contribution made by a private party to a political party. Political donations offer a way for citizens to participate in their government by supporting parties or ideological positions that they agree with. Donations can be problematic for democracy because the possibility always exists that donations buy political influence and thus distort the democratic will. Australia has relatively strict laws governing political donations. The United States permits extremely large donations. Large donations can be associated with corporatism.

political party Associations formed by people seeking to influence lawmaking. They have a broad focus. Classified as either major, minor or micro parties. They usually 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 the more likely they will be further from the centre of the political spectrum. From the extreme left to extreme right, typical political ideologies are: communism, socialism, democratic socialism, social democracy, social liberalism, economic liberalism, social conservatism, 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 participation The participation of citizens in their own government. It is enabled by political and civil rights such as the right to vote and to run for public office and the freedoms of speech and assembly.

popular sovereignty The right to govern rests with the people. 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.

power The ability to compel others to behave in ways they may not choose of their own free will. Power is a defining characteristic of politics, which is a contest for the exercise of power.

pragmatism An approach to policy and lawmaking which relies on achieving what is practically possible within a particular distribution of power — for example the balance of power within a parliament — rather than a solid commitment to ideological purity.

preferential voting A majoritarian electoral system based on single member electorates in which the electors list candidates in order of preference. The winner is the candidate with an absolute majority of votes (50%+1 vote). If no candidate wins on their primary votes, candidates with the least primary votes are eliminated and their second preferences distributed until an absolute majority is achieved. Exhaustive preferential voting has been used in Australia for electing the House of Representatives since 1919 and for the Senate between 1919 and 1949. It is used in all state lower house elections. Some states use optional preferential voting.

prerogatives (executive) Actions the executive government can take without the approval of parliament. Limited to those actions that the parliament itself cannot pass a law to enact. Inherited from the Westminster System. Referred to in Britain as crown prerogatives — a legacy of absolute monarchy. A declaration of war is an executive prerogative. In more recent times executive prerogatives are coming under increasing scrutiny because they permit executive action that is unaccountable to the parliament.

President of the Senate The Presiding Officer of the Senate. Responsible for maintaining the functioning of the chamber according to the Standing Orders.

pressure groups Associations formed by people seeking to influence lawmaking. 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.

preventative detention order An instrument used by the executive to detain a suspect who may commit a crime — usually associated with terrorism. Controversial because they limit the freedoms of a suspect, not a convicted criminal. Offends the presumption of innocence, which is an important legal right.

primaries A method used by political parties to allow party members a direct role in selecting candidates for public office. Not common in Australia. The most prominent examples are the US presidential primaries in which the Democratic and Republican Parties choose their candidates for the presidential election.

primary votes The first preference of an elector in a preferential voting system.

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.

private member A member of parliament who is not a member of the cabinet or ministry. The opposition front bench (shadow ministry) are private members, but not backbenchers.

privatise To sell government owned assets to the private sector. A policy favoured by economic liberals. The opposite of nationalise.

privileges committee A parliamentary committee formed in each house of parliament which holds members of the House of Representatives and Senators to account for their conduct as parliamentarians and for their use of parliamentary privilege. The House of Representatives Standing Committee of Privileges and Members' Interests is an example.

procedures and processes The rules by which an institution of government operates. For example, the Standing Orders of the House of Representatives and of the Senate contain the processes and procedures of their respective house and, therefore, 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 multi-member 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 reduced transfer value. Votes are distributed at their transfer value to the second preference candidate. It 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. It is fair to all political parties. It may be considered partly responsible for a revival of parliament.

prorogue To bring a parliament to an end without dissolving it. Section 5 of the Constitution grants this power to the Governor-General.

protocol In international law, a supplementary treaty or agreement attached to an original treaty, covenant or convention (international). It usually contains specific details concerning the

implementation of the original agreement. They are optional — countries may sign the original agreement, but are not bound to agree to its attached protocols.

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.

purpose rule Another name for the mischief rule.

question time A key procedure associated with the responsibility role of the 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 (STV) The requirement to win a seat in single transferrable voting electoral system.

