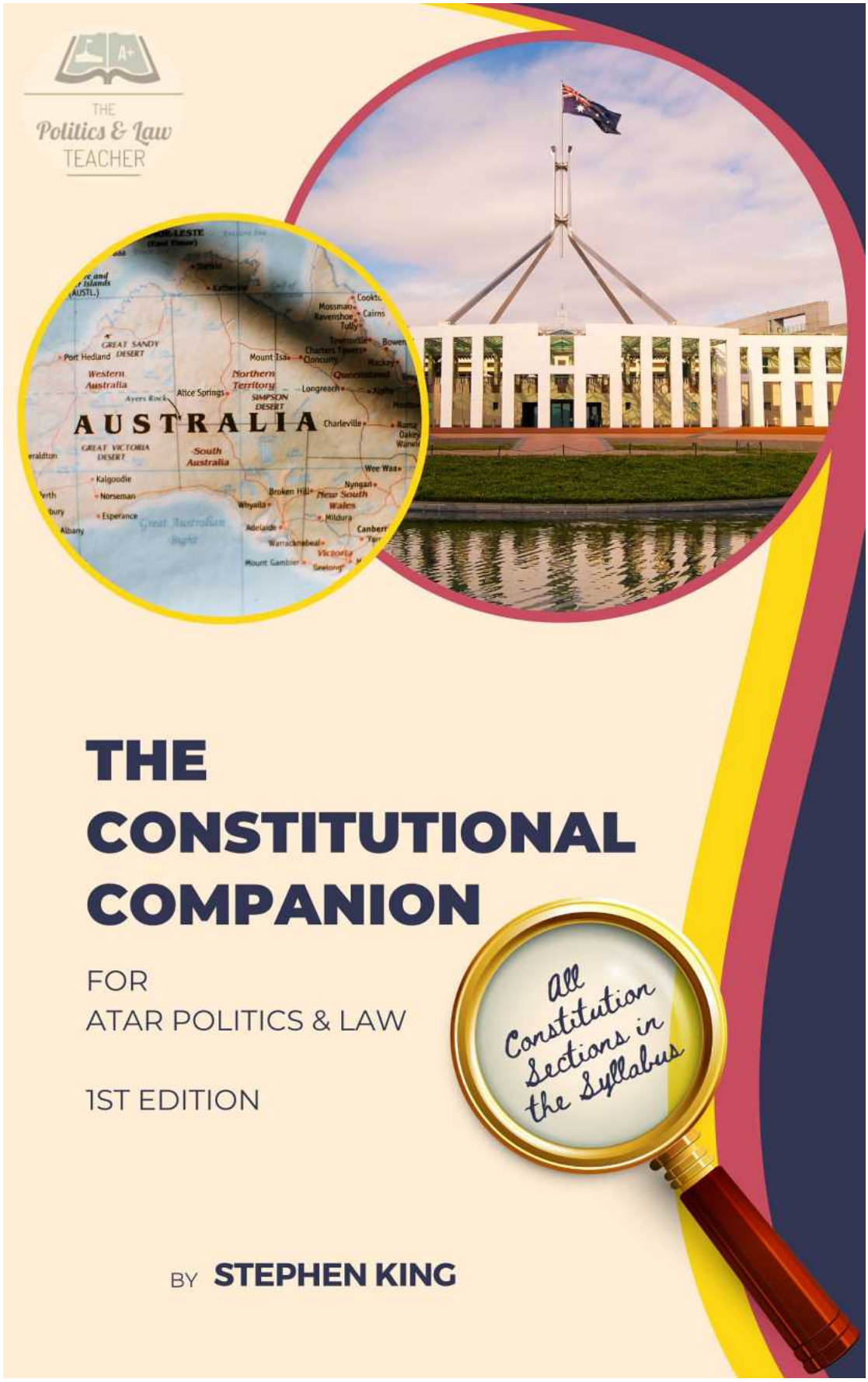
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Esperance
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Nyngan
New South Wales
Mildura
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Wee Waa
THE
CONSTITUTIONAL
COMPANION
FOR
ATAR POLITICS & LAW
1ST EDITION
All Constitution Sections in the Syllabus
BY STEPHEN KING

Caption

The Constitutional Companion

This book contains details about every section of the Constitution required for the WA Politics and Law Syllabus

By **Stephen King**

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Stephen wrote the Year 11 and 12 textbooks for the Western Australian ATAR Politics and Law courses. He has taught Politics and Law since 2002 and has produced resources for teachers and students since 2015.

Stephen is passionate about civics education because he believes young people deserve and desire a better future. His work seeks to empower them with the tools to become good and influential citizens.

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Prologue

The Commonwealth Constitution (Australia) is Australia's foundational document.

It governs the Australian political and legal system.

Western Australia's ATAR Politics and Law course students must understand particular sections and how they influence the Australian political and legal system.

This book summarises every Constitutional section required by the Politics and Law Syllabus. It outlines the function, impact and powers related to each section. It also refers to landmark High Court cases and course links.

Constitution Sections referenced in the Politics and Law Syllabus

Sections	Function	Notes
7	Creates the Senate and makes it a states' house	Equal state representation. To be “directly chosen by the people"
24	Creates the House of Representatives and makes it a people's house	Representation of States based on population. To be “directly chosen by the people" The nexus clause - the House must be twice the size of the Senate (as near as practicable)
28	3-year limit on the life of a Parliament.	The Governor-General’s power to dissolve parliament for an election. This power is used on the Prime Minister’s advice or as a reserve power
51	Powers of the Parliament	Allocates legislative powers to the Commonwealth Parliament. It does not make these powers 'exclusive' - so many are 'concurrent' unless 'exclusive by nature'
51(ii)	'tax power'	A concurrent financial power
51(xx)	'corporations power'	Power to regulate incorporated bodies like companies
51(xxix)	'external affairs power'	Power to make laws based on international agreements like treaties or UN Conventions and Covenants
51(xxxvii)	'referral of powers'	Any State can voluntarily transfer a residual power to the Commonwealth. It only affects the referring State.
52	Exclusive power of the Parliament over the seat of the national government and federal public service	Exclusive power over the Australian Capital Territory and the Australian Public Service
53	Prohibits Senate from originating or amending money bills	A limitation the Senate’s legislative power
57	The double dissolution power	The conditions and procedure for resolving legislative deadlocks between the two Houses
61	Creates the executive	Vests executive powers in the King, making it exercisable by the Governor-General
62	Creates the Federal Executive Council	The Federal Executive Council is chaired by the Governor-General. Ministers are members.
63	Governor-General in Council	Defines the Federal Executive Council
64	Governor-General to appointment and dismiss ministers	A 'formal' power of the Governor-General used on advice. Also a 'reserve' power of the Governor-General
68	Governor-General is the Commander in Chief of the armed forces	A 'fictional' power - this power is never used
71	Creates the High Court and gives parliament power to create a federal judiciary	Vests the judicial power of the Commonwealth in the High Court and other courts created by the Parliament
72	Establishes the independence of the judiciary	Appointment, removal and tenure of judges Protects judicial independence
73	Appellate jurisdiction of the High Court	Makes the HCA the final court of appeal for all types of cases in Australia
75	Original jurisdiction of the High Court	Cases that must start in the High Court - e.g. disputes concerning treaties, cases in which the Commonwealth is party, inter government (*inter se*) cases

76	Additional original jurisdiction of the High Court	The Parliament can add additional original jurisdiction to the HCA through legislation
87	Commonwealth to grant 75% of revenue from 'excise and customs duties' to the States for the first 10 years after federation	The "Braddon Blot". A 'spent section' that is no longer active
90	Exclusive power over excise	Makes excise an exclusive power of the Commonwealth
92	Trade between the States to be 'absolutely free'	Prevents States making laws that hinder the trade of goods and services across state borders
96	'grants power'	Allows the Commonwealth to transfer surplus revenues to the States as tied or untied grants
107	Preserves the legislative power of State parliaments	Enables States to legislative in all areas of residual and concurrent power. Gives the States plenary power
109	Commonwealth laws to prevail over conflicting State laws	Resolves conflicts in fields of concurrent power by making Commonwealth law override State laws 'to the extent of the inconsistency'
128	Alteration of the Constitution	Specifies the process for formal constitutional change

Section 7 – The Senate

The Senate shall be composed of senators for each State, directly chosen by the people of the State, voting, until the Parliament otherwise provides, as one electorate… There shall be six senators for each Original State… senators shall be chosen for a term of six years. (Abridged)

Purpose

Section 7 is in Chapter 1 of the Constitution and creates the Senate, the upper house of Australia's bicameral parliament. The Senate is also the States' House and a House of Review. Section 7 borrows heavily from Article 1 Section 3 of the United States Constitution.

Key features

1. Electors directly choose senators.
2. Each Original State has the same number of senators, and each State is a single electorate.
3. Senators have six-year terms.

Function

Number 1 makes the Senate a democratic house.

Number 2 makes the Senate a States' House.

Number 3 upholds the Senate's House of Review function by preserving senators' experience.

Section 13 complements the review function by establishing the Senate rotation. Half the Senate is elected at a general election, which makes it a 'continuing house', like the US Senate. The continuation of half the Senate conserves the experience and memory of the Senate. Consequently, the Senate has more legislative experience than the lower house.

Impact

Section 7's direct election provision makes Australia a representative democracy. Section 24 does the same for the House of Representatives - see Section 24.

The States' House function has had little impact since the first decade after federation. Senators are overwhelmingly partisan MPs who 'toe the line' of their political parties rather than act as State delegates or trustees.

The House of Review function is the most influential aspect of the Senate. It is a powerful upper house compared to the upper chambers of other liberal democracies. It frequently checks the legislative power of the House of Representatives, in which the government is formed.

Section 7 makes the Senate a powerful upper house.

High Court Interpretations

The most significant interpretations of Section 7 relate to the words "directly chosen by the people".

Noteworthy cases are:

- *Australian Capital Television Pty Ltd v the Commonwealth (1992) 177 CLR 106*
- *Stephens v West Australian Newspapers Ltd (1994) HCA 45 & Theophanous v Herald & Weekly Times Ltd (1994) HCA 46*
- *Lange v Australian Broadcasting Corporation (1997) 189 CLR 520*
- *Brown v Tasmania (2017)*
- *Clubb v Edwards & Preston v Avery (2019) HCA 11*
- *Comcare v Banerji (2019) HCA 23*
- *LibertyWorks Inc v Commonwealth of Australia (2021) HCA 18*
- *Ruddick v Commonwealth of Australia (2022) HCA 9*

In *Australian Capital Television*, the High Court held that Section 7 (& 24) make Australia a representative democracy, which means Australians have an implied right to freedom of political communication.

The implied right to freedom of political communication has been refined through other cases listed above.

High Court Justice Simon Steward has cast doubt on the implied freedom of political communication, saying it may not exist and was not settled law. His opinion leaves open the possibility a future case may overrule all the above cases and erase the implied right.

Course Links

- Unit 3 - Functions of Parliament
- Unit 4 - Human rights

Section 24 – The House of Representatives

The House of Representatives shall be composed of members directly chosen by the people of the Commonwealth, and the number of such members shall be, as nearly as practicable, twice the number of the senators. The number of members chosen in the several States shall be in proportion to the respective numbers of their people… five members at least shall be chosen in each Original State. (Abridged)

Purpose

Section 24 is in Chapter 1 of the Constitution and creates the House of Representatives, the lower house of Australia's bicameral parliament. The House is also the People's House and the House of Government. Section 24 borrows heavily from the United Kingdom's House of Commons.

Key features

1. Electors directly choose members.
2. Each State has members in proportion to its population. There is a minimum of five members per Original State.
3. The House shall be "as nearly practicable" twice the size of the Senate.

Details

Section 24 makes the House of Representatives a democratic house.

It also makes the lower house a People's House by making representation proportional to State populations. This feature enables one-vote-one-value, an essential democratic principle - unachievable in the Senate because of equal State representation.

Section 24 contains the "nexus clause". The nexus clause binds the two houses of parliament according to size. A referendum proposal to break the nexus failed in 1967.

Section 24 says nothing about the House of Representatives' function to form and hold governments to account. Westminster conventions of responsible government establish this function. Following the convention established by the UK's House of Commons, whoever commands the confidence of the House of Representatives forms the government. Thus, Australia's executive is a ‘parliamentary executive’. The government is responsible - i.e. accountable - through the Westminster conventions of individual and collective ministerial responsibility.

Impact

Section 24's direct election provision makes Australia a representative democracy. Section 7 does the same for the Senate. Section 24 is more fundamental than Section 7 because it is the People's House and represents Australians more or less equally.

Direct election makes Australia a representative democracy and grants Australians a constitutional right to freedom of political communication.

Section 24 makes Australia a representative democracy and implies a constitutional right to freedom of political communication.

High Court Interpretations

The most significant interpretations of Section 24 relate to the words “directly chosen by the people”.

Notable cases are:

- *Australian Capital Television Pty Ltd v the Commonwealth (1992) 177 CLR 106*
- *Stephens v West Australian Newspapers Ltd (1994) HCA 45 & Theophanous v Herald & Weekly Times Ltd (1994) HCA 46*
- *Lange v Australian Broadcasting Corporation (1997) 189 CLR 520*
- *Brown v Tasmania (2017)*
- *Clubb v Edwards & Preston v Avery (2019]) HCA 11*
- *Comcare v Banerji (2019) HCA 23*
- *LibertyWorks Inc v Commonwealth of Australia (2021) HCA 18*
- *Ruddick v Commonwealth of Australia (2022) HCA 9*

In *Australian Capital Television* 1992, the High Court held that Section 24 was the primary constitutional provision that makes Australia a representative democracy and grants Australians an implied right to freedom of political communication.

The High Court's reasoning about the implied right has developed through the other cases listed above.

The implied right to freedom of political communication is a constitutional right. Still, it may be overruled by future interpretations of Section 24 because it is not a specifically entrenched right.

2019 High Court Justice Simon Stewart said in *obiter dicta* in *LibertyWorks 2021* that the implied right may not exist.

The High Court split 4 to 3 in *Ruddick 2022*, indicating the continuing controversy surrounding the implied right to freedom of political communication.

