PART I – THEMES AND INSTITUTIONS

I Introduction and Framework[1]

A Historical Context

The British Parliament could make law binding upon the Australian Commonwealth until 1942.[2] States continued to be bound by British law until 1986.[3] Some English legislation may still apply in Australia.

B Levels of Government

Australia is a federalist country; there are two primary levels of government, the Commonwealth (with one federal Parliament), and the states/territories (each with separate Parliaments). Municipal authorities form a less important, third tier of government.

1 Power division

Legislative powers are divided between the Commonwealth and states/territories, asset out in the *Constitution*. There are three types of federal power:

- **Exclusive jurisdiction** – matters made the exclusive province of the Commonwealth parliament;
- **Concurrent powers** – matters able to be dealt with by both Commonwealth and state/territory Parliaments; and
- **Residual powers** - matters left unspecified in the *Constitution*; the exclusive province of the states/territories.

In practice, the Commonwealth may influence areas outside its constitutional jurisdiction by imposing conditions on the way money granted to the states/territories is spent.

Because many federalist issues arise in the context of finance and trade, they might be thought to be resolved in the Commonwealth's favour by reference to s 51(i) (the relevant head of power). However, even where the spending of money is involved, an exercise of power may still fall outside the scope of ss 51–2.

2 Internal conflict of laws

Where a law enacted by a state or territory conflicts with one enacted by the Commonwealth, the latter will prevail to the extent of the inconsistency.

For example, the State constitutions often purport to be able to legislate 'in all cases whatsoever';[4] clearly, this expansive power is limited by the federal *Constitution*.

[1] Rosemary Hunter, 'Institutions, Institutional Structure and Sources of Law' (2001).
[2] See *Statute of Westminster Adoption Act 1942* (Cth).
[3] See *Australia Act 1986* (Cth) s 3.
[4] *Victorian Constitution* s 16.

C *Constitutions*

1 *States*

Each state has its own Constitution. They were originally acts of the British Parliament, but are now Acts of the Australian states. By s 107 of the *Commonwealth Constitution*, the states' constitutions were expressed as remaining in force through federation.

2 *Commonwealth*

The *Commonwealth Constitution* is still contained in an Act of the British Parliament.

3 *Modification*

State constitutions can be altered by their enacting Parliament.

Modifying the *Commonwealth Constitution* is a more involved procedure; it consists of the following stages:

- **Enactment** – the proposed amendment must be passed by federal Parliament; and
- **Referendum** – the proposed amendment is put to popular vote; to be accepted, it must be assented to by a majority of voters in a majority of states.

Many referenda have failed since federation. The *Constitution* is designed to be resistant to change; this is because the rules of government it creates are foundational (ie, universal and atemporal, and thus stable).

4 *Purpose*

A constitution primarily establishes and sets limits on the exercise of sovereign power; however, it also serves various related functions:

- **Codification** – a constitution lays down foundational principles of a government and its constituting society;
- **Arms of government** – a constitution defines and creates the arms of its government (and is supplemented by unwritten conventions);
- **Federal structure** – a constitution distributes power between federal and state levels of government;
- **Court hierarchy** – a constitution defines the jurisdiction of the highest court and establishes its appeal process and judicial tenure (lower courts are legislated);

D *Parliaments*

With the exceptions of Queensland and the territories, all Parliaments in Australia are composed of three bodies – two of practical significance, one symbolic:

- **The Queen** – represented by the *Governor–General* at Commonwealth level and by *State Governors* in the states;
- **Upper House** – at Commonwealth level, the *Senate*; in Victoria, the *Legislative Council*;

- **Lower House** – at Commonwealth level, the *House of Representatives*; in Victoria, the *Legislative Assembly*.

1 *A bicameral system*

This is a bicameral (two chamber) system of Parliament. It is modelled on the Westminster (British) Parliament; its Upper House is called the *House of Lords* (unelected aristocrats) and its Lower House the *House of Commons*. By contrast, in all Australian Parliaments, members of both Upper and Lower Houses are elected.

Nevertheless, Australia's Lower Houses of Parliament are still conceived of as 'the people's house' (ie, most representative). This has been used to justify additional powers over the Upper Houses:

- The governing party is determined by the holder of the majority of Lower House seats only;
- Proposals for legislating government expenditures can only be initiated in a Lower House (and amendment by the Upper House is generally not possible).