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 Australian Constitution. The procedure is contained in Section 128 of the Constitution. It requires a bill to pass the parliament proposing the change. The question to 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.

referral of powers Section 51(xxxvii) of the Constitution allows individual states to pass residual powers to the Commonwealth. The effect of a referral is a change in the federal balance of power. It only affects the referring state. Other states may adopt the referral if they choose. It has only had a limited effect on the federal balance of power.

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 House of Representatives and 76 in the Senate.

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. May be in the form of a 'democratic republic' (United States) 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 of the Constitution to dismiss Prime Minister Whitlam in 1975 is an example.

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.

retrospective law Retrospective law is law that takes effect from a date in the past. It is considered a challenge to the rule of law. The rule of law includes the principle that the law should be known and clear. Retrospective law undermines this principle. It is tolerated in Australia, but the courts assume that parliament does not intend to act unjustly when interpreting retrospective laws. The United States Constitution forbids retrospective law.

revival of parliament The counter argument to the decline of parliament thesis. It argues that the emergence of the Senate as a powerful check on executive government and the fact that it is frequently a 'hung house' enable it to perform the major roles of parliament adequately. The strength of committees in both houses also supports the revival of parliament argument.

rights Universal freedoms and entitlements which recognise each person's right to develop their unique potential. Based on the principles of equality and fairness, they incorporate civil, political, economic, social and cultural rights. The rights to life, education and a minimum standard of living are examples. Respect for rights is a key feature of liberal democracy and a component of the rule of law.

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.

rule of law A key democratic principle. It is the sum of a number of other principles such as equality before the law, judicial independence, respect for rights, clear and coherent laws and no retrospective laws. The principle that all people are equally bound and equally subject to the law.

rule of men The opposite to the rule of law. Autocratic systems of government are characterised by the rule of men.

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 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 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.

select committee A parliamentary committee formed for a specialised purpose. Disbanded once the select committee reports to parliament.

Senate The upper house of the Commonwealth Parliament. It is created by Section 7 of the Constitution and is 'directly chosen by the people'. It is the 'states' house' — a federal and representative role — and a 'house of review' — responsibility role. Currently there are 76 Senators.

Senate committee A parliamentary committee formed only of Senators. For example, the Senate Standing Committee for the Scrutiny of Delegated Legislation.

separation of powers A doctrine by which the functions of government to make, carry out, interpret and enforce the laws are dispersed in order to prevent the concentration of power. First described by French aristocrat, 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 the performance of 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 employed in 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 a part of a progressive agenda. Tony Abbott is a social conservative.

social contract An Enlightenment theory that the people give consent to government to be governed on the condition that the government governs well. If the government fails to maintain the 'bargain', the people may withdraw their consent. Elections are the main mechanism through which a social contract is established and concluded between a government and the people they govern.

social democracy progressive political ideology on the centre left of the political spectrum. Social democrats believe that government should use the power of the state to provide for basic economic equality and opportunity for all citizens. The market is considered the best means of achieving economic efficiency, but there are market failures which 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 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 supreme power to govern. National sovereignty refers to the power to govern a people and a territory.

Speaker The Presiding Officer of the House of Representatives. Responsible for maintaining the functioning of the chamber according to its Standing Orders.

special leave to appeal 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.

specific purpose payments Grants made from the Commonwealth to the states under Section 96 of the Constitution. Conditions may be attached 'as the Parliament thinks fit' to how SPP grant money is spent, allowing the Commonwealth to interfere in state residual powers. Also known as tied grants.

specific mandate A claim by a governing party to have authority to implement policies and promises that were specifically part of an election campaign. They are the most successful of all claims to a mandate.

standing The right to bring a case to court. See locus standi.

standing committee A parliamentary committee which endures for the life of a parliament. Disbanded when a parliament is dissolved by the Governor-General prior to an election.