Course links

- Unit 3 - Functions of Parliament
- Unit 4 - Accountability of Parliament, human rights

Section 28 – Power to dissolve the House of Representatives for election

Every House of Representatives shall continue for three years from the first meeting of the House, and no longer, but may be sooner dissolved by the Governor-General.

Purpose

Section 28 is in Chapter 1 of the constitution. It sets a maximum term of three years for the House of Representatives. It is a formal power of the Governor-General, by convention, used only on advice. It is also a reserve power of the Governor-General.

Key features

1. Limits the term of the House of Representatives to a maximum of three years. There is no minimum term. Senate terms are unaffected by Section 28 - they are fixed at six years unless there is a double dissolution election (see Section 57).
2. The three-year term permits elections for the House of Representatives and Senate to be held on the same day.

Details

Section 28 ensures elections are regular, which is desirable for the representativeness and accountability of the Commonwealth Parliament.

In practice, the Governor-General almost always dissolves the House of Representatives before the maximum term expires. Only the 3rd Parliament lasted a full three-year term from 20 Feb 1909 to 19 Feb 1910. Between federation in 1901 and 2019, the average length of a Parliament was slightly less than 136 weeks or approximately two and half years. The shortest Parliament was the 11th, which was dissolved after 223 days.

In reality, it is the Prime Minister who determines the duration of the House of Representatives because, by convention, the Governor-General excises Section 28 power on advice.

Section 28 enables conjoint - or synchronous - elections for both houses of Parliament by making the term of members of the House of Representatives half that of senators. Thus, it enables elections of the whole House and half the Senate to occur on the same election day.

By convention, the Governor-General has the reserve power to refuse advice to dissolve the House of Representatives if...

a) The government has lost the confidence of the House of Representatives, and
b) The Prime Minister advises the Governor-General to dissolve the House, and
c) The House can form another government, and

d) There is time remaining before the expiry of the House's term.

Impact

Section 28 directly impacts the frequency of elections and the representativeness and accountability of the Parliament.

Section 28 upholds the representativeness and accountability of the Parliament

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The House of Representatives' maximum three-year term has been criticised as too short and promoting "short-termism" in contemporary politics. Proposals for fixed three-year terms have yet to be successful. This solution has been adopted in several States, including Western Australia, which has fixed terms.

Another suggested reform is to increase the term of the House of Representatives to four years. However, this would necessitate lengthening the Senate's term to eight years, reducing the representativeness and accountability of the upper house. Alternatively, separate elections for each house would be required, which would double the cost of elections.

Any change to Section 28 would require a referendum, which is unlikely to succeed.

Course links

- Unit 3 - Roles and Powers of the Governor-General
- Unit 4 - Accountability of the Parliament

Section 44 – Qualifications to sit in Parliament

Any person who… (see the five key features below) … shall be incapable of being chosen or of sitting as a senator or a member of the House of Representatives. (Abridged)

Purpose

Section 44 in Chapter 1 of the Constitution lists five reasons a person may be disqualified from sitting in the Commonwealth Parliament.

Key features

Persons are disqualified from sitting in Parliament on the following grounds…

1. Allegiance to or citizenship of a foreign power.
2. Convicted of treason or crimes with a sentence of one year or more.
3. Bankruptcy.
4. Employed by the Australian government (i.e. public servants) - except Ministers.
5. Having a financial agreement or interest with the Commonwealth.

Section 44 says persons fitting any of the above criteria "shall be incapable of being chosen" as a member of parliament. Thus, it applies from the moment a person nominates as a candidate.

Details

Section 44 is essential for the accountability of the Parliament. It ensures the loyalty of lawmakers to the Commonwealth of Australia. Furthermore, it ensures persons of good character are eligible by excluding criminals and bankrupts. The exclusion of employees of State and Federal executives ensures a separation of executive and legislative powers. Finally, disqualifying persons with financial relationships with the Commonwealth prevents conflicts of interest.

The exception applied to Ministers in Section 44(iv) is necessary because the Westminster system depends on Ministers being members of parliament - see Section 64.

Impact

Section 44 was written when Australia was a Dominion of the British Empire, and all Australians were British subjects. There was no Australian citizenship, and the problem of dual citizenship did not arise.

The *Australian Nationality and Citizenship Act 1948* established Australian citizenship. From then on, the impact of Section 44(i) has been problematic due to the increasing number of Australians with dual nationality. It undermines the political representation of Australia's ethnic diversity.

Section 44 undermines political representation.

Section 44 severely impacted the 45th Parliament. Fifteen members and senators resigned or were disqualified - i.e. 6.6% of the 45th Parliament was forced out of Parliament because of Section 44.

High Court Interpretations

Section 44(i)

- *Re Wood (1988) 167 CLR 145*
- *Sue v Hill (1999) HCA 30)*
- *Re Canavan and others (2017) HCA 45*: The *Citizenship Seven case* involved the Deputy Prime Minister, Barnaby Joyce and six senators. Five were disqualified on Section 44(i) grounds.
- *Re Gallagher [2018] HCA 17*

Notes

- In 2017/18, other members of parliament resigned before they could be referred to the High Court - e.g. Senator Jacqui Lambie.
- Replacement senators determined by the High Court were also found ineligible before they could take their seats - e.g. Holly Hughes was found ineligible to replace the disqualified senator Fiona Nash.

Section 44(ii)

- *Re Cullerton No2 (2017) HCA 4 - see Section 44(iii) below*

Section 44(iii)

- *Re Cullerton No2 (2017) HCA 4*

Senator Rod Cullerton (WA) was declared bankrupt by the Federal Court in December 2016. The President of the Senate notified the Governor of Western Australia of Mr

Cullerton's disqualification. Mr Cullerton applied for Special Leave to appeal his disqualification in the High Court. The High Court rejected his application. On the same day, the High Court held Mr Cullerton ineligible to be chosen under Section 44(ii) because of a criminal conviction - see Section 44(ii) above.

Section 44(iv)

- *Sykes v Cleary (1992) 176 CLR 77*
- *Free v Kelly (1996) 185 CLR 296*

These cases resulted in people employed in the executive branch of government being disqualified from election to Parliament.

Mr Cleary was a Victorian state schoolteacher and Ms Kelly served in the RAAF.

Both occupied an "office of profit under the Crown" - i.e., they were employed in either State or Federal executive branches at their nomination.

Section 44(v)

- *R v Day (2017) HCA 14*

Mr Day was a senator who owned a building with offices leased by an Australian Public Service department. The rental contract meant he had a financial agreement with the Commonwealth, disqualifying him from Parliament.

There are many cases besides the above, which indicates the need for clarity concerning Section 44.

The High Court has applied strict legalist interpretations to Section 44 that fail to resolve its undemocratic limitations. For example, it held that mere entitlement to foreign citizenship is sufficient for disqualification. Candidates could be disqualified even if they were unaware of entitlement to foreign citizenship.

The problematic nature of Section 44 creates uncertainty. Its impact on representing Australia's multicultural community is of particular concern because it disqualifies many Australian citizens from election to Parliament.

The problems with Section 44 have long been recognised and led to reform proposals.

Referendum Proposals

- 1981: the Senate Standing Committee on Constitutional and Legal Affairs recommended in its report, *The Constitutional Qualifications of Members of Parliament,* that all five subsections of Section 44 be amended or deleted.
- 1985-2000: the Australian Democrats, a Senate minor party often holding the Senate balance of power, proposed four bills to initiate a referendum. All failed.
- 1988: The Constitutional Commission, a body established to examine reforming the Constitution, proposed similar reforms to those of the Constitutional and Legal Affairs Committee in 1981.
- 1996: The House of Representatives Standing Committee on Legal and Constitutional Affairs recommended a referendum to amend Section 44(i) and (iv). It proposed replacing Section 44(i) with a subsection requiring members of parliament to be Australian citizens and to give Parliament powers to make laws concerning foreign allegiance - (note, this is common practice in most liberal democratic constitutions). It also recommended Section 44(iv) be replaced with a provision making public servants' jobs vacant if they were nominated or were elected to Parliament. The government at the time accepted the recommendations and stated that *constitutional and legislative action is the only realistic way to overcome these shortcomings [of Section 44]*. No action was taken.
- 1998: Senator Bob Brown (TAS) introduced the *Constitutional Alteration (Right to Stand for Parliament Qualification of Members and Candidates) Bill 1998*. The private senator's bill proposed altering subsections 44(i) and 44(iv). Debate on the bill revealed most members of parliament agreed that change was needed but disagreed about what changes.
- 2003: the Senate voted that Section 44(i) and (iv) should be amended to overcome the ban on dual citizens and public servants running for parliament.
- 2017: the Joint Standing Committee on Electoral Matters conducted an inquiry during the term of the disrupted 45th Parliament. It recommended that Section 44 be repealed in full or the words "until the Parliament otherwise provides" be inserted. The effect of either amendment would be to give Parliament the power to legislate the conditions of disqualification.

Without bipartisan and cross-party support, none of the above referendum proposals could pass Parliament for a referendum. The Australian public is unsympathetic to change and would likely reject any change to Section 44.

Course links

- Unit 3 - Roles and Powers of the High Court, at least one reform proposal to change the Commonwealth Constitution (Australia) such as Commonwealth Constitution (Australia) Section 44 (i), (ii) and(iii)
- Unit 4 - Accountability of the Parliament

Section 51 – Making laws for peace, order & good government

The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to: … (40 fields of non-exclusive legislative power)

Note: The subsections of Section 51 relevant to the Syllabus are included as separate chapters and are not covered in detail in this chapter.

Purpose

Section 51 is in Chapter 1 Part V of the Constitution. Part V is about the powers of the Parliament. Section 51 lists a series of "heads of power" that confer certain legislative powers upon the Commonwealth Parliament. Most are **concurrent** powers.

Key features

1. Confers certain legislative powers upon the Commonwealth Parliament "to make laws for the peace, order and good government of the Commonwealth".
2. Section 51 power cannot be used to infringe any other part of the Constitution.
3. Establishes the federal division of powers by defining the Commonwealth's law-making power.
4. No legislative or financial powers listed in Section 51 are exclusive to the Commonwealth, meaning they may be concurrent with the States.
5. Contains 40 legislative **heads of power** "with respect to" which the Parliament may legislate.
6. The longest section of the Constitution.

Details

Section 51 grants legislative power to the Commonwealth Parliament and makes it "subject to [the] Constitution". Thus, the Parliament cannot legislate itself out of obligations imposed by other sections of the Constitution like Section 116 (freedom of religion) or Section 80 (right to trial by jury).

Section 51 establishes the federal division of powers by specifying the Commonwealth Parliament's legislative powers. Section 51 contains no exclusive powers; thus, the States may exercise the powers concurrently with the Commonwealth. Potential conflicts between Commonwealth and State laws are resolved by Section 109 (see Section 109). Despite not being exclusive, some legislative powers are inappropriate for States, for example, Section

51(xxix), the external affairs power. Only the Commonwealth makes laws under these "exclusive-by-nature" heads of power.

The list of 40 heads of power does not prevent the Commonwealth Parliament from legislating for matters outside the scope of Section 51. The risk is that such laws will not withstand a constitutional challenge in the High Court. However, unchallenged legislation remains valid.

Impact

Section 51 is enormously important. It is fundamental to Australian federalism because it expresses the legislative powers of the national government, creating the division of powers. Its partner in the division of powers is Section 107. Section 107 preserves the six colonial parliaments' legislative powers after becoming States within the federation. Together, Sections 51 and 107 establish the federal division of powers, which make Australia a federation. (See Section 107).

Section 51 creates the federal division of powers.

Section 51 has had a considerable impact through its interpretation by the High Court. Many heads of power contain only a single word or short phrase. Consequently, there may be uncertainty about the Parliament's powers. The High Court resolves these doubts by interpreting Section 51 and its relevant subsections. Landmark constitutional cases concerning Section 51 are a significant agent of constitutional change.

Parliament is accountable through the High Court's judicial review of legislation made with respect to Section 51 powers.

High Court Interpretations

The term "with respect to" precedes the 40 subsections of Section 51. The High Court has held that these words broaden the powers by enabling the Parliament to do what may be necessary to give full effect to a head of power. These implied "incidental" powers have dramatically centralised legislative and financial power since 1920.

The willingness of the High Court to widen the powers is supported by the last subsection of Section 51 - Section 51(xxxix) - the incidental power.

In *Grannall v Marrickville Margarine Pty Ltd (1955) 93 CLR 55*, the High Court said each express Commonwealth legislative power:

"Impliedly carries with it authority to legislate in relation to acts, matters and things the control of which is found necessary to effectuate its main purpose, and thus carries with it power

to make laws governing or affecting many matters that are incidental or ancillary to the subject matter".

Note: Cases related to subsections of Section 51 are included in following chapters.

Course links

- Unit 3 - Functions of the Commonwealth Parliament, federalism in Australia with reference to constitutional powers of State and Commonwealth parliaments, including exclusive, concurrent, and residual powers, formal and informal methods of constitutional change and their impact
- Unit 4 - Accountability of the Parliament

Section 51(ii) – The taxation power

The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to: taxation; but so as not to discriminate between States or parts of States.

Purpose

Section 51(ii) is the Commonwealth Parliament's taxation power. It is an extensive financial power. There are no limits to the types of taxation the Commonwealth may legislate.

Section 51(ii) is a concurrent power so States can make taxation laws too. States can impose any tax except those given exclusively to the Commonwealth by Section 90. These are customs and excise duties - see Section 90.

Key features

1. The Commonwealth may raise any form of taxation.
2. Commonwealth taxation must be equally applied across the States - i.e., non-discriminatory.
3. As a concurrent power, Section 109 applies if Commonwealth and State taxation laws are inconsistent - see Section 109.
4. Section 53 prevents the Senate from exercising powers under Section 51(ii) - see Section 53.

Details

The power to raise taxation is an essential aspect of government, which is why Section 51(ii) is a concurrent power.

Section 51(ii) is a financial power that allows the Commonwealth to raise revenues necessary for ordinary government.

business. The Australian Public Service carries out this business, delivering services like Medicare and welfare. Defence is an example of an expensive Commonwealth responsibility funded through taxation.