2 *Queensland and the territories*

Queensland and the Territories have 'unicameral' parliaments; ie, only Lower Houses. For example, Queensland's Upper House was abolished in 1922.

3 *Functions*

- Formulating and passing legislation;
- Analysing statutory rules and regulations;
- Receiving petitions from members of the public; and
- Controlling Ministers (via question time)

4 *Parliamentary committees*

Parliamentary committees are comprised by members of the Upper House (as in the case of a Senate Committee), Lower House (as in the case of a House of Representatives Committee), or both houses (as in Joint Committees). They provide oversight for government action.

Most committees exist indefinitely. Others are created extempore for the purpose of inquiring into a particular matter (eg, deaths in custody). It is common for committee findings to form the basis for new legislation (eg, Victoria's abolition of provocation).

5 *The legislative process*

- **Bill**
    - Introduced to parliament accompanied by an explanatory memorandum by the Minister who has responsibility for its subject–matter
    - Occasionally, a Bill may be introduced by a backbencher or opposition member ('a private member Bill'); such Bills rarely succeed

- **First Reading**

    - A mere introductory formality

- **Second Reading**
    - The substance of the Bill is debated
    - May be referred to a Committee for examination
    - A ‘Committee of the whole House’ is then formed to consider the Bill in detail
    - At this stage, the Opposition might suggest amendments to the Bill

- **Third Reading**
    - Of the Bill in its final state; another formality

- **Assent by the other House**
    - Where a second House exists, the same process of introduction, first, second and third readings occurs
    - If the other House passes the Bill, it will be sent to the Queen's representative for assent
    - If the other House makes amendments, the Bill returns to its instigating House for approval
    - If the Houses become deadlocked (such that neither is willing to accept the other’s position – as where, eg, one party holds a majority in the one House and a minority in the other), a compromise will usually be reached and the Bill passed in modified form

- **Royal Assent**
    - The Queen's representative (Governor–General, Governor, or Administrator in the Northern Territory) must approve the Bill before it is enacted
    - This is also little more than a formality; Bills are always approved

- **Enactment**
    - The Bill is now an Act of Parliament, though it may not come into force immediately

All these proceedings are recorded in Hansard, which often prove useful when interpreting, applying, and critiquing the resulting legislation.

6 *Other sources of Australian law*

Other sources of Australian law include:

- **Constitutions** – rules arising out of the Commonwealth and state *Constitutions*;
- **Delegated legislation** – law made by delegates of Parliament
- **Case law** – binding on lower courts and persuasive to Courts in other hierarchies
- **Constitutional conventions** – historical developments made binding by custom
- [**Aboriginal customary law** – arguably a pluralist legal system of its own]

E *The Executive*

The executive is the body that makes policy decisions about the running of the country, state or territory. It implements these decisions via subordinate agencies, and holds effective power.

According to the *Constitution*, the Queen's representatives possess sole executive power. However, convention dictates that executive power is exercised by the current government;

effectively, the Governor–General or relevant Governor will only act on the advice of government Ministers.

The executive is also composed of the following figures:

- Prime Minister, Premier or Chief Minister;
- Cabinet (the Prime Minister or Premier plus an inner circle of the most powerful Ministers);
- Other Ministers who have been chosen from the political party in government; and
- Executive Council (the Queen's representative, Prime Minister or Premier, plus a handful of Ministers).

Functions of the Executive branch include:

- Policy-making;
- Administration; and
- Making and amending delegated legislation (a class of statutory regulations over which the executive has operational control).

F *Administration and Bureaucracy*

Government administration implements legislation and government programmes. It is grouped into a number of public services, each of which is organised into departments directed by a responsible Minister (who is answerable to Parliament for their department, which also submit annual reports on progress). Service departments are also responsible for devising new policies, which are sometimes the basis for legislative proposals.

Department heads may also be authorised by an Act of Parliament to make delegated or legislation and exercise discretion in the administration of an Act. They can also decide disputes arising out of an Act under their control. However, such *administrative decisions* do not carry with them a doctrine of *stare decesis* (they are not binding precedent).

G *Judicial System*

1 *Function*

Courts resolve disputes between parties, usually in an adversarial fashion. Parties may be private citizens, corporations, statutory bodies, or even governments. Courts exercise judicial power.