Standing Orders The rules by which each house of parliament operates. 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 lawmaking 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, it 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. The Australian Electoral Commission (AEC) — which administers the Electoral Act 1902 — is an example.

statutory bill of rights A bill of rights made by an Act of parliament. A flexible approach to codifying rights in law. May be 'weak' if the courts may only issue declarations of incompatibility and cannot strike down laws incompatible with human rights. May be 'strong' if courts can strike down incompatible laws. Leads to the superiority of parliament over rights — constrained parliamentarianism.

statutory process The process by which the parliament initiates, debates, amends and passes bills into law.

supply Money bills or appropriations bills. To govern, a government must be able to obtain supply from the parliament. A rejection of supply in the lower house is a vote of no confidence in the government causing it to resign.

swinging voters Electors who change their votes from one election to the next. They do not have a strong loyalty to any particular political party. They are a particular target of political advertising during an election campaign because they determine the outcome more than any other group of voters.

the 'Red' The Senate's daily agenda.

the Enlightenment A historical period during the late 17th and 18th centuries during which new sciences, art and challenges to established political systems — mostly absolute monarchies — took place. Many of the theories of political science — such as social contract theory, representative government, popular sovereignty and others — took hold during the Enlightenment. It was inspired by the rediscovery of the ancient world, notably Ancient Greek ideas of government and philosophy.

The government The executive branch. Formed by the party with a majority of seats in the House of Representatives.

tied grants Grants to the states from the Commonwealth made under Section 96 of the Constitution, which permits the Commonwealth to attach conditions to the grant. Since the emergence of the vertical fiscal imbalance (VFI), tied grants have become a powerful mechanism altering the federal balance of power by allowing the Commonwealth to use its financial power to interfere in state residual power. Tied grants stipulate how the money is to be spent before the grant is made. The onus is on the Commonwealth to monitor state compliance. See: incentive payments and specific purpose payments.

tribunal A dispute resolution body similar to a court, but not capable of exercising judicial power. Tribunals apply natural justice and alternative dispute resolution methods to settle disputes. They can consider the merits of a case, not just the law and the evidence. They may resolve disputes more cheaply, less formally and more quickly than courts and can often result in win/win outcomes that both parties are happy with. The Administrative Appeals Tribunal is an example.

trustee representative 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 term describing a pure democratic system with few checks on the power of the elected government to carry out the wishes of the majority. It may lack respect for rights — especially the rights of minorities — which is an essential feature of the rule of law. It may be illiberal and lead to the persecution of minorities.

ultra vires Latin for 'beyond the power'. Statutes for which the parliament lacks a firm head of power within the exclusive and concurrent powers may be struck down by the High Court if challenged. Such laws are said to be ultra vires. Certain prerogatives of the executive contained within Section 61 of the Constitution and inherited as part of the Westminster system of responsible government may also be challenged and found ultra vires.

unchallenged legislation Unconstitutional laws that go unchallenged in the High Court. Until struck down by the High Court they remain active law. Statutes passed by the Commonwealth Parliament can be 'unconstitutional' because the parliament packs a head of power within the Constitution granting it the legislative power to make the law. Such laws are ultra vires.

unicameral A legislature composed of one house or chamber. Queensland and New Zealand have unicameral legislatures.

vertical fiscal imbalance (VFI) The imbalance in the taxing powers and spending obligations between the two levels of government within a federation. In Australia, the Commonwealth collects more revenue than it needs and the states much less than they need. The VFI forces the states to accept grants — often tied grants — to meet their spending obligations.

veto The power to reject a decision or law. Parliament may veto government policies by passing laws that limit the executive. It can refuse to pass the appropriations bills or certain measures within the budget. In contemporary Australia, veto power is a prominent political power of the Senate crossbench. The US President has a veto over Congressional legislation. The Governor-General has a theoretical veto, but by convention never withholds Royal Assent even though Section 58 of the Constitution allows it.

Westminster hybrid A blend of the Westminster system of responsible parliamentary government and the US system of federalism.

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 parliament, 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 advice.