Revenues can also be raised for specific purposes, like infrastructure projects, defence acquisitions, levies to cover health costs and disaster relief.

The Commonwealth Budget is the most significant legislation associated with Section 51(ii).

All legislation raising taxation must start in the House of Representatives. The Senate must pass taxation legislation for it to become law. The Senate cannot amend taxation legislation but may communicate with the House to suggest amendments - see Section 53.

Impact

Money is power.

The power to raise taxation is a fundamental power of government. The broad scope of Section 51(ii) enables the Commonwealth to exercise substantial financial power to achieve its goals.

The Commonwealth exerts significant influence over the national economy through regular budgets outlining its taxation and spending policies. Federal governments can manage the business cycle through taxation and spending to avoid inflation and recessions.

Budgets are statements of priorities enabling the Commonwealth to steer the nation towards its preferred social, economic, environmental, and other goals. For example, allocating money to the National Disability Insurance Scheme prioritises the participation of people with disabilities in society and the economy.

The High Court's Section 51(ii) interpretations have significantly impacted the federal balance of power by increasing the vertical fiscal imbalance (VFI) between the Commonwealth and the States.

Interpretations of Section 51(ii) significantly increased the VFI.

The most significant change in the VFI occurred in 1942. The Commonwealth legislated the Uniform Tax Scheme (UTS) to fund national defence during WW2. The UTS took over income tax from the States, depriving them of 63% of their revenue (Chordia, 2015).

High Court Interpretations

- *South Australia v Commonwealth (1942) 65 CLR 373 - the First Uniform Tax Case*
- *Victoria v Commonwealth (1957) 99 CLR 575 - the Second Uniform Tax Case*

High Court interpretations of Section 51(ii) have significantly impacted Commonwealth legislative and financial powers, the federal balance of power and the Senate.

The two Uniform Tax Cases - above - were landmark cases. They centralised power by upholding the validity of the UTS, enhancing the financial power of the Commonwealth Parliament. The cases shifted the vertical fiscal imbalance in favour of the Commonwealth, significantly magnifying its financial power at the expense of the States.

Centralised financial power results in surplus Commonwealth revenues, which are transferred to the (now impoverished) States using the Section 96 grants power. The grants power enables the Commonwealth to set grant conditions as it "thinks fit" - see Section 96. Thus, the enhanced financial power of the Commonwealth can be used to coerce the States.

Course links

- Unit 3 - Functions of the Commonwealth Parliament, federalism, roles and powers of the High Court, federalism
- Unit 4 - Accountability of the Parliament

Section 51(xx) – The corporations power

The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to: foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth.

Purpose

Section 51(xx) is the Commonwealth Parliament's power to legislate for incorporated bodies. It is a concurrent power, so States can also make laws regulating corporations. The corporations power is one of the Commonwealth Parliament's most important powers.

Key features

1. Incorporated bodies are independent legal entities. They are organisations recognised by law as separate from their owners.
2. The Commonwealth may regulate the practices of "foreign, trading and financial" corporations.
3. The process of incorporation is a residual power belonging to the States.

Details

Incorporated bodies - or corporations - are a type of organisation. The law recognises corporations as "artificial persons" with rights and duties like a "natural person". For example, they may be sued in a civil case.

Corporations are widespread in society and the economy. The Constitution recognises their importance and gives the Commonwealth most of the power for regulating existing corporations - but limited power over creating new incorporated bodies.

Impact

Corporations dominate the economy and employ approximately 85% of the workforce. They operate in the mining, agriculture, manufacturing, and service sectors. Therefore, the ability to legislate for corporations gives the Commonwealth Parliament significant power over any activity they carry out, including product safety and warranties, advertising, employment, and the environment.

Some of the most significant legislation in Australia has been passed under Section 51(xx). The *Competition and Consumer Act 2010* and the *Fair Work Act 2009* are examples. Both regulate aspects of the Australian economy.

Interpretations of Section 51(xx) altered the balance of power and facilitated both cooperative & coercive federalism.

Interpretations of the corporations power have significantly altered the federal balance of power by centralising law-making. Meanwhile, cooperative federalism plays a vital role in regulating aspects of corporations beyond the Commonwealth's Section 51(xx) jurisdiction. For example, State *Fair Trading Acts* are "national application laws" that make the Australian Consumer Law national in scope. Additionally, uniform State laws apply to the incorporation of companies. COAG negotiated these uniform laws as corporations increasingly operate across State borders, where the Commonwealth lacks power.

High Court Interpretations

- *Huddart, Parker & Co Pty Ltd v Moorehead [1909] HCA 36*
- *Strickland v Rocla Concrete Pipes Ltd (1971) HCA 40 - the "Concrete Pipes Case"*
- *New South Wales v Commonwealth (1990) HCA 2, (1990) 169 CLR 482*
- *New South Wales v Commonwealth (2006) 229 CLR 1 - the "WorkChoices Case"*

After initially limiting the corporations power by reading its meaning narrowly, the High Court has since expanded Commonwealth legislative power under Section 51(xx). It has done so through increasingly broad interpretations that have widened the scope of the power.

In *Huddart 1909,* the High Court applied the Reserved Powers Doctrine to limit the corporations power. The Reserved Powers Doctrine was a narrow style of interpretation developed early after federation to prevent Commonwealth encroachment into State powers. After the landmark *Engineers Case 1920*, the High Court abandoned the Reserved Powers Doctrine.

The High Court finally overruled *Huddart* in *Strickland 1971* - known as the Concrete Pipes Case. *Strickland* held that the original *Trade Practices Act 1965* was valid. The decision changed the federal balance of powers by significantly expanding Commonwealth law-making power.

In *New South Wales v Commonwealth 1990*, the High Court held that Section 51(xx) did not contain the power to incorporate companies. Thus, incorporation remained a residual State power. The case triggered an episode of cooperative federalism when the States enacted

uniform legislation to simplify the process for companies wishing to incorporate across State borders.

In *New South Wales v Commonwealth 2006* - known as the Work Choices Case - several States challenged the Commonwealth's *Workplace Relations Amendment (Work Choices) Act 2005. T*he *WorkChoices Act* was a federal takeover of industrial relations. By legislating for employment within corporations, it used Section 109 to invalidate significant portions of State industrial relations laws - see Section 109. It relied on Section 51(xx) as the dominant head of power.

Several States challenged *WorkChoices*, arguing Section 51(xx) was limited to regulating the external relationships of corporations - not their internal affairs like pay and working conditions - and by the existence of a unique industrial relations power in Section 51(xxxv). The High Court dismissed the States' arguments and held the *WorkChoices Act* valid.

WorkChoices 2006 altered the federal balance of power by considerably expanding Commonwealth law-making power at the States' expense. The federal government may now regulate many economic, environmental, and social matters formerly within State jurisdiction. For example, the federal government used the expanded corporations power to regulate irrigators' water allocations to save water for wetlands along the Murray Darling River system. Most irrigators are incorporated agricultural companies subject to Section 51(xx).

Course links

- Unit 3 - Functions of the Commonwealth Parliament, federalism in Australia with reference to constitutional powers of State and Commonwealth parliaments, including exclusive, concurrent and residual powers, formal and informal methods of constitutional change and their impact, roles and powers of the High Court, federalism
- Unit 4 - Accountability of the Parliament

Section 51(xxix) – The external affairs power

The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to: external affairs.

Purpose

Section 51(xxix) is the Commonwealth Parliament's power to legislate treaties and other international agreements into law. The power is exclusive by nature, so States do not legislate in this area.

The external affairs power has expanded alongside Australia's post-WW2 status as a fully-fledged independent liberal democracy. The power is especially important in upholding human rights in Australia.

Key features

1. External affairs cover Australia's relations with international entities, including other countries and the United Nations. The federal executive makes agreements with international entities. The Commonwealth Parliament can legislate these agreements to give them legal status.
2. Australia is a founding member of the United Nations and agrees to uphold human rights contained in UN covenants, protocols and treaties. The Commonwealth Parliament can legislate human rights and other agreements with the UN to give them legal status.

Details

The power to have relations with other countries is a mark of sovereignty. Thus, external affairs is an essential power of the Commonwealth Parliament.

As a sovereign nation, Australia interacts with the international community in trade, military alliances, extradition treaties, environmental agreements and other matters.

The federal executive makes international agreements using powers inherent in Section 61 of the Constitution - see Section 61. The external affairs power enables the Commonwealth Parliament to ratify the executive's agreements and make them law. This process raises the status of international agreements, giving them full legal effect in Australia.

Impact

The external affairs power was relatively unimportant when Australia was a Dominion of the British Empire. As a British Dominion, Australia's foreign policy was the same as the Empire's.

During and after WW2, the impact of the external affairs power expanded. The *Statute of Westminster Adoption Act 1942* severed Australia's legislative links to Britain and made Australia an independent nation capable of making independent foreign policy.

At the end of WW2, Australia was instrumental in establishing the United Nations and one of its most outstanding achievements - the Universal Declaration of Human Rights.

Treaties can expand the Commonwealth's law-making power if they cover matters beyond its standard constitutional heads of power, like anti-discrimination. Legislating such international agreements brings these matters under the Commonwealth's authority. The *Race Discrimination Act 1975* is an example of a new Commonwealth power obtained by legislating the UN Convention on the Elimination of All Forms of Racial Discrimination.

Increases in Commonwealth legislative power though Section 51(xxix) impact the federal balance of power when new Commonwealth laws enter spheres where State laws operate. Section 109 may be triggered, invalidating inconsistent State laws - see Section 109.

Section 51(xxix) has an almost unlimited capacity for expanding Commonwealth power.

The High Court said that Section 51(xxix) "differs from the other powers conferred by Section 51 in its capacity for almost unlimited expansion." (*Tasmanian Dams Case 1983*). The High Court's attitude to external affairs makes it one of the most significant powers in terms of its impact on the federal balance of powers.

United Nations human rights agreements have greatly impacted Australia's approach to protecting human rights.

High Court Interpretations

- *R v Sharkey* (1949)
- *Koowarta v Bjelke-Petersen (1982) HCA 27*
- *Commonwealth v Tasmania (1983) HCA 21 - the "Tasmanian Dams Case"*
- *Polyukhovich v The Commonwealth (1991) HCA 32 - the "War Crimes Act Case"*

In *R v Sharkey 1949,* the High Court held that Section 51(xxix) applied to foreign nations outside the British Empire and British Commonwealth.

Koowarta 1982 extended *Sharkey* by holding that Section 51(xxix) applied to "international persons" that were not sovereign countries. In this case, the "international person" was the United Nations.

In the *Tasmanian Dams Case 1983*, the High Court extended the Commonwealth's external affairs powers. It held that the Parliament could legislate any international agreement, whatever the agreement covered.

In the *War Crimes Act Case 1991*, the High Court held that the Commonwealth could make laws about crimes committed in other countries if the suspects were in Australia.

The High Court developed a broad validity test for laws made under Section 51(xxix) through these and other cases. Under the test, a law is valid if it legislates for any agreement with an "international character". Since the 1980's, globalisation significantly expanded the Commonwealth's law-making power by greatly enlarging the range of international agreements.

The impact on the federal balance of power has been substantial. Legislating international agreements has eroded State power by enabling the Commonwealth to enter spheres of residual power. Areas such as land management and rivers are threatened. For example, the Bonn Convention on migratory birds supported laws protecting wetlands along the Murray Darling River - at the expense of the States' rivers power.

The Treaties Council advises COAG (now the National Federal Reform Council) on the impacts of international agreements on the federal balance of power.

Course links

- Unit 3 - Functions of the Commonwealth Parliament, federalism in Australia with reference to constitutional powers of State and Commonwealth parliaments, including exclusive, concurrent and residual powers, formal and informal methods of constitutional change and their impact, roles and powers of the High Court, federalism
- Unit 4 - Accountability of the Parliament

Section 51(xxxvii) - Referral of powers

The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to: matters referred to the Parliament of the Commonwealth by the Parliament or Parliaments of any State or States, but so that the law shall extend only to States by whose Parliaments the matter is referred, or which afterwards adopt the law.

Purpose

Section 51(xxxvii) is the power of State parliaments to refer concurrent or residual powers to the Commonwealth.

Key features

1. A referral of power makes a referring State's power a Commonwealth power.
2. Only the referring State is affected. Commonwealth law made using a referred power does not affect non-referring States.
3. States may refer powers for a specific time, after which the powers return to the referring State(s).

Details

Referrals of power were intended to be a vehicle for cooperative federalism. Referrals allow the Commonwealth and States to adjust the federal balance of power by agreement rather than via formal constitutional change - i.e. referendum.

In practice, Section 51(xxxvii) has been used infrequently. Other forms of cooperative federalism arose instead.

Impact

South Australia has used section 51(xxxvii) to refer to railways power because of the cost of running railways.

Law reform and changes to social norms have led to referrals of power. In the 1970s, no-fault divorce reforms, the rise of *de facto* relationships and Australians' increasing inter-state mobility led all States except Western Australia to refer family law powers to the Commonwealth.

Section 51(xxxvii) has not been widely employed to alter the federal balance of power.

Likewise, the Commonwealth used referred powers to legislate the *Mutual Recognition Act 1992*. The Act enabled professional qualifications earned in one State to be recognised in all States. The Act also meant products made in one State, according to its legal standards, were recognised by other States even if their standards differed.

By the 2000s, the international nature of the crime of terrorism made it more appropriate for the Commonwealth to make the crime part of its criminal code. By agreement through COAG, all States referred relevant criminal powers.

In practice, Section 51(xxxvii) has not been widely employed to alter the federal balance of power. The preferred method for negotiated cooperative federalism has been uniform legislation passed by the States by agreement with the Commonwealth through COAG.

Course links

- Unit 3 - Functions of the Commonwealth Parliament, federalism in Australia with reference to constitutional powers of State and Commonwealth parliaments, including exclusive, concurrent and residual powers, formal and informal methods of constitutional change and their impact, federalism

Section 52 - Exclusive powers essential for the national government

The Parliament shall, subject to this Constitution, have exclusive power to make laws for the peace, order, and good government of the Commonwealth with respect to: … (see the three features below)

Purpose

Section 52 lists three "heads of power" that confer exclusive legislative powers upon the Commonwealth Parliament. The powers relate to the seat of the national government and the federal public service.