2 *Characteristics*

Courts are reactive in that they will only adjudicate a given dispute between parties when called upon to do so. A strict separation of powers is observed between the judiciary and other arms of government. Judges have security of tenure to prevent interference from Parliament or the executive.

3 *The Australian court hierarchy*

In addition to standard courts of first instance and appeal, several specialised tribunals exist to hear disputes of particular kinds (eg, urban planning). They made and are bound to follow precedent.

Supreme Courts of the states and territories have unlimited original civil and criminal jurisdiction in all matters involving the common law or arising under state or territory legislation.

The Federal Court of Australia, which was created in 1976, deals primarily with matters arising under Commonwealth legislation. In its original jurisdiction, cases are heard by a single judge. In its appellate jurisdiction (from a single judge of the Federal Court or single judge of a State Supreme Court in a federal matter), cases are heard by a Full Court comprising three judges.

The Family Court of Australia has exclusive jurisdiction over matters arising under the *Family Law Act 1975* (Cth).

The High Court of Australia is the ultimate court of appeal. In its original jurisdiction, it deals with constitutional law matters (including determining the constitutional validity of Commonwealth legislation) and disputes between state governments.

4 *Historical nullities*

The British Judicial Committee of the Privy Council (once the Star Chamber) was previously available as a further court of appeal from all ultimate courts of the colonies of the British Empire. It existed in an attempt to harmonise law among the British Commonwealth and with England. Though Privy Councillors usually were or had been English judges, it was not part of the English court hierarchy.

The role of the Privy Council in deciding Australian disputes was successively diminished during the 20th century:

- Appeals from the High Court to the Privy Council in constitutional and other federal cases were abolished in 1968;
- In 1975, all remaining appeals from the High Court to the Privy Council were abolished;
- Finally, in 1986, appeals from State Supreme Courts to the Privy Council were also abolished.

I *Fundamental Concepts*[5]

A *Constitution*

A constitution is a set of legal rules describing how government is structured and operated.

- Wheare: 'The collection of legal and non-legal rules which govern the governors'
- Jennings: 'The document in which are set out the rules governing composition, powers and methods of operation of the main institutions of government'

Constitutions may be written or unwritten. Written constitutions are reducible to a single, self-contained document, whereas unwritten constitutions may be spread across a number of sources (eg, the United Kingdom). However, the separation between 'written' and 'unwritten' is not a dichotomy: many gradations of formality and singularity may be identified between the two extremes.

Even a written constitution comprises more than the document itself:

- **Case law**
  Judicial interpretations of its express provisions, further implications and applications:
  - Example: the statement 'absolutely free' in connection with interstate trade and commerce (s 92) does not actually mean 'absolutely free' according to the High Court of Australia; rather, it means, 'free in some circumstances';

- **Conventions**
  Informal, generally non-enforceable agreements about the manner in which certain provisions are to be treated in practice; and

- **Imperial statutes**
  Legislation in the parent jurisdiction that bind the Commonwealth by intention, such as the *Statute of Westminster 1931* (Imp), the *Australia Act*s *1986* (UK) and the *Commonwealth of Australia Constitution Act 1901* (Imp);

- **Common law rules**

These four additional sources of constitutional law are crucial, in Australia, for the proper and effective functioning of government.

1 *Constitutional conventions*

Constitutional conventions are practices followed in relation to the operation of government.

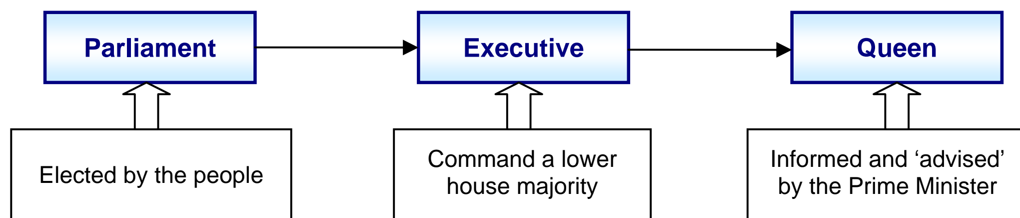
For example, the doctrine of responsible government is a primarily tacit convention. Thus, while s 1 of the *Australian Constitution* may vest enormous powers in the Queen and governor-general, they are rarely used. For example, the Queen in Council must give assent to new legislation (s 59) – and can in theory refuse to give such assent – but in practice such approval is always given. In a similar fashion, s 61 vests executive power in the Queen.