Westminster system The system of government in which the legislature forms the executive and holds it responsible between elections. Distinguished by the fusion of the legislative and executive powers and the relatively weak separation between these two branches of government. Evolved in Britain over many centuries.

Whip Members of parliamentary parties with the responsibility of ensuring all the party's members are in the chamber for votes. Whips ensure that members of the party know their party's policy and stance on issues. They count the results of divisions and pass the tally to the Speaker or President. They are party organisers and disciplinarians.

will of the majority mandate Claimed by governments when they win an election. They claim that the people have delegated their sovereignty to the government and it should be able to implement its specific policies and laws in line with its general ideology.

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.

writ A written command by a court or another body or person with the legal authority to issue the command. Courts issue writs of mandamus. The Governor-General issues writs for an election.

writ of mandamus Mandamus means 'we command'. A court order requiring a public official — for example, a public servant — to carry out a particular action. Part of judicial review and the accountability of the executive. A court cannot order an official to do anything that is not lawful. An executive accountability role of the courts.

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Further exam practice questions

Chapter 9

Investigation

1) Complete the table below:

Elements of Australia's federal system	Description of significance for/impact on the federal balance of power
One constitutional power, including: - Section 51(xx) - Section 51(xxix) - Section 109 You may need to make reference to the High Court's interpretation of your chosen section in your description.	
One financial power, including: - Section 51(ii) - Section 87 - Section 90 - Section 92 - Section 96 You may need to make reference to the High Court's interpretation of your chosen section in your description.	
The Commonwealth Grants Commission, with reference to the Goods and Services Tax	
The referral of powers (Section 51(xxxvii))	
The Council of Australian Governments	
National Cabinet	
Constitutional interpretation by the High Court, with reference to one of the following cases: - Surplus Revenue Case (1908) - Engineers Case (1920) - Uniform Tax Cases (1942 and 1957) - Tasmanian Dam Case (1983) - WorkChoices Case (2006)	

OR

- 1) Change in the federal balance of power has been effected through the High Court's interpretation of the Constitution.
 - a) Identify one High Court decision concerning each of the following constitutional powers:
 - External affairs power (Section 51(xxix))
 - Corporations power (Section 51(xx))
 - Taxations powers
 - b) Describe the impact of each case on the federal balance of power in Australia.

- 2) The National Cabinet superseded the Council of Australian Governments (COAG) in 2020.
 - a) Read the two articles below:
 - <https://www.abc.net.au/news/2020-05-29/coag-is-no-more-what-is-coag-national-cabinet/12301482>
 - <https://www.abc.net.au/news/2020-06-07/federal-reform-treacherous-waters-scott-morrison-capital/12320028>
 - b) With reference to the two articles, answer the following questions:
 - Explain how the National Cabinet differs from COAG.
 - Which proposals of the National Cabinet have been adopted? Which proposals have been discarded?
 - To what extent does the creation of the National Cabinet demonstrate the emergence of a new spirit of cooperative federalism in Australia?
 - With reference to examples, discuss how the states have confronted the dominance of the Commonwealth.

Chapter 14

Investigation

- 1) The accountability of the courts is achieved through different mechanisms.
 - a) Complete the table below:

Accountability mechanism	Internal or external?	Overall evaluation of effectiveness, with reference to examples
The appeals process		
Parliamentary scrutiny and legislation		
Transparent processes and public confidence		
The censure and removal of judges		

- b) Comment upon the extent to which internal or external mechanisms are more effective in ensuring the accountability of the judiciary.
- 2) Students will undertake a group activity.
 - a) The class will be divided into seven small groups.
 - b) Each group will be allocated one of the following individuals:
 - Magistrate Roger Prowse
 - Judge Sandy Street
 - Judge Salvatore Vasta
 - Justice Angelo Vasta
 - Chief Justice Tim Carmody
 - Justice Lionel Murphy
 - Justice Dyson Heydon