Key features

1. Section 52(i) gives the Commonwealth exclusive power over the Australian Capital Territory (ACT) and all places acquired for Commonwealth purposes.
2. Section 52(ii) gives the Commonwealth exclusive power over the Australian Public Service (APS).
3. Section 52(iii) gives the Commonwealth exclusive power over all other matters declared by the Constitution to be exclusive to the Commonwealth.

Details

Section 52 grants the Commonwealth limited but essential powers necessary for the national government. It makes these exclusive powers.

Impact

Section 52 establishes exclusive authority over the geographical location of the national government and any place acquired by the national government for its purposes. Such places include defence force bases, airports and post offices.

Section 52(iii) reinforces other exclusive powers, such as Section 90, and gives the Commonwealth power to legislate for them (see Section 90).

Section 52 specifies limited but essential powers necessary for the national government.

High Court Interpretations

- *Worthing v Rowell and Muston Pty Ltd (1970) 123 CLR 89*

In *Worthing*, the High Court held that State laws do not apply in "places acquired by the Commonwealth for public purposes". As a result, State laws could not apply inside a Post Office.

To overcome this troublesome interpretation, the Commonwealth used Section 52(iii) to legislate the *Commonwealth Places (Application of Laws) Act 1970,* which permits State law to apply on Commonwealth land. The Act is an example of cooperative federalism.

The High Court developed the Doctrine of Intergovernmental Immunities early in the 20th Century to determine the extent to which the laws of the Commonwealth and the States may bind each other. The Doctrine has evolved significantly since.

Course links

- Unit 3 - Functions of the Commonwealth Parliament, federalism in Australia with reference to constitutional powers of State and Commonwealth parliaments, including exclusive, concurrent and residual powers, formal and informal methods of constitutional change and their impact
- Unit 4 - Accountability of the Parliament

Section 53 - Senate powers

Proposed laws appropriating revenue or moneys, or imposing taxation, shall not originate in the Senate. (Abridged)

Purpose

Section 53 is about the powers of the Parliament. Section 53 makes the powers of the Senate equal to those of the House of Representatives, except for "money bills".

Key features

Section 53 prevents the Senate from legislating to initiate or amend bills that...

1. Impose taxation.
2. Appropriate revenue to be spent in specific ways.
3. Appropriate revenue for the “ordinary annual services” government.
4. Except for the above money bills, the Senate "shall have equal powers with the House of Representatives."

Section 53 prevents the Senate from initiating or amending the types of money bills above. However, it permits it to withhold approval and communicate with the House by messages suggesting amendments to any of the three types of money bills.

Importantly, Section 53 does nothing to prevent deadlock between houses regarding money bills.

Details

Executives raise and spend money to fund the government's activities. The House of Representatives forms governments and holds them responsible for how they govern. Scrutinising government taxation and spending is a mechanism through which the House holds the executive to account. Section 53 prevents the Senate from threatening this essential Westminster function of the House of Representatives by ensuring that money bills can only originate or be amended in the lower house.

In all other respects, the Senate is equal to the House of Representatives.

Impact

Section 53 makes the Senate a powerful house of review, and it has performed its review function effectively since the 1970s. It may block all types of legislation, including money

bills. It regularly negotiates significant amendments and functions as a genuine check on the House of Representatives and the executive formed within it.

The 1975 Crisis was triggered by the deadlock over the Whitlam Government's money bills, which the Senate refused to pass, crippling the government's finances and precipitating a constitutional crisis embroiling the Governor-General. The Senate's actions brought down the government.

Section 53 makes the Senate a powerful house of review, and it has performed its review function effectively since the 1970s.

Senate Estimates Committees hold the government to account via the scrutiny of money bills during the budget process. They do so as the House debates them. For this purpose, Estimates Committees use memoranda sent by the House containing details of the money bills. To suggest amendments to money bills, Estimates Committees use the Section 53 power to communicate “by message” with the House of Representatives. This procedure allows the Senate to influence money bills despite lacking the power to amend them.

The "Compact of 1965" is an agreement between the two chambers about the definition of "ordinary annual services" of government. Under the Compact, one-time projects, like funding a dam or making Section 96 grants to the States, are not "ordinary annual services" of government. The Compact means that the government's Budget is always presented in two bills - one for the "ordinary annual services" of government - which the Senate cannot amend - and another for other projects - which it may amend.

Senate inquiries, conducted by its powerful committee system, provide deep analysis and scrutiny of legislation, government policy and social, economic and other issues facing the nation.

Section 53 limitations on Senate power have not significantly restrained the upper house.

High Court Interpretations

The High Court regards Section 53 as an internal matter of the Parliament. As such, the High Court would likely dismiss a Section 53 challenge to any legislation.

Disputes about Section 53's meaning are thus left to the houses of Parliament to settle between themselves. The Compact of 1965 is an example where Parliament resolved issues concerning Section 53.

For example, in 2019, the minority Morrison Government attempted to prevent the House from passing the *Medevac Bill 2019*, a government bill amended in the Senate and returned to the House. Lacking the numbers to defeat the bill in a vote, the government argued that the Senate's amendments "imposed a (financial) burden on the people" and were thus

unconstitutional under Section 53. The bill passed regardless. The law was not challenged because the High Court was almost sure to find it valid under Section 53.

The meaning of "taxation" has undergone interpretation by the High Court through cases involving Section 51(ii) - see Section 51(ii). These interpretations are meaningful because they influence what types of legislation can be affected by Section 53.

Course links

- Unit 3 - Functions of the Commonwealth Parliament, roles and powers of the Governor-General - the 1975 Crisis
- Unit 4 - Accountability of the Executive - Senate Estimates Committees and one other committee (e.g. Senate Delegated Legislation Committee)

Section 57 – Disagreement between the Houses

If the House of Representatives passes any proposed law, and the Senate rejects or fails to pass it… and if after an interval of three months the House of Representatives… again passes the proposed law… and the Senate rejects or fails to pass it… the Governor-General may dissolve the Senate and the House of Representatives simultaneously… If after such dissolution the House of Representatives again passes the proposed law… and the Senate rejects or fails to pass it… the Governor-General may convene a joint sitting of the members of the Senate and of the House of Representatives… [to] deliberate and… vote together upon the proposed law (Abridged)

Purpose

Section 57 is about the powers of the Parliament. Section 57 provides a mechanism for resolving deadlocks between the House of Representatives and the Senate.

Key features

Section 57 applies only to bills that start in the House of Representatives, meaning the procedure is likely to apply to deadlocked government bills because they are the dominant type. The following procedure may resolve a deadlocked bill…

1. The House passes a bill.
2. The Senate rejects it, fails to pass it or passes the bill with amendments to which the House "will not agree".
3. The House passed the bill a second time within three months of the Senate's decision.
4. The Senate rejects, fails to pass or amends the bill again.
5. The Governor-General may simultaneously dissolve both houses of parliament - note, Step 5 onwards cannot occur if the House is due to expire within six months by "effluxion of time" - see Section 28.
6. A "double dissolution" election is held.
7. The house passes the bill(s) again.
8. The Senate rejects it, fails to pass it or passes the bill with amendments to which the House "will not agree".
9. The Governor-General may call for a joint sitting of both house - held together in the Senate Chamber.
10. The bill(s) are put to the joint sitting and passed by a 50%+1 majority or rejected.
11. The Governor-General gives Royal Assent.

Details

In all respects other than money bills, the Senate has identical powers to the House of Representatives. A bill must pass both to become law.

Each House has a different representative role and will likely contain different proportions of party and other representatives.

These two factors make it likely the Houses will disagree, and bills may be deadlocked between them.

Section 57 provides the mechanism for resolving legislative deadlocks between the two Houses. The procedure is designed to put the power to resolve contentious bills into the hands of the people.

By convention, the Governor-General acts on advice when dissolving the houses, issuing writs for an election and calling for a joint sitting.

If the deadlock causes a breakdown in constitutional government, the Governor-General may act without advice to break the deadlock and allow an election to restore constitutional government. In this case, Section 57 is a reserve power.

Section 57 provides the mechanism for resolving legislative deadlocks between the two Houses.

Impact

Section 57 has had some impact. Since federation, there have been...

- Seven double dissolution elections - 1914, 1951, 1974, 1975, 1983, 1987 and 2016
- One joint sitting of Parliament - 1974

In 1914, 1975 and 1983, the deadlock was resolved through elections where the governments lost office. In 1951, the government won control of the Senate, making passage of the bills a formality.

While the number is not high, the impact of at least three double dissolutions has been significant because the election did not resolve the dispute. The common factors in 1974, 1983 and 2016 were...

- The government was returned.
- The government failed to win control of the Senate.

Thus, contentious government bills remained a live issue, yet the Senate remained independent.

In 1974, six bills were deadlocked. The Whitlam Government was returned with a reduced majority and passed the bills a third time. The Senate rejected them a third time, and a joint

sitting was called. The bills passed the joint sitting. One was later ruled invalid by the High Court because it did not satisfy the conditions of Section 57.

In 1987, the government abandoned the bills and did not present them to the Senate.

The 1975 double dissolution was the most significant. It was associated with the 1975 Crisis. The bills in question were money bills that the Senate refused to pass. The Whitlam Government refused to resign and continued to govern without supply. The Governor-General dismissed the government and accepted advice to dissolve both Houses and issue writs for an election from the caretaker Prime Minister he had just appointed. The money bills were not the "trigger" necessary for Section 57. Instead, other deadlocked bills met the constitutional criteria for a double dissolution of both houses.

The Dismissal was an exercise of reserve power under Section 62 - see Section 62. However, the Prime Minister - Malcolm Fraser - who did not command the confidence of the House of Representatives, gave the advice to dissolve Parliament. Thus, it was "unconventional" at least and a reserve power at best.

1975 led to calls for reform of Section 57, including proposals to strip the Senate of the power to reject money bills. Other proposals called for a separate procedure for money bills that would permit the Senate to delay but not reject them. So far, these proposals have failed. However, the 1975 Crisis led to changes in practice related to Section 53, where messages between the Houses are used to allow the Senate to influence (if not amend) money bills as they are dealt with by the House, reducing the potential for deadlocks.

Dissolving the Senate breaks the half-Senate cohorts of senators. Following a double dissolution election, the Australian Electoral Commission separates new senators into "six-year" and "three-year" classes to re-establish the cohorts necessary for general elections at which half the Senate is chosen. Those elected on the first three quotas per State are assigned to the six-year class, while those elected on the last three quotas are assigned to the three-year class.

High Court Interpretations

- *Cormack v Cope Queensland v Whitlam (1974) 131 CLR 432*

In *Cormack V Cope 1974,* two senators challenged the validity of the 1974 double dissolution because only one bill, not a group of bills, could trigger Section 57. The High Court dismissed the argument and held that a batch of bills could trigger a double dissolution and be dealt with by subsequent joint sittings of Parliament.

In the same case, the High Court held that the *Petroleum and Minerals Authority Act 1973* - one of the six trigger bills in 1974 - was invalid because it did not meet the conditions of Section 57 - namely, less than three months elapsed at Step 3 (see above).

Course links

- Unit 3 - Functions of the Commonwealth Parliament, roles and powers of the Governor-General - the 1975 Crisis
- Unit 4 - Accountability of the Parliament

Section 61 - The federal executive

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

Purpose

Section 61 is in Chapter 2 of the Constitution. Chapter 2 is about the executive branch.

Key features

1. It makes Australia a constitutional monarchy.
2. Encompasses all executive powers from three sources - see Details below.
3. According to Westminster convention, all executive powers are exercised by the Governor-General on advice from ministers.
4. Leaves many aspects of executive power unspecified, relying on conventions to guide its use and the High Court to define its boundaries.

Details

Section 61 vests the executive power of the Commonwealth in the King and makes it exercisable by the Governor-General. This makes Australia a constitutional monarchy. Combined with Section 1, which vests the King with legislative power, this creates a Westminster system of government.

Section 61 is short. Whereas the powers of the Parliament are detailed in Chapter 1, the powers of the executive are left to convention and interpretation.

Executive power is the power to administer the business of governing. It comes from three sources.

1. The Constitution - by specifying and enumerating executive power. These are formal powers of the Governor-General used on advice from ministers through the Federal Executive Council - see Section 62. They include the reserve powers of the Governor-General. Constitutional powers include the "nationhood power", which is unspecified but derives from Section 61.
2. Legislation - the executive implements statutes made by Parliament. Legislation often delegates power to the executive to make regulations and discretionary power to ministers.
3. Common law - recognises a range of prerogative powers that may be exercised without Parliamentary authority. The executive can make contracts, conduct inquiries, develop

policies and run programs. Executive schemes are either discretionary compensation payments or wavers - e.g. 'act of grace payments' and debt waivers, or grants administration - e.g. community sports grants.

The executive power is often defined negatively - that is, by what it isn't rather than what it is. For example, all powers that are not legislative or judicial are executive powers.

The Constitution specifies the federal legislative and judicial powers division - see Sections 51, 52, 75, 76, 90, 107 & 109. However, Chapter 2 is silent on the federal division of executive power. Therefore, the High Court applies the principle that since the executive exercises powers delegated to it by the Commonwealth Parliament and carries out Commonwealth statutes, it has executive power in the same general areas.

All powers that are not legislative or judicial are executive.

Impact

The executive branch interacts with ordinary Australians more than any other branch of government. It has sweeping yet ill-defined powers, many of which are coercive. These factors make the impact of Section 61 very significant.

The same factors make executive power highly contested and subject to frequent interpretation by the High Court.

High Court Interpretations

- *R v Sharkey 1949*
- *Davis v the Commonwealth [1988] HCA 63; 166 CLR 79*
- *Pape v Commissioner of Taxation [2009] HCA 23*
- *Williams v The Commonwealth HCA 23, (2012) 248 CLR 156*
- *Alexander v Minister for Home Affairs [2022] HCA 19*

The above is a representative sample of Section 61 cases through which the High Court has defined, expanded and limited the executive power. There are many others.