[5] Adapted from and based upon the work of S Joseph and M Castan, *Federal Constitutional Law: A Contemporary View* (2001) 2-12, 16-22.

2 *Relationship between Queen in Council and Parliament*

In practice, unwritten convention effectively curtails the exercise of the Queen in Council's broad executive powers. The Queen and governor-general are seen as being responsible to the legislature, so that while executive power is, at least technically, vested in them, they must act only upon the advice of cabinet and the Prime Minister, who are in turn informed by the elected majority in the House of Representatives.

There is thus indirect accountability between the Queen and governors-general and the people:



The one exception to this chain of accountability is the existence of reserve powers, which are capable of being exercised independently of Cabinet's 'advice'. For example, governor-general Kerr dismissed the Whitlam government. However, it is generally accepted that there must be reasonable cause for making use of such powers; though not binding, this is still an effective constraint upon their use.

3 *The purpose of a constitution*

The function or purpose of a constitution is largely a matter of political theory; as such, various opinions are proffered:

- Sartori: a constitution is a *telos* (an end)
    - They constrain substantive definitions
    - They are a 'garantisme' (a fundamental law which restricts arbitrary power and ensures 'limited government')

- Why protect liberties? Why limit power?
    - Reductionist answer: to limit government (Sartori)
        - However, constitutions serve different, often conflicting purposes, and can't all be reduced to a single reason for being
        - Because not all constitutions limit power, a more accurate answer would note a multiplicity of purposes
    - Alternative position: Parliament is supposed to represent its constituency; where their election is legitimate, they should have absolute power to promote the common welfare (elected dictatorship)

Naturally, the purpose of a constitution ought also to be assessed by reference to other foundational principles, such as parliamentary sovereignty, the rule of law, etc.

B *Parliamentary Sovereignty*

This ideal is the idea that Parliament is absolutely sovereign with respect to law-making and amendment (with the exception, perhaps, of its obligations under international law). It should be endowed with constitutional power to 'make or unmake any law whatever', with no other body having such authority and all persons obliged to obey Parliamentary statutes.[6]

In reality, Australian Parliaments are not absolutely sovereign; state and federal Parliaments are constrained by the Commonwealth *Constitution*. Nevertheless, Parliamentary sovereignty is important to the extent that statutes are unable to be voided by the Courts unless unconstitutional.

Arguably, *absolute* Parliamentary sovereignty is undesirable because it lacks the checks and balances required to ensure it is exercised appropriately. (Examples include constitution, committee, and judiciary.) These are particularly important in Britain and Australia, where no constitutionally-enshrined Bill of Rights exists (unlike the United States of America). Parliamentary oversight ensures that – at least in theory – though Parliament may be influenced by agendas at odds with majority opinion, their capacity to enact oppressive and undesirable legislation remains limited.

History has seen Australian Parliaments pass many discriminative laws (eg, denying women voting rights, breaching human rights with respect to refugees, denying Aboriginal rights). Given that Members of Parliament are elected by the people, this suggests that citizens are not troubled by such laws. However, it is also possible that the partisan structure of the election mandates the enactment of legislation supported by both major parties. That not being the case, even with the most extensive protections, a political system cannot protect against short-sightedness or apathy in the electorate.

C *The Rule of Law*

Dicey sets out three aspects to the rule of law:

- **Ruled by regular law**
  - The governors must act within the law of the governed;
  - To be legitimate, a law cannot confer 'wide discretionary authority'.

Arguably, modern government regularly departs from this first requirement (eg, in the apparently arbitrary nature of some administrative decisions, such as Centrelink). It should also be noted that discretion is sometimes a good thing: it enables flexibility in applying laws, recognises the discrepancies inherent in any interpretation of the law, is sensitive to the unique character of every situation, and accounts for other salient matters that a strictly determinative rule may ignore. That said, discretion carries with it the potential for improper process; it introduces an unchecked arbitrary element into decision-making and has the potential to be abused.

The contemporary Australian approach appears to maintain procedural and substantive fairness by balancing discretion with constraint, respect for law with flexibility and pragmatism in its application.