- c) The students in each group will work together to answer the following questions:
 - Describe the misbehaviour that your group's allocated individual is alleged to have committed.
 - To what extent was your individual held accountable for their alleged misbehaviour?
 - What does the case involving your individual illustrate about the realities of the accountability of judges in Australia?
 - Discuss the issues that your case gives rise to which suggest that reforms need to be made in order to improve the accountability of judges.
 - d) Using Screencastify, each group will create a podcast or a video to teach the class about the case involving the group's allocated individual.
- 3) The appeals process, transparent processes and public confidence contribute to the accountability of the judiciary.
- a) With reference to the case of George Pell, discuss the role of the appeals process in holding judges to account for their decisions.
 - b) With reference to the case of Witness K, discuss the extent to which a lack of transparency in court proceedings can undermine judicial accountability.

Chapter 15

Investigation

- 3) The Australian Capital Territory, Victoria and Queensland have each adopted a statutory charter of rights.
- a) Distinguish between a constitutional bill of rights and a statutory charter of rights.
 - b) In the absence of a constitutional bill of rights, discuss the significance of the discovery of implied rights in protecting human rights in Australia.
 - c) With reference to the protection of human rights in a country other than Australia, discuss the extent to which it can be argued that Australia should adopt a constitutional bill of rights.
- 4) In pairs, create a podcast for your peers about a recent case study regarding the protection of human rights in Australia.
- a) Collate information about your chosen case study. You may like to begin your research by visiting this webpage of Human Rights Watch (<https://www.hrw.org/world-report/2020/country-chapters/australia>).
 - b) In your podcast, discuss:
 - The nature of the case study involving human rights
 - The human rights in question
 - Links to international covenants, protocols and/or treaties
 - Links to Commonwealth and/or state laws
 - Potential reforms to Australia's framework of human rights protection in light of the case study

CHAPTER 17

Investigation

3) Democratic principles are upheld to varying degrees in different countries. Working either individually or with a partner, answer the following questions:

a) In the table below, with reference to examples, describe the ways in which each of the five democratic principles are upheld and undermined in Australia.

Democratic principle	Ways upheld	Ways undermined
Political representation		
Popular participation		
The rule of law		
Judicial independence		
Natural justice		

b) In the table below, with reference to examples, describe the ways in which each of the five democratic principles are upheld and undermined in a country other than Australia.

Country other than Australia:		
Democratic principle	Ways upheld	Ways undermined
Political representation		
Popular participation		
The rule of law		
Judicial independence		
Natural justice		

c) Come to an overall evaluation of the extent to which each of the five democratic principles is upheld in both Australia and another country.

Democratic principle	Overall evaluation	
	<i>Australia</i>	<i>Another country</i>
Political representation		
Popular participation		
The rule of law		
Judicial independence		
Natural justice		

Solutions

Chapter 5

Solutions to Activity 2

Composition of the House of Representatives after the 2013 federal election

Party	Seats
Liberal/National Coalition	90
Australian Labor Party	55
Australian Greens	1
Katter's Australian Party	1
Palmer United Party	1
Independents	2
Total	150

Composition of the House of Representatives after the 2016 federal election

Party	Seats
Liberal/National Coalition	76
Australian Labor Party	69
Australian Greens	1
Katter's Australian Party	1
Nick Xenophon Team	1
Independents	2
Total	150

Composition of the House of Representatives after the 2019 federal election

Party	Seats
Liberal/National Coalition	77
Australian Labor Party	68
Australian Greens	1
Katter's Australian Party	1
Centre Alliance	1
Independents	3
Total	151







The Prime Minister of Australia and President of the United States are touted as the most powerful actors in their respective systems of government. Despite this, such power is constrained, both are held accountable for their actions as well as inactions and critiqued on the extent to which they impact rights in their liberal democracies.