A common feature of High Court jurisprudence in Section 61 is the reference to the nature of Australia as a "nation" or "polity" - which had grown since Australia was a Dominion of the British Empire. Another aspect of Section 61 jurisprudence is the interpretation of executive power in a negative sense - i.e. by what it is not rather than what it is.

To deduce the meaning of executive power, the High Court often relies on other sections of the Constitution, like Sections 81 and 83, which relate to funding the government business. This is necessary because Section 61 - and Chapter 2 in general - provide scant detail.

In *R v Sharkey,* the High Court held that the Australian Government could enter into agreements with countries outside the British Empire. *Sharkey* recognised the growing status of Australia as an independent nation post-WW2, expanding the "nationhood power" implied by Section 61 and other sections of the Constitution.

In *Davis 1988*, a challenge to the validity of laws and executive schemes related to celebrating Australia's Bicentennial was dismissed. The High Court said, "The commemoration of the Bicentenary is pre-eminently the business and concern of the Commonwealth as the national government and as such falls fairly and squarely within the federal executive power". Empathising the national nature of the federal executive, the judges added, "Section 61 confers on the Commonwealth all the prerogative powers of the Crown except those necessarily exercisable by the States".

In *Pape 2009*, the High Court upheld the validity of an executive scheme to support the economy during the Global Financial Crisis. It held the scheme was underpinned by the implied nationhood power.

In *Williams 2012*, the High Court held that funding for an executive scheme providing religious instruction in state schools was unconstitutional because it could - and thus must - be authorised by an Act of Parliament. The landmark case set boundaries between the executive and legislative powers.

In *Alexander 2022*, the High Court held that the power to denaturalise dual Australian citizens was punitive (i.e. punishment) and, thus, a judicial, not executive, power. *Alexander* is an example of how executive power is sometimes negatively defined - i.e. by what it is not.

Course links

- Unit 3 - Roles and powers of the executive, roles and powers of the Governor-General, roles and powers of the High Court
- Unit 4 - Accountability of the Executive

Section 62 - The Federal Executive Council

There shall be a Federal Executive Council to advise the Governor-General in the government of the Commonwealth, and the members of the Council shall be chosen and summoned by the Governor-General and sworn as Executive Councillors, and shall hold office during his pleasure.

Purpose

Section 62 is in Chapter 2 of the Constitution. Chapter 2 is about the executive branch.

Key features

1. Creates a formal executive body to advise the Governor-General.
2. Links the formal or constitutional powers of the Governor-General with the parliamentary executive - i.e. the ministry.
3. Makes the Governor-General chairperson of the executive council.
4. The Governor-General swears in other members.

Details

Section 62 creates the Federal Executive Council. The Council is part of the constitutional executive - i.e. the part of the executive branch vested with formal or legal executive power. Executive councils trace their origins to the ancient councils summoned by kings and queens to advise them.

Westminster systems typically have executive councils chaired by the Head of State, in whom executive power is vested. Other members include ministers drawn from parliament, including the Head of Government - the Prime Minister.

Prime ministers and ministers are not vested with legal executive power. Instead, they exercise power through the executive council by advising the Head of State. The Council is thus the link between formal (i.e. legal or constitutional) executive power and the parliamentary executive, which is accountable to an elected Parliament.

In Australia, the Governor-General - as Head of State (or representing the Head of State) - chairs the Federal Executive Council and receives advice from ministers.

Executive Council members are “chosen and summoned” by the Governor-General. They hold office “during his (or her) pleasure”. Two limitations apply...

- Section 64 states that members of the Executive Council must be members of Parliament - see Section 64

- Westminster convention requires the Governor-General to follow ministerial advice regarding appointments to the Council.

The power to appoint and dismiss members of the Federal Executive Council is a reserve power of the Governor-General. It may be used without advice to restore constitutional government in a crisis.

The Federal Executive Council links formal (i.e. legal or constitutional) executive power with the Ministry located in Parliament.

Impact

Constitutionally, Section 62 is vital because it links the Crown's unelected and unaccountable executive power with the parliamentary executive (i.e. the ministry) accountable to Parliament and the people.

In practice, the Executive Council is a formality. The conventions of responsible government require the Governor-General to accept ministerial advice - which is always the case.

Any member of Parliament may be appointed to the Federal Executive Council. In the past, Prime Ministers advised the Governor-General to appoint MPs as Parliamentary Secretaries. Since the Turnbull Government, Prime Ministers have advised appointing Assistant Ministers. Consequently, the composition of the Executive Council reflects the Cabinet preferences of the Prime Minister.

Course links

- Unit 3 - Roles and powers of the executive, roles and powers of the Governor-General
- Unit 4 - Accountability of the Governor-General

Section 63 - The Governor-General in Council

There shall be a Federal Executive Council to advise the Governor-General in the government of the Commonwealth, and the members of the Council shall be chosen and summoned by the Governor-General and sworn as Executive Councillors, and shall hold office during his pleasure.

Purpose

Section 63 is in Chapter 2 of the Constitution. Chapter 2 is about the executive branch.

Key features

1. Clarifies constitutional references to the "Governor-General in Council" to mean the Governor-General acting on the advice of the Federal Executive Council

Details

Section 63 aims to remove constitutional misunderstanding by clarifying that references to the "Governor-General in Council" throughout the Constitution shall mean the Governor-General acting on the advice of the Federal Executive Council - see Section 62.

Impact

Section 63 has no impact other than clarifying the wording of the Constitution.

Course links

- Unit 3 - Roles and powers of the executive, roles and powers of the Governor-General

Section 63 ensures the Governor-General's power is exercised through the Federal Executive Council - of which ministers are members.

Section 64 – Appointing ministers and entrenching the Westminster system

The Governor-General may appoint officers to administer such departments of State of the Commonwealth as the Governor-General in Council may establish.

Such officers shall hold office during the pleasure of the Governor-General. They shall be members of the Federal Executive Council, and shall be the Queen's Ministers of State for the Commonwealth.

Purpose

Section 64 is in Chapter 2 of the Constitution. Chapter 2 is about the executive branch.

Key features

1. The Governor-General appoints ministers to administer public service departments.
2. The Governor-General removes ministers.
3. Ministers must be members of the Federal Executive Council - see Section 62
4. Ministers must be members of Parliament or become so within three months of appointment.

Details

Section 64 vests the Governor-General with formal power to appoint and dismiss the ministry. Westminster convention limits this power by ensuring it is exercised on advice.

Ministers must be members of Parliament, which creates an executive drawn from the Parliament - the hallmark of the Westminster system. Thus, Section 64 entrenches the Westminster system in Australia by fusing the legislative and executive branches.

Ministers are appointed to "administer such departments" of the public service as the "Governor-General in Council may establish". Ministers are, therefore, assigned specific portfolio responsibilities, which is critical for Parliament to uphold the conventions of ministerial responsibility.

Ministers must be members of the Federal Executive Council because it is the body that links the Governor-General - vested with formal executive power - with the parliamentary executive - i.e. the ministry - see Section 62. The ministry has no legal power.

Ministers must be members of Parliament, which creates an executive drawn from the Parliament - the hallmark of the Westminster system.

By convention, the elected House of Representatives forms the executive and holds it to account. The Governor-General is bound by convention to appoint the majority party's leader as Prime Minister. The Prime Minister then advises who the Governor-General shall appoint as ministers. Unwritten conventions require the Governor-General to act on Executive Councillors' (i.e. ministers') advice. Thus, the conventions of responsible government make executive power democratically accountable by ensuring it is answerable to Parliament.

The power to appoint and dismiss ministers in Section 64 is a reserve power that the Governor-General may use to restore constitutional government in a crisis.

Impact

Section 64's primary significance is to entrench the Westminster system in Australia. The way the Westminster system operates is not specified. It relies instead on the unwritten conventions of responsible government and ministerial responsibility.

The House of Representatives determines the formation of the executive. Usually, election results are clear-cut, and the Governor-General follows convention by appointing the leader of the House majority as Prime Minister and inviting them to form a government. The Governor-General then accepts the Prime Minister's advice to appoint the rest of the ministry.

The Governor-General's role is more active if no party or coalition of parties wins a majority of seats in the lower house - rendering it unable to form a government. In that case, the Governor-General must decide who to invite to form a government. The Governor-General may call another election if Parliament cannot form a government. The last occasion when the Governor-General played an active role was the 2010 election, which produced a hung Parliament that took 17 days to form the executive.

A Prime Minister who refused to call an election or resign if they lost the confidence of the House of Representatives could be dismissed by the Governor-General. Unwritten conventions are so strong that such a situation has never occurred. Controversially, Governor-General Sir John Kerr dismissed Prime Minister Gough Whitlam in 1975. Sir John claimed it was because Mr Whitlam could not govern without the passage of money bills blocked by the Senate. Mr Whitlam retained the confidence of the House throughout the 1975 Crisis.

During the COVID-19 pandemic, Prime Minister Scott Morrison advised the Governor-General to appoint him to five ministries. The appointments were secret, even to most other ministers. Two inquiries in 2022, one by the Solicitor-General and another by a retired High Court judge, concluded that Mr Morrison's secret appointments undermined the principles of responsible government. Because of the secrecy, Parliament was unaware of who held

executive power in specific portfolios and could not uphold the conventions of ministerial responsibility. The incident called the Governor-General's judgment into question.

High Court Interpretations

- *Re Governor, Goulburn CC (1999) HCA 44; 200 CLR 322; 165 ALR 171; 73 ALJR 1324 - the Eastman Case*
- *Re Patterson (2001) HCA 51; 207 CLR 391; 182 ALR 657; 75 ALJR 1439*

Section 64 requires ministers to be members of Parliament. Thus, if a minister is ineligible to sit in Parliament, were they validly appointed to the ministry? Are their executive decisions valid? These questions arose during the Section 44 citizenship crisis that afflicted the 45th Parliament.

Ministers Fiona Nash and Barnaby Joyce were found ineligible to sit in Parliament under Section 44(i), casting doubt on the validity of their ministerial decisions. Nash and Joyce remained in Cabinet while the High Court heard their cases. The opposition questioned the validity of their decisions, noting that ministers must become members of Parliament within three months of appointment, a period which had long elapsed since the 2016 election when Nash and Joyce were appointed. The government never referred the matter to the High Court, so no decision was made.

Meanwhile, Peter Dutton's qualification to sit in Parliament and thus be appointed Home Affairs Minister was questioned. Mr Dutton's family business received payments from the Commonwealth, which led to questions about his eligibility to sit in Parliament under Section 44(v) - see Section 44.

The common law "*de facto* officer doctrine" is applied by courts to validate the decisions of executive and judicial officers who are invalidly appointed. The doctrine prevents "anarchy and chaos," which would follow if an invalid appointment disqualified a public official's decisions.

The doctrine was upheld by the High Court in the common law case *Forge v Australian Securities and Investments Commission [2006] HCA 44; 80 ALJR 1606; 229 ALR 223*.

However, in *Eastman (1999)* and *Patterson (2001)*, the High Court held that the *de facto* officer doctrine would not apply "where the want of authority is the consequence of the operation of the Constitution".

Mr Dutton's eligibility was never tested in the High Court and thus *Eastman* and *Patterson* were not revisited.

Course links

- Unit 3 - Roles and powers of the executive, roles and powers of the Governor-General, roles and powers of the High Court
- Unit 4 - Accountability of the Executive

Section 68 – Governor-General as Commander-in-Chief

The command in chief of the naval and military forces of the Commonwealth is vested in the Governor-General as the Queen's representative.

Purpose

Section 68 is in Chapter 2 of the Constitution. Chapter 2 is about the executive branch.

Key features

1. The Governor-General is vested with command of Australia's naval and military forces

Details

Section 68 powers are fictional. The Governor-General does not command Australian naval and military forces. The defence minister and Chief of the Defence Force command the Australian Defence Force (ADF) in practice.

Air forces are not mentioned in Section 68, as the Constitution was written before aircraft were invented. However, the Royal Australian Air Force is a “military force” under Section 68.

Section 68 powers are fictional.

Impact

Section 68 has no significant impact. The Governor-General awards military honours on advice.

Course links

- Unit 3 - Roles and powers of the executive, roles and powers of the Governor-General, roles and powers of the High Court

Section 71 - The federal judiciary

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

Purpose

Section 71 is in Chapter 3 of the Constitution. Chapter 3 is about the judicial branch. Section 71 separates the judiciary from the legislative and executive branches.

Key features

1. Vests the Commonwealth's judicial power in the High Court of Australia
2. Acts of Parliament may vest judicial power in other federal courts (and State courts using Section 77)

Details

Section 71 creates the third branch of the Australian political and legal system. Chapter 3 is modelled on Article 3 of the Constitution of the United States, which creates a strictly separate judicial branch.

Section 71 makes the High Court mandatory but allows significant flexibility for Parliament to create other federal courts.

Impact

Section 71 is a democratic keystone because it enshrines the separation of judicial power. From this flow, other democratic principles like judicial independence and the rule of law.

High Court Interpretations

- *Waterside Workers' Federation of Australia v J W Alexander Ltd (1918) 25 CLR 434*
- *R v Kirby; Ex parte Boilermakers' Society of Australia (1956) 94 CLR 254*
- *Brandy v Human Rights & Equal Opportunity Commission (1995) 183 CLR 245*
- *Alexander v Minister for Home Affairs (2022) HCA 19*

Section 71 is the first section in Chapter 3. The High Court has vigorously defended the separation of judicial power since the early days of the federation.

In *Alexander's Case 1918*, the High Court held that the Commonwealth Court of Conciliation and Arbitration's power to resolve disputes was arbitral, not judicial. The Court reasoned that only courts exercising judicial power can enforce rights and responsibilities.

In the *Boilermakers' Case 1956*, the High Court held that the Commonwealth Court of Conciliation and Arbitration could not punish the Boilermakers' Society of Australia for breaking its orders. The court ruled that punishment is a strictly judicial function. The Court went further than *Alexander's Case 1918* by ruling that arbitration is foreign to judicial power and cannot be attached to a court by an Act of Parliament. The decision invalidated the Commonwealth Court of Conciliation and Arbitration. Parliament abolished the Court and replaced it with two new bodies - the non-judicial Conciliation and Arbitration Commission and the Commonwealth Industrial Court with judicial power to enforce the decisions of the Arbitration Commission.