- **Equality before the law**
  - The law applies to and is enforceable against all members of society, including the governors thereof;
  - Government must proceed in accordance with the laws it creates.

[6] A V Dicey, *Introduction to the Study of the Law of the Constitution* (10th ed 1964) 40.

Note that Dicey's second aspect has two possible interpretations: i) that all persons (governs and governed) are *subject* to the law [correct]; ii) that all such persons are subject to the *same* laws [incorrect]. Dicey does not require that the content of law be identical as towards all persons; for example, adults may be subject to different laws than children. What is required is that *all* persons are governed by the rule of law (as distinct from caprice or might).

- **Individual rights**
    - Rights are best protected by a 'bottom up' process (ie, by the people);
    - Protection is not the result of a written constitution but judicial decisions interpreting and applying it.

This third aspect has a clear normative component: the rule of law *ought to* protect individuals. Dicey argues that such protection would be more effective by the people than by a written document (such as a Bill of Rights). This certainly reflects the United Kingdom experience, and may also apply in Australia. However, this may not be appropriate in many other countries.

D *Representative Government*

Representative government consists of government by people through their representatives. It is to be contrasted with direct government (rule by a majority). Representatives are usually chosen via democratic election. Implicit in such systems in the notion of political equality: each person receives a single vote of equal value to every other.

E *Responsible Government*

A responsible government is one whose executive is accountable to Parliament for its actions. In Australia, this occurs in two ways:

- **Parliamentary controls upon supply (ss 81 and 83)**
  Executive spending must be authorised by the House of Representatives (and approved by the Senate);

- **Ministerial accountability**
  Each member of Cabinet is also a member of Parliament; this regulates their actions to the extent that, under s 64 of the *Constitution*, they may be forced to resign for misconduct.

F *Federalism*

Federalism is a system of government consisting in two levels of government which divide governmental power between them. In Australia, these two levels are federal (Commonwealth) and state, and power is divided as follows:

- States have plenary (absolute) power; however
- The Commonwealth has power in the areas set out in s 51 of the *Constitution*

Federalist principles are reflected in the composition of the Commonwealth Senate, which has an equal number of representatives from each state (s 7). This ensures that each state has an effective influence upon federal law. However, it is arguably inconsistent with the principle of

representative government to the extent that it allows smaller states, like Tasmania, to have greater legislative power per voter than larger states.

Amendment of the *Constitution* itself is also federalist: a double majority is required (ie, a majority of voters overall *and* a majority of voters in a majority of states). The full procedure for constitutional amendment is set out in s 128.

G *Separation of Powers*

Government power is allocated to three different bodies: executive, legislative and judicial. Each branch serves different functions; their separation is meant to limit the clustering of power in any one arm of government.

The fact that members of Parliament also serve as Ministers in cabinet undermines the strict separation of powers (in that a single person serves both legislative and executive functions); however, functional separation arguably still persists.

III *The Australian Federal System*

A *Key Features of Australian Federalism*[7]

- **Composition**
  - One central government and six state governments, each with its own legislature, executive and judiciary;
  - The senate equally represents all states;

- **Division of power**
  - Lawmaking powers are divided between the national and state legislatures whereby the former are specified in the *Constitution* and the remaining functions are left to the states;
  - Federal laws prevail over state laws to the extent of any inconsistency;
  - The *Constitution* embodies some features of coordinate federalism (with each level of government maintaining a high degree of autonomy);
    - Cf Canada, where diverse cultural groups maintain complete independence;
  - The *Constitution* also embodies some features of cooperative federalism (there being interdependence between federal and state governments);

- **Judiciary**
  - A judiciary is appointed by the federal government to determine whether either level of government has exceeded its powers;
  - A judicial 'umpire' regulates the operation of the division of power between them;

- **Operation**
  - These features are entrenched by a rigid constitutional framework that is difficult to alter;
  - The practical interaction between each level of government depends on both legal and extralegal (such as political and economic) factors;

The Constitutional Commission also criticises Wheare's definition of coordinate federalism as comprising both legal and extralegal components; they maintain that the *Constitution* should only be construed by reference to its terms and the interpretations thereof by the High Court of Australia.