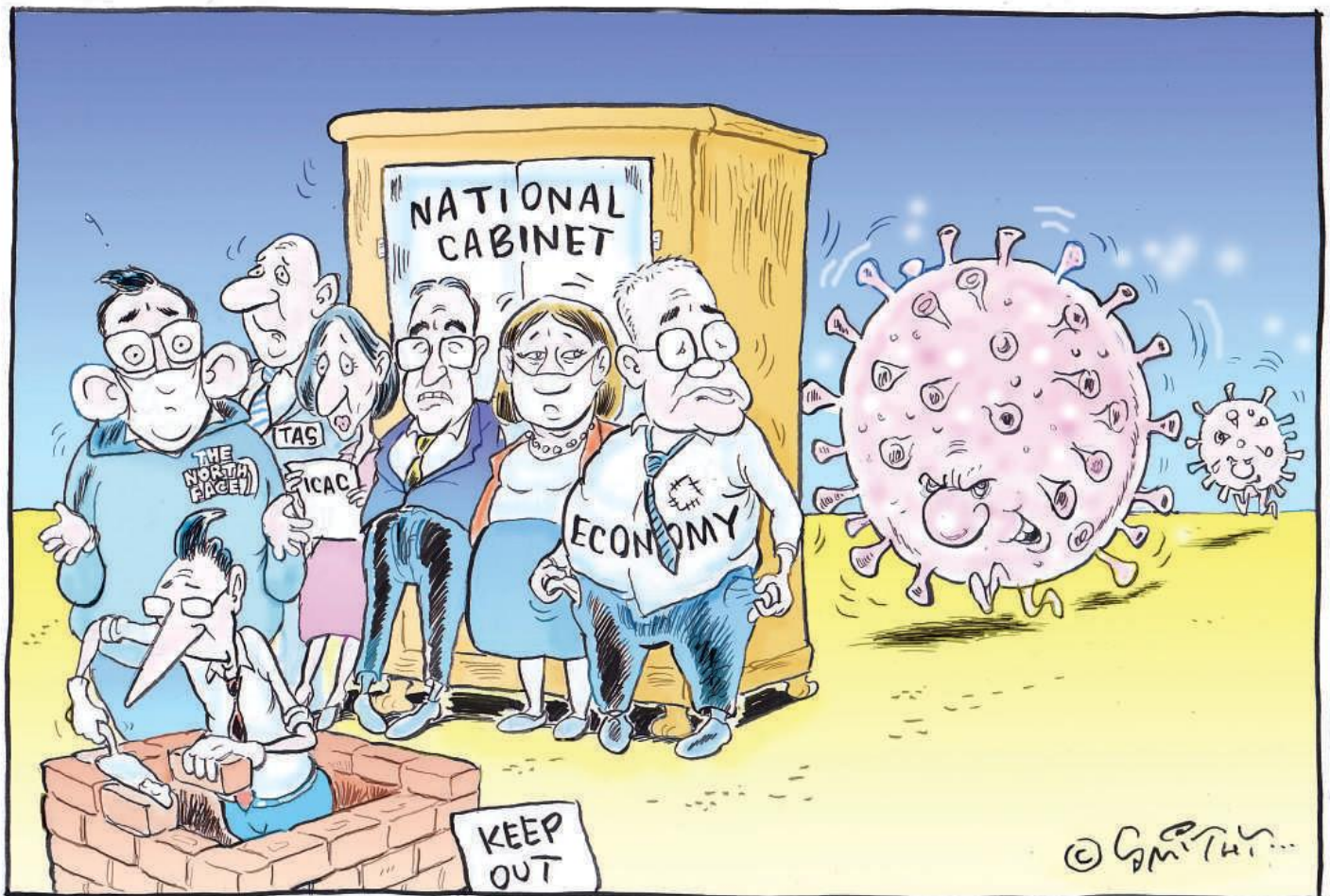
This text provides an authoritative reference on:

Power: the roles and powers of actors and institutions in the legislative, executive and judicial arms of government within Australia and the United States;

Accountability: how separation of powers and the people use the mechanisms available to check the use and misuse of power by individuals and by institutions; and

Rights: the contrasting ways that human rights are protected in Australia and United States and the extent to which the democratic principles are upheld and undermined.

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