Brandy's Case followed *Boilermakers*. According to the High Court, the Human Rights and Equal Opportunity Commission (HREOC) enforced rights and responsibilities by registering its decisions with the Federal Court, which automatically enforced them. In *Brandy's Case*, the High Court held that HREOC could not exercise judicial powers this way. Today, the Human Rights Commission - successor to HRECO - mediates human rights disputes and cannot enforce rights. Parties must go to the Federal Court to enforce their rights.

The High Court has vigorously defended the separation of judicial power since the early days of the federation.

Alexander's Case 2022 (not to be confused with *Alexander's Case 1918*) is the most recent case where the High Court has guarded the separation of judicial power. In this case, the court held that Parliament could not vest a minister with the power to strip Australian citizenship from dual nationals. Denaturalisation is a punishment and, therefore, a judicial power. The decision invalidated Section 36B of the *Australian Citizenship Act 2007*, and stripped the Home Affairs Minister of the denaturalisation power.

Course links

- Unit 3 - Roles and powers of the High Court
- Unit 4 - Accountability of Parliament and Executive

Section 72 - The independence of the federal judiciary

The Justices of the High Court and of the other courts created by the Parliament: (i) shall be appointed by the Governor-General in Council; (ii) shall not be removed except by the Governor-General in Council, on an address from both Houses of the Parliament in the same session, praying for such removal on the ground of proved misbehaviour or incapacity; (iii) shall receive such remuneration as the Parliament may fix; but the remuneration shall not be diminished during their continuance in office… The appointment of a Justice of the High Court shall be for a term expiring upon his attaining the age of seventy years, and a person shall not be appointed as a Justice of the High Court if he has attained that age. (Abridged)

Purpose

Section 72 is in Chapter 3 of the Constitution. Chapter 3 is about the judicial branch. Section 72 establishes and protects the independence of the judiciary.

Key features

1. Judges are appointed by the Governor-General (on advice from the Attorney-General).
2. Judges may be dismissed on limited grounds by the Governor-General after Parliament votes for their removal.
3. Parliament decides judges' pay, but their pay cannot be reduced.
4. High Court judges must retire on or before their 70th birthday.
5. Amended by referendum in 1977 to alter the term of High Court judges from life to 70 years.

Details

Section 72 protects the independence of the federal judiciary in three ways...

1. Separating appointment and removal powers in subsections 72(i) and (ii).
2. Specifying limited but vague grounds for judges' removal by Parliament.
3. Protecting judges’ salaries.

The Attorney-General, a cabinet-rank minister, nominates federal judges. The Governor-General appoints nominated candidates.

Parliament can dismiss judges. However, Section 72 says they can only be removed from the "ground of proved misbehaviour or incapacity". The meanings of "proved",

"misbehaviour" and "incapacity" are vague. The vagueness means Parliament must debate each case thoroughly before dismissing a judge - a process for which it is electorally accountable.

Protecting judges' pay prevents the executive from coercing judges by threatening their pay.

Impact

Section 72 is a democratic keystone because it enshrines judicial independence. From judicial independence flow other democratic principles like the rule of law.

So respected is the High Court's independence that appointments to the highest court are non-partisan despite no formal check on executive power. Successive Australian governments have refined the process. The appointment of Justice Jayne Jagot as the 56th High Court judge in 2022 demonstrates the contemporary appointment process. Before appointing Justice Jagot, the Commonwealth Attorney-General consulted with State and Territory Attorneys-General and their opposition shadows, the Chief Justices of the Federal Court of Australia and State and Territory Supreme Courts, pressure groups like National Legal Aid, Australian Women Lawyers, the National Association of Community Legal Centres and the heads of university law schools.

Section 72 is a democratic keystone because it enshrines judicial independence.

Likewise, no federal judge has been removed by Parliament since the federation. "Misbehaving" or "incapacitated" judges almost always resign before Parliament begins a formal removal process. In most cases, judges are accountable to their Chief Justices, who may advise them of their suitability to remain on the bench.

In 1986, Parliament acted against a judge suspected of misbehaving. High Court Justice Murphy had been convicted of perverting the course of justice. His conviction was reversed on appeal. Parliament initiated a process to assess Justice Murphy's fitness for office. A special Parliamentary Commission was appointed to investigate Justice Murphy and make recommendations to Parliament. The process was abandoned after Justice Murphy was diagnosed with terminal cancer.

The *Judicial Misbehaviour and Incapacity Act 2012* formalises the Murphy process. Under this Act, Parliamentary Commissions would be established to investigate federal judges and make recommendations to Parliament.

As a result of Justice Murphy's death, there is no precedent for removing a High Court judge. Without precedent, it is unclear if the convention obliges the Governor-General to accept Parliament's recommendation for removal.

While judges' pay cannot be reduced, it does not have to be increased to keep pace with inflation. Thus, the protection provided by Section 72(iii) is weaker than that in Sections 72(i) and (ii).

High Court Interpretations

- *Waterside Workers' Federation of Australia v J W Alexander Ltd (1918) 25 CLR 434*
- *R v Kirby; Ex parte Boilermakers' Society of Australia (1956) 94 CLR 254*
- *Brandy v Human Rights & Equal Opportunity Commission (1995) 183 CLR 245*
- *Alexander v Minister for Home Affairs (2022) HCA 19*

Section 72 is the second section in Chapter 3. The High Court has vigorously defended the judicial power's separation since the federation's early days.

See “Impact” section for Section 71 above.

Course links

- Unit 3 - Roles and powers of the High Court
- Unit 4 - Accountability of Parliament and Executive

Section 73 – The appellate jurisdiction of the High Court

The High Court shall have jurisdiction, with such exceptions and subject to such regulations as the Parliament prescribes, to hear and determine appeals from all judgments, decrees, orders, and sentences… and the judgment of the High Court in all such cases shall be final and conclusive. (Abridged)

Purpose

Section 73 is in Chapter 3 of the Constitution. Chapter 3 is about the judicial branch. Section 73 makes the High Court Australia's highest court of appeal.

Key features

1. Assigns appellate jurisdiction to the High Court.
2. Parliament may make exceptions to appeals.

Details

Section 73 makes the High Court Australia's highest court of appeal. Cases on appeal may come from…

- The High Court, in its original jurisdiction.
- Other federal courts.
- State and Territory courts.

Parliament has used its power to enable the High Court to choose which appeals to hear. The *Judiciary Act 1903* contains provisions for special leave to appeal. Special leave is designed to manage the High Court's appeal caseload.

Each year the High Court receives approximately 400 applications for special leave to appeal. Between 2012 and 2021, the average success rate of applications for special leave was 11.8%.

Impact

Section 73 significantly impacts Australia's legal system because the High Court develops common law through its appellate jurisdiction.

High Court decisions are binding throughout Australia as it is the peak court in the hierarchy. Consequently, appeal decisions made by the High Court have a unifying effect on

Australia's common law by elevating precedents created in State and Territory courts to the national level, binding them in all Australian jurisdictions.

The High Court develops common law through its appellate jurisdiction.

An example is an appeal by three news organisations against a 2020 NSW Supreme Court decision holding them liable for third-party comments on their social media posts. In *Fairfax Media Publications Pty Ltd v Voller; Nationwide News Pty Limited v Voller; Australian News Channel Pty Ltd v Voller (2021) HCA 27*, the High Court upheld the original NSW decision. The appeal decision made the Voller precedent binding throughout Australia.

The High Court holds all lower courts to account through its appellate jurisdiction.

Course links

- Unit 3 - Roles and powers of the High Court
- Unit 4 - Accountability of the courts

Section 75 – The original jurisdiction of the High Court

In all matters… listed (1) to (v) below… the High Court shall have original jurisdiction. (Abridged)

Purpose

Section 75 is in Chapter 3 of the Constitution. Chapter 3 is about the judicial branch. Section 75 gives the High Court five areas of original jurisdiction.

Key features

1. Assigns five original jurisdictions to the High Court.
2. Together with Section 76, it divides the federal judicial powers from State judicial powers.

Details

Section 75 gives the High Court original jurisdiction in matters involving…

(i) Treaties

(ii) Senior diplomatic representatives of other countries

(iii) The Commonwealth

(iv) States and residents of States

(v) Writs of Mandamus, prohibition or injunction

Impact

Sections 75 and 76 divide judicial powers between the Commonwealth and States. Thus, Section 75 performs a similar function as Section 51 does for legislative power and Section 61 for executive power.

Notable by its absence from Section 75 is a constitutional jurisdiction - instead, this is conferred by Parliament under Section 76 - see Section 76.

Section 75 has had some impact, notably through subsections (iii), (iv) and (v).

Treaties are legislated agreements with foreign entities, like other countries or the United Nations. Treaties have become more significant since WW2 and the 1980s, when globalisation accelerated. Treaties may require Australian governments to act in specific ways, giving rise to legal disputes that must be settled in the High Court under the jurisdiction in Section 75(i).

Section 75(ii) means disputes involving other countries or their diplomats commence in the High Court.

Section 75(iii) requires any case where the Commonwealth is a party to commence in the High Court. Even if Parliament had not given it constitutional jurisdiction under Section 76 - which it has - Section 75(iii) would mean the High Court would deal with constitutional matters because the Commonwealth is almost always a party in such cases.

Section 75(iv) is unusual. It implies that disputes between residents of different States commence in the High Court. This would be an unmanageably large jurisdiction if the High Court did not take early steps to limit cases - see *Australasian Temperance 1922* below.

Section 75(iv) is fundamental to the rule of law – "the jurisdiction of the Court to require officers of the Commonwealth to act within the law cannot be taken away by Parliament".

Section 75(iv) is fundamental to the rule of law. Statutes cannot remove executive officials from the reach of Section 75(v) writs of Mandamus, prohibitions and injunctions. The subsection makes the executive branch inescapably accountable to judicial review.

High Court Interpretations

- *Australasian Temperance and General Mutual Life Assurance Society Ltd v Howe (1922) HCA 50; 31 CLR 290*
- *Plaintiff S157/2002 v Commonwealth (2003) HCA 2*

Australasian Temperance 1922 significantly limited those who may commence proceedings under Section 73(iv). The High Court has refused every special leave application that might reopen *Australasian Temperance*.

In this landmark case, the High Court held that a "resident of a State" must be a natural person. The case involved a mortgage lending firm that commenced proceedings in the High Court against a defendant (Howe) residing in another State. The Court ruled that, as an artificial person, Australasian Temperance and General Mutual Life Assurance Society Ltd could not be a "resident of a State". The effect was to prevent companies from using the High Court to commence proceedings that are more appropriately dealt with by lower courts. These matters could dramatically escalate the High Court's caseload.

In *Plaintiff S157 2003*, Justice Gleeson noted that Section 73(v) protects a fundamental element of the rule of law, i.e., "the jurisdiction of the Court to require officers of the Commonwealth to act within the law cannot be taken away by Parliament".

Course links

- Unit 3 - Roles and powers of the High Court, informal constitutional change
- Unit 4 - Accountability of the Parliament and Executive

Section 76 – The additional original jurisdiction of the High Court

The Parliament may make laws conferring original jurisdiction on the High Court in any matter… (see the four features listed below).

Purpose

Section 76 is in Chapter 3 of the Constitution. Chapter 3 is about the judicial branch. Section 76 allows the Commonwealth Parliament to add original jurisdictions to the High Court.

Key features

Allows Parliament to add original jurisdictions to the High Court in four areas. They are over…

1. The Constitution and its interpretation.
2. Laws made by Parliament.
3. Military matters.
4. Different States claim the same matters.

Details

Section 76 enables the expansion of the High Court's original jurisdiction. It allows flexibility so the High Court's powers can adapt to changing circumstances.

The Commonwealth Parliament adds original jurisdiction to the High Court by passing legislation. The *Judiciary Act 1903* is the primary legislation that adds original jurisdiction to the High Court.

Impact

Section 76(i) has been used to reinforce the High Court's power as a constitutional court by supplementing the constitutional jurisdiction implied in Section 75(iii) - see Section 75. The Australian Law Reform Commission described Section 76(i) as an "odd fact of history" because it creates the far-fetched possibility that Parliament could remove the High Court's constitutional jurisdiction and create another court vested with constitutional jurisdiction (Size, 2020).

Section 76(i) reinforces the High Court's constitutional jurisdiction.

Section 76(iv) performs a federal function by resolving conflicts between State legal systems. If the laws of two or more States apply in the same case (called diversity jurisdiction), Section 76(iv) allows the High Court to determine the matter. Thus, Section 76(iv) upholds the rule of law by ensuring that one jurisdiction applies, i.e., federal jurisdiction.

High Court Interpretations

- *Burns V Corbett (2018) 353 ALR 386*

Burns 2018, had implications for the federal balance of power.

Diversity jurisdiction refers to the power of courts and tribunals to hear disputes between residents of different States. Sections 75(iv) and 76(iv) of the Australian Constitution govern diversity jurisdiction. *Burns* clarified diversity jurisdiction related to State tribunals.

Before *Burns 2018*, it was unclear whether State parliaments could confer tribunals with powers to hear disputes between parties in different States.

The case arose when Therese Corbett, a Victorian electoral candidate in 2013, made discriminatory remarks that were widely reported. NSW anti-discrimination activist Gary Burns brought a case against Cornett in the New South Wales Civil and Administrative Tribunal (NCAT). Ms Corbett argued in the NSW Court of Appeal that NCAT lacked jurisdiction.

The NSW Court of Appeal found "no constitutional implication [in Sections 75 or 76] preventing State parliaments from conferring diversity jurisdiction on state tribunals". However, it found that a State law conferring diversity jurisdiction on a tribunal would conflict with the Commonwealth *Judiciary Act 1903* and be invalidated by Section 109 - see Section 109. Mr Burns and several State Attorneys-General appealed to the High Court.

The High Court upheld the NSW Court of Appeal decision, invalidating State laws conferring diversity jurisdiction on State tribunals and clarifying Sections 75 and 76.