B *The Rationale behind Federalism in Australia*

- The drafters of the *Constitution* wanted any union to preserve the states:
  - Dicey: inhabitants of each state feel a stronger attachment to their own state than the federal government;
  - The views of the framers are now considered a primary source for the purposes of interpreting the *Constitution*:
    - **Research essay:** with the emergence of Parliamentary Hansard as a valid source of legislative interpretation, records of the constitutional committee can be used to interpret the text itself;
- A federal form of government afforded representation to state interests in the senate, and meant that states could be granted funds and jurisdiction by the federal government;
- Federation was desired for several reasons (primarily political and pragmatic):

[7] See Constitutional Commission Report 2.15.

- Regulating interstate and international trade;
- Nationalising rules governing taxation and corporations;
- Providing for a single national defence scheme;
- It was also believed that the people were most likely to accept a federal system;

- Dicey and Bryce also proved influential sources;

C *Dividing Power under the* Australian Constitution

Legislative power is divided between the Australian states and the federal government. State lawmaking is limited by two sources:

- The relevant state constitution; and
- Sections 51, 52 and 90 of the *Australian Constitution*.

State legislative power is plenary unless limited by one of these sources. This limitation can take two forms:

1 Exclusive Commonwealth powers
2 Concurrent Commonwealth and state powers

In the case of an exclusive power, the Commonwealth has sole jurisdiction. Sections 52 and 90 set out exclusive powers.

Where a power is concurrent, both Commonwealth and states may make laws in respect of its subject matter. Section 51 sets out many 'heads of power' which are able to be exercised concurrently by federal and state Parliaments.

However, where

- there is conflict between state and Commonwealth laws; and
- the Commonwealth has concurrent power to legislate in respect of the subject matter,

the Commonwealth law prevails to the extent of the inconsistency (s 109).

The effect of this division of power is to limit parliamentary sovereignty at both federal and state levels. It gives effect to cooperative federalism, which seeks to minimise redundancy and inefficiency in government.

Other relevant provisions in the *Constitution* include:

Section	**Purpose and effect**
106	Old colonies were transformed into states at the time of federation; their constitutions were to continue until modified by the relevant state Parliaments
107–8	Most of the former colonies' powers and some colonial laws were to continue as state laws; the sources of parliamentary power available to the states are set out in their own constitutions (and, by negative implication, the *Commonwealth Constitution*)

51	Set out the lawmaking powers of the Commonwealth Parliament by enumerating the fields in which it may legislate
52	Sets out exclusive federal powers (exercised only by the Commonwealth)
90	Vests the power to pass laws with respect to customs and excise taxes in the federal Parliament
109	Provides that in the event of inconsistency of laws falling within a concurrent head of power (such as those outlined in s 51), the Commonwealth law will prevail
122	Federal Parliament may make laws in respect of territories; it may also grant them representation in federal Parliament 'to the extent and on the terms which it thinks fit'
128	Provides a special mechanism to change the *Constitution* itself; the mechanism reflects federal principles (by requiring a majority of states) and national principles (by requiring an overall majority of the populace); the procedure is quite elaborate, requiring referendum

For an illustration of the operation of this distribution of legislative power, see the *Age Discrimination Act 2004* (Cth) ss 9, 10, 12, 13, 39.

Section	**Purpose and effect**
9	Limits geographical application to Australian geographical limits; this shows that the Act was intended to have 'effect throughout Australia' (sub-s 2) and its territories (sub-s 1)
10	Outlines the heads of powers in reliance upon which the Act was passed (corporations, trade and commerce, treaty, etc); shows that federal Parliament does not have any general capacity to make laws but is limited to specific heads of power; sub-ss 2–11 define when the Act will apply, limiting it to circumstances permissible under a head of power
13	States that the Act is intended to apply to the executive governments of the Commonwealth, states, territories, and Norfolk Island; this means that government officials are subject to the law that they create (Dicey's first aspect); when applied to such officials, it will be also necessary to consider whether the Commonwealth actually has power to legislate in that specific area
39	Sub-section 4 creates an exemption where the conduct complies with a state or territory law; shows how Commonwealth laws must deal with their existence in a context of concurrent state and federal power; this is an example of expressly leaving room for states to regulate concurrently on the same subject matter

D Crown and Intergovernmental Immunity

1 *Crown (governmental) immunity*

Crown immunity is the antiquated