Course links

- Unit 3 - Roles and powers of the High Court, informal constitutional change, federalism

Section 87 – The transfer of 75% of exclusive Commonwealth revenues from duties, customs & excise to States

During a period of ten years after the establishment of the Commonwealth and thereafter until the Parliament otherwise provides, of the net revenue of the Commonwealth from duties of customs and of excise not more than one-fourth shall be applied annually by the Commonwealth towards its expenditure.

The balance shall, in accordance with this Constitution, be paid to the several States, or applied towards the payment of interest on debts of the several States taken over by the Commonwealth.

Purpose

Section 87 is in Chapter 4 of the Constitution. Chapter 4 is about the economic aspects of federalism. It covers financial and trade powers. Section 87 provided States with a proportion of exclusive Commonwealth revenues to preserve their financial autonomy.

Key features

1. Guaranteed States at least a 75% share of exclusive Commonwealth revenues collected under Section 90.
2. Time-limited to 10 years after federation, following which Parliament could decide whether to maintain the transfers.
3. Included in the Constitution at the insistence of Tasmanian Premier Edward Braddon.
4. The section is spent and no longer operates.

Details

Section 87 is one of two sections that enabled the transfer of Commonwealth surplus revenues to the States. The other is Section 96 - see Section 96.

Section 87 was included in the Constitution at the urging of Tasmanian Premier Edward Braddon. The Premiers of NSW and other colonies resisted it, concerned it would distort the economic union at the heart of the federation. The disagreement over Mr Braddon's proposal led to Section 87 becoming known as the "Braddon Blot".

Section 90 made customs, excise and bounties - which are taxes related to the production and movement of goods and services - exclusive to the Commonwealth - see Section 90.

These taxes were significant sources of colonial revenue. However, they hindered free trade between colonies and were a drag on economic development. The purpose of making

them exclusive to the Commonwealth was to prevent future State laws from impeding inter-State trade. However, Braddon feared the States would be impoverished by losing customs, excise and bounties.

Section 87 was a compromise reached during the constitutional conventions of the 1890s. It forced the Commonwealth to transfer 75% of Section 90 revenues to the States. The compulsory transfers would guarantee State financial autonomy. However, the compromise meant that Section 87 was limited to 10 years, after which the Commonwealth Parliament could end the transfers if it wished.

Braddon's advocacy led to the inclusion of Section 96 - the grants power - to enable continued transfers of surplus Commonwealth revenues after the expiry of Section 87.

Impact

The Commonwealth Parliament ended the transfers immediately after Section 87 expired.

While it operated, Section 87 provided financial autonomy to the States. The transfers were "untied" - i.e. the Commonwealth could not attach conditions to the funds. With States able to decide how to spend the money, Section 87 helped achieve the coordinate-style dual federalism intended by the authors of the Constitution.

Section 87's most significant impact was its failure to provide long-term financial autonomy to the States.

Upon its expiry, the States lost a significant source of revenue and had to rely on Section 96 transfers. Section 96 transfers could be "tied" to the Commonwealth Parliament's conditions. Tied grants were to have very significant consequences for Australian federalism - see Section 96.

Section 87's most significant impact was its failure to provide long-term financial autonomy to the States. Had Section 87 survived, the nature of Australian federalism would have been profoundly different. The highly coercive "fiscal federalism" that emerged under the influence of Section 96 would likely have been less significant.

Course links

- Unit 3 - Federalism

Section 90 – The exclusive power over duties, customs & excise

On the imposition of uniform duties of customs the power of the Parliament to impose duties of customs and of excise, and to grant bounties on the production or export of goods, shall become exclusive. (Abridged)

Purpose

Section 90 is in Chapter 4 of the Constitution. Chapter 4 is about the economic aspects of federalism. It covers financial and trade powers. Section 90 makes certain taxes exclusive to the Commonwealth.

Key features

1. Makes the collection of revenues from customs, excise and bounties exclusive to the Commonwealth.

Details

Section 90 transferred power over customs, excise and bounties from the States to the Commonwealth. Customs and excise are taxes related to producing and moving goods and services. They can restrict free trade.

Customs are taxes on goods that enter a jurisdiction. Bounties are subsidies paid to producers. The meaning of excise needs to be clarified and has evolved through High Court interpretation.

Intercolonial taxes were described by James Service, a Victorian Colonial Premier in the 1880s, as the 'lion in the path' of federation.

Before federation, these taxes and subsidies limited growth by hindering the economic integration of the Australian colonies. They were used by some colonies, notably Victoria and Western Australia, to protect their economies from competition. NSW preferred free trade, which made the import and export of goods and services across colonial borders free of taxation.

As implied by James Service, economic integration was one of the key drivers of the federation. Therefore, preventing the States from taxing each other's exports was a priority at the 1890s constitutional conventions where the Constitution was drafted. Section 90 achieved that purpose.

Section 90 also ensures that only the Commonwealth can tax goods entering Australia, creating uniform import taxes.

Intercolonial taxes were described as the 'lion in the path' of federation.

Impact

Section 90 has drastically centralised financial power in the federation.

During the 1890s constitutional conventions, concerns were voiced that Section 90 would financially undermine the States by removing a significant source of their revenue. Tasmanian Premier Edward Braddon was so concerned that Section 87 was included to transfer at least 75% of the Section 90 revenues to the States - see Section 87.

After Section 87 expired, the Commonwealth ended the transfer of Section 90 customs, excise and bounties revenues. From then on, it relied on Section 96 to grant surplus revenues to the States. However, Section 96 places significant fiscal power in the hands of the Commonwealth - see Section 96.

Section 90 is a significant cause of the vertical fiscal imbalance (VFI) that contributed to centralising power within the Australian federation. The VFI was instrumental in the development of coercive federalism.

High Court Interpretations

- *Peterswald v Bartley (1904) HCA 21*
- *Dennis Hotels Pty Ltd v Victoria (1960) HCA 10*
- *Walter Hammond and Associates v the State of NSW and others and Ha and Anor v the State of NSW and others (1997) HCA 34 - Hammond and Ha Cases*
- *Vanderstock & Anor v The State of Victoria M61/2021*

Excise has been subject to interpretation by the High Court almost since its inception.

Narrow interpretations of exclusive powers limit Commonwealth power by reserving power to the States. Broad interpretations have the opposite effect. Therefore, interpretations of exclusive powers like excise can alter the balance of power and significantly impact Australian federalism.

Peterswald 1904 was one of the earliest constitutional cases decided by the High Court, which first sat in 1903. This early case – which narrowly defined excise – demonstrates the long-term uncertainty about the meaning of excise in Section 90.

In *Dennis 1960*, the High Court again interpreted excise narrowly, reserving State power to impose liquor licensing fees.

In *Hammond and Ha 1997*, the High Court reversed direction and interpreted excise in broad terms. The cases were decided together on 5 August 1997. It held that business franchise fees and fees on the sale of tobacco were an excise.

Hammond and Ha significantly widened the scope of excise, expanding the VFI. Since 1997, excise is any levy or tax on goods at any point in the manufacturing and distribution chain. This definition excludes the States from levying taxes worth $4.9 billion, or 16 per cent of their budgets in 1997, and makes them more dependent on Section 96 grants from the Commonwealth - see Section 96.

Hammond and Ha were landmark cases because of their impact on economic relations within the federation. They enhanced the Commonwealth's fiscal power and supported coerced federalism.

Vanderstock & Anor v The State of Victoria HCA is the most recent Section 90 case. It involves State charges on the distance driven by electric vehicles. The plaintiffs argue the charges are an excise. The Victorian Attorney-General argues they are “activity taxes” and not excise. The Commonwealth intervened in the case, arguing in its submission to the High Court that it “the term ‘excise’ in Section 90 ought to be construed *with all the generality that the word permits*, and should not be read down or narrowly construed to preserve concurrent State power” (Submissions of the Attorney-General of the Commonwealth – intervening 2022). The case was ongoing at the time of writing.

Course links

- Unit 3 - Roles and powers of the High Court, informal constitutional change, federalism

Section 92 - Free trade amongst the States

On the imposition of uniform duties of customs, trade, commerce, and intercourse among the States, whether by means of internal carriage or ocean navigation, shall be absolutely free. (Abridged)

Purpose

Section 92 is in Chapter 4 of the Constitution. Chapter 4 is about the economic aspects of federalism. It covers financial and trade powers. Section 92 makes interstate trade “absolutely free”.

Key features

1. Makes "trade, commerce and intercourse among the States... absolutely free."

Details

Section 92 provides for the free movement of people and goods within the federation. It works with other Chapter 4 sections, like Section 90, to set economic conditions for trade and other forms of interaction between States within the federation.

The issue of free trade was a key driver of federation. In particular, "discriminatory protectionism" amongst the States was viewed as the 'lion in the path' of the federation. Section 92 abolished State protectionism, contributed to economic integration and helped solve the colonial-era issue of intra-Australian trade. See Section 90.

Impact

Section 92 is the most litigated section of the Constitution and has been interpreted heavily by the High Court. The volume of constitutional litigation and the evolving meaning of Section 92 is its primary impact.

The issue at the heart of Section 92 is the tension between a free national market and the obligation upon the States to protect their residents. States have made many laws to protect their populations from environmental, social and health harms. The purpose of these laws is not economic. However, their impacts might be, and thus they may be challenged under Section 92.

In cases starting from the early days of the federation, the High Court has sought to strike the right balance between preserving a free national market and the legitimate rights of States to act in the interests of their residents.

The COVID-19 pandemic is an example of State public health laws designed to protect State residents from a health threat. The closure of Western Australia's border had discriminatory and economic effects, but its purpose was to protect WA residents, not limit free trade. The border closure led to a High Court challenge.

Further, Section 92 interacts with other parts of the Constitution that explicitly protect State powers. Some of these powers may have discriminatory effects against other States. For example, Section 112 allows States to impose customs duties - which are prohibited by Section 90 - to support the inspection of goods entering their jurisdictions[1]. These interactions create uncertainty about the meaning of Section 92 - hence the high litigation rates.

High Court Interpretations

- *Rv Smithers; Ex parte Benson (1912) 16 CLR 99*
- *Bank of New South Wales v Commonwealth (1948) HCA 7, (1948) 76 CLR 1*
- *Cole v Whitfield (1988) HCA 18 - the Tasmanian Lobster case*
- *Castlemaine Tooheys Ltd v South Australia (1990) HCA 1*
- *Betfair Pty Limited v Western Australia (2008) HCA 11*
- *Palmer & Anor v The State of Western Australia & Anor (2021) HCA 5*

In *R v Smithers 1912*, the High Court held that a State could lawfully restrict cross-border movement to protect public order, safety or morals, but only if the measure was proportional to the threat. The case was the first to test the meaning of the term "absolutely free". It also introduced the concept of proportionality in Section 92, which would be fundamental to future interpretations.

In *Bank of New South Wales v Commonwealth 1948*, any individual trader negatively affected by a state's law when carrying out interstate trade could be protected by Section 92. This interpretation expanded Section 92 to include "individual rights", but the freedom was not absolute.

By the 1980s, interpretations of Section 92 focused on individual rather than economic rights. *Tasmanian Lobster* was a landmark case in four respects...

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[1] To preserve the exclusivity of customs duties, any State duties collected under Section 112 must be transferred to the Commonwealth)

1. It altered the meaning of Section 92 by anchoring the economic concept of free trade at its core, overruling individual rights interpretations.
2. It created a legal test - i.e. the 'free trade approach' - which the High Court could apply to future Section 92 cases,
3. It was the first case in history where the High Court used records from the 1890s constitutional convention debates and historical pre-federation materials to help interpret the meaning of the Constitution. From these sources, the Court concluded that the authors of Section 92 intended to prevent "discriminatory protectionism" among the States.
4. The strict free trade interpretation limited State legislative power

Tasmanian Lobster was about the constitutionality of Tasmanian laws protecting the State's lobster fishery. The Court held that the law fell within the definition of "discriminatory protectionism" by preventing the import of undersized lobsters from another State - i.e. South Australia. In the second part of the legal test, the High Court held that Tasmania's law was unconstitutional because it went beyond what was necessary to protect Tasmania's lobster fishery - i.e. it was *disproportionate* to its purpose.

Section 92 reduces State power even if limiting trade is an unintended consequence of State laws.

In *Castlemaine 1990*, the High Court held that a South Australian law promoting recycling by mandating a 0.15c deposit on empty bottles was a barrier to a Western Australian brewery exporting beer to South Australia. The Court ruled that the 0.15c deposit was unnecessarily high to achieve the recycling aim - i.e. it was *disproportionate* to the purpose - making the law unconstitutional.

In *Betfair 2008*, the High Court applied the *Tasmanian Lobster* test to find a Western Australian anti-gambling law unconstitutional. The law banned online betting that allowed Western Australians to place bets on sporting events in other states. The Court found the law fell within the meaning of "discriminatory protectionism" and was *disproportionate* to the intention of protecting Western Australians from the harm of gambling.

In *Palmer 2021*, the High Court held that a Western Australian law preventing inter-State movement during the COVID-19 pandemic was *proportional* to the health threat posed by the SARS-CoV-2 virus to the residents of Western Australia. The law, therefore, did not breach Section 92.

Since *Tasmanian Lobster*, Section 92 has diminished State power by prohibiting laws restricting free trade, even if limiting trade is an unintended consequence of laws protecting State residents. States must ensure their laws are proportional to their intended purpose – if they stray into "discriminatory protectionism", the High Court will strike them down.

Course links

- Unit 3 - Roles and powers of the High Court, informal constitutional change, federalism

Section 96 - The grants power

During a period of ten years after the establishment of the Commonwealth and thereafter until the Parliament otherwise provides, the Parliament may grant financial assistance to any State on such terms and conditions as the Parliament thinks fit.

Purpose

Section 96 is in Chapter 4 of the Constitution. Chapter 4 is about the economic aspects of federalism. It covers financial and trade powers. Section 96 enables the Commonwealth to provide financial assistance to States through grants.

Key features

1. Enables Commonwealth financial assistance to the States as tied or untied grants "as the Parliament thinks fit".

Details

Section 96 is the only operational section of the Constitution that enables transfers of Commonwealth funds to the States.

Section 96 was inserted late in the constitutional draft when Section 87 was adopted - see Section 87. The Constitution's authors sought ways to compensate the States for the loss of revenues from customs and excise, which Section 90 transferred to the Commonwealth - see Section 90.

The Constitution's authors expected the States to retain financial autonomy after the Commonwealth came into being in 1901. They did not want or expect a vertical fiscal imbalance to become a feature of Australian federalism.

Therefore, Sections 87 and 96 were intended to be transitional - they were both mandated for ten years, after which the Parliament could decide whether they should continue. Parliament chose to discontinue Section 87, while Section 96 continues today.

From the mid-1920s, the Commonwealth seized Section 96's coercive power to force the States to implement Commonwealth policy. The context of Chapter 4 - in which Section 96 is found - suggests this was not the intention of the Constitution's authors.

Impact

Section 96 has been highly influential on the federal balance of power.

Constitutional developments - see High Court Interpretations below - led to a considerable vertical fiscal imbalance (VFI). In the context of a high VFI, Section 96 became very important.

The Commonwealth has used Section 96 to coerce financially disadvantaged States by exploiting its power to attach conditions to grants.

The Commonwealth cannot legally compel States to accept grants. Still, in practice, it is difficult for them to refuse federal money since their revenues fell by 63 per cent due to the *Uniform Tax Cases* and 16 per cent because of the *Hammond and Ha Cases*, which made them dependent on Commonwealth grants.

The Commonwealth has used 'tied grants' to achieve its aims in areas like education where it lacks legislative power. The High Court has even allowed the grants power to be used to bypass the States entirely by granting money to non-state organisations – like scripture unions – without the consent of the States.

The Commonwealth has used Section 96 to coerce the States.

The High Court created this situation by taking a strictly literalist/legalist approach to Section 96, which has culminated in the States being "no more than passive instruments by which the Commonwealth transmitted its moneys to the persons whom it had decided to assist" (Justice Gibbs, *DOGS case* 1981).

By the 1990s, political and economic developments led to the need for cooperation to achieve national policy outcomes. Accomplishing national objectives often requires State *legislative* and Commonwealth *financial* power. The increasing importance of national policy reduced the coercive impact of Section 96. In an example of cooperative federalism, the Council of Australian Government (COAG) and its successor, the National Cabinet, negotiate national priorities. In the contemporary federation, Section 96 supports Commonwealth/State financial agreements and national partnerships to accomplish joint outcomes.

High Court Interpretations

- *Victoria v Commonwealth (1926) HCA 48* - the *Federal Roads case*
- *The Deputy Federal Commissioner of Taxation (New South Wales) v W R Moran Proprietary Limited (1939) 61 CLR 735 - the Flour Tax case*
- *South Australia v Commonwealth (1942) 65 CLR 373 - the First Uniform Tax Case*
- *Melbourne Corporation v Commonwealth (1947) HCA 26 - the State Banking case*
- *Victoria v Commonwealth (1957) 99 CLR 575 - the Second Uniform Tax Case*
- *Attorney-General (Vic) ex rel Black v Commonwealth (1981) HCA 2 - the DOGS case*

The High Court has developed and applied a strictly literalist/legalist interpretation to Section 96 in the above-mentioned cases. The resulting interpretive method has been described as the "orthodox method".

The orthodox method interprets Section 96 without regard to the Constitution's federalist nature, the context of Chapter 4, the intentions of its authors or its political impact.

The long-standing orthodox interpretation, established over nearly 100 years, implies that it is cemented into the Constitution and that Section 96 will continue to operate as it always has. Thus, politics and economics rather than constitutional rules determine whether the grants power is used coercively - as between 1926 and the 1990s, or cooperatively - as at present.

Today, Section 96 grants are made by the Commonwealth Grants Commission. The Goods and Services Tax (GST) funds the most significant Section 96 grants program. GST grants achieve Horizontal Fiscal Equalisation (HFE) by ensuring government services are equivalent across all States and Territories despite their own-source revenue. GST grants are calculated by the Commonwealth Grants Commission using an HFE formula. GST / HFE grants are untied grants distributed to the States and Territories.

Course links

- Unit 3 - Roles and powers of the High Court, informal constitutional change, federalism

Section 107 - State legislative powers

Every power of the Parliament of a Colony which has become or becomes a State, shall, unless it is by this Constitution exclusively vested in the Parliament of the Commonwealth or withdrawn from the Parliament of the State, continue as at the establishment of the Commonwealth, or as at the admission or establishment of the State, as the case may be.

Purpose

Section 107 is in Chapter 5 of the Constitution. Chapter 5 is about the States. It preserves the constitutions, legislative power and laws of the six Colonies that became States within the Commonwealth of Australia on 1 January 1901. It also deals with other aspects of State power.

Key features

1. Preserves the legislative power of the States.
2. Prohibits States from making laws in areas vested exclusively in the Commonwealth.

Details

Section 107 works with other Chapter 5 sections, namely 106 and 108, to ensure the continuation of sovereign States after federation.

Thus, along with Chapters 1, 2 and 3 - which create the Commonwealth level - Chapter 5 makes Australia a federation by preserving the State level.

Section 107 saves “every power of the Parliament of a Colony which has become or becomes a State”. It is where residual legislative powers reside, even though they are unspecified.

Section 107 bans the States from legislative powers exclusively vested by the Constitution in the Commonwealth.

Impact

Section 107 is essential for the operation of federalism.

Federalism is the division of sovereignty between one national and two or more regional governments. Section 107 enables Australia’s regional governments - the States - to make laws.

Section 107 is essential for the operation of federalism.

High Court Interpretations

- *D'Emden v Pedder (1904) HCA 1*
- *Peterswald v Bartley (1904) HCA 21*
- *Railway Servants Case (1906) HCA 94*
- *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd (1920) HCA 54 - the Engineers' case*

Section 107 is the source of the States' residual legislative power. Residual powers are unspecified, which makes them problematic for interpretation by the High Court. Without text to interpret, the High Court must apply non-literal styles of interpretation in cases about unspecified and implied powers.

States have argued in many cases that the Constitution implies unspecified residual powers that the High Court should preserve. Lacking textual support in the Constitution, State arguments have traditionally relied on the federal nature of the Constitution. In essence, they have argued that the Australian Constitution is – by its intent and structure (if not in its words) - a federalist document.

In *D'Emden 1904*, the High Court was persuaded to adopt a US Supreme Court federalist doctrine that saved State powers. It was known as the implied intergovernmental immunities doctrine. The doctrine drew upon the Constitution's federal nature - implied in Chapters 1, 2, 3 and 5 - to protect the States' legislative powers against Commonwealth incursions.

In *Peterswald 1904* and *Railway Servants 1906*, the High Court adopted another US Supreme Court federalist principle – the reserve powers doctrine – to defend the States' unspecified powers against the Commonwealth.

The implied intergovernmental immunities and reserved powers doctrines relied on intentionalist (i.e. non-literal) interpretations of the Constitution. In the *Engineers Case 1920,* the High Court abandoned intentionalism in favour of literalism and overruled both doctrines. Literal interpretations rely on explicit meanings in the text. Implications are usually unsustainable in literalist interpretations.

The High Court's so-called "orthodox interpretation" of Section 96 is another example of literalism preventing implied federalist readings of the Constitution - see Section 96, High Court Interpretations.

Course links

- Unit 3 - Roles and powers of the High Court, informal constitutional change, federalism

Section 109 - Inconsistent State & Commonwealth laws

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

Purpose

Section 109 is in Chapter 5 of the Constitution. Chapter 5 is about the States. It preserves the constitutions, legislative power and laws of the six Colonies that became States within the Commonwealth of Australia on 1 January 1901. It also deals with other aspects of State power, such as conflicting State and Commonwealth laws.

Key features

1. Applies to Section 51 concurrent powers.
2. Invalidates State law that conflicts with Commonwealth law.
3. Commonwealth law "prevails to the extent of the inconsistency".

Details

Section 109 is a federal provision. It is necessary because laws made by both levels of government under concurrent heads of legislative power may be inconsistent - see Section 51.

Section 109 preserves the rule of law - which requires laws to be consistent and coherent - by eliminating conflicts between State and Commonwealth law that prevent “simultaneous obedience” to each law.

Impact

Section 109 is significant for the federal balance of power. It has contributed to the centralisation of legislative power and undermined State power.

Its impact depends on the High Court's interpretation of "inconsistency". Two alternative interpretation methods. They are...

1. Narrow interpretations check the centralisation of legislative power by only invalidating specific clauses in State laws. The narrow method is known as the "simultaneous obedience" test.

2. Broad interpretations strongly centralise legislative power by invalidating entire fields of State legislative power. The broad method is known as the "cover-the-field" test.

Section 109 has contributed to the centralisation of legislative power.

High Court Interpretations

- *Clyde Engineering Co Ltd v Cowburn (1926) HCA 6*

Before 1926, the High Court applied the simultaneous obedience test to Section 109 cases. These cases preserved State legislative power - see the two alternative approaches to interpretation above.

In these earlier cases, the High Court asked if it was possible to obey Commonwealth and State law at the same time - i.e. simultaneously. If not, an inconsistency existed, causing the invalidation of conflicting parts of the State law. The rest of the State law remained intact.

Clyde Engineering 1926 introduced a second, much broader test. In this case, Justice Issac of the High Court held that...

"the vital question would be: was the second Act [the Commonwealth Act] on its true construction intended [expressly or impliedly] to cover the whole ground and, therefore, to supersede the first [the State Act]?"

If so, the Commonwealth law covered the entire legislative field, invalidating all State law in the same field.

The cover-the-field test has operated since 1926. It has altered the federal balance of power by centralising concurrent legislative power. Marriage is an example.

Course links

- Unit 3 - Roles and powers of the High Court, informal constitutional change, federalism

Section 128 - Changing the Constitution

This Constitution shall not be altered except in the following manner:.. The proposed law for the alteration... must be passed by... each House of the Parliament, and not less than two nor more than six months after its passage through both Houses the proposed law shall be submitted in each State and Territory to the electors... And if in a majority of the States a majority of the electors voting approve the proposed law, and if a majority of all the electors voting also approve the proposed law, it shall be presented to the Governor-General for the Queen's assent. (Abridged)

Purpose

Section 128 is in Chapter 8 of the Constitution. Chapter 8 is about the alteration of the Constitution. It provides the only method for formal constitutional change. The constitutional change method specified in Section 128 was inspired by Swiss direct democracy.

Key features

Section 128 sets out the procedure for altering the Constitution as follows...

1. Parliament approves a bill to alter the Constitution. The bill contains the proposed alteration.
2. Within two and six months, a referendum is put to electors in each State and Territory.
3. A majority of electors and a majority of electors in a majority of States must approve the bill.
4. If the referendum vote succeeds, the Governor-General gives Royal Assent to the bill (at 1 above).
5. The new law alters the Constitution.

Details

Section 128 provides the mechanism for the formal alteration of the Constitution. The method is a direct democratic vote by qualified electors accepting or rejecting a bill that proposes a constitutional alteration.

The referendum ballot paper contains the constitutional alteration proposed by the bill, to which electors vote ‘yes’ or ‘no’.

A so-called "double majority" is required for a successful constitutional alteration. That is a majority of electors (50 + 1 vote nationally) and a majority of electors in a majority of States (4 or more of 6 States) must approve.

Parliament legislates how referendums are conducted, including funding for YES and NO campaigns and how information is communicated to electors.

Impact

Section 128 has had relatively little impact on constitutional change. Only eight of 44 attempted alterations have been successful. The last alteration was in 1977.

Its low impact is due to the difficulty of achieving the double majority. Proposals usually fail for one or more of the following reasons...

1. The proposal was too complex or poorly understood by electors.
2. The proposal was perceived as giving too much power to the Commonwealth.
3. The proposal became a divisive issue between political parties or the Commonwealth and States.

Despite the low success rate, individual alterations have been noteworthy. Two referendums significantly expanded the Commonwealth's legislative power and modernised the Constitution. They helped make the Constitution fit for purpose in post-WW2 Australia. They were...

1. Social Services (1946) - which expanded Commonwealth welfare powers by adding Section 51(xxxiiiA)
2. Aborigines (1967) - which removed racist legal discrimination against First Nations Australians by altering the wording of Section 51(xxvi) and removing Section 127

Other notable referendums were...

3. Territory Voters (1977) - which extended voting rights to electors in the ACT and NT so they could participate in referendums to alter the Constitution.
4. Retirement of Age of Judges (1977) - which limited the term of federal judges to 70 years of age.

Potentially valuable proposals have been rejected. They include some that would have expanded democratic and legal rights and recognised local government...

1. Post-war Reconstruction and Democratic Rights (1944).
2. Fair Elections (1988).

3. Constitutional Recognition of Local Government (1988).
4. Expansion of Rights and Freedoms (1988).

The decade with the most referendum proposals was 1971 to 1980, with ten proposals - three being successful.

The longest period without a referendum proposal is 23 years, from 1999 to 2022.

Section 128 has had relatively little impact on constitutional change.

High Court Interpretations

The attitude of High Court judges to Section 128 may affect how they informally alter the Constitution through interpretation.

In *R v Hughes 2000,* Justice Michael Kirby expressed his discontent with formal constitutional change, noting "the discouraging history of referendum proposals under Section 128 of the Constitution".

As 'The Great Dissenter', Justice Kirby is remembered as an activist judge who disagreed with his colleagues in 50% of constitutional cases. His judicial activism may have resulted, in part, from frustration with the failure of Section 128 to bring about formal constitutional change.

In some cases, the High Court has informally changed the Constitution in ways rejected by the people in referendums. The most significant example concerns five referendums proposing expanded Commonwealth power over corporations, all rejected by electors. In *Concretes Pipes 1971,* the High Court effectively overrode the democratic will of the people by expanding the Commonwealth's corporations power.

Professor Michael Coper has shown that the High Court has altered the Constitution in at least four areas rejected by the people in referendums, such as aviation, government schemes for primary products marketing and freedom of speech.

The High Court is the most significant agent of Constitutional change. Its attitude to Section 128 may explain why.

Course links

- Unit 3 - Roles and powers of the High Court, formal and informal constitutional change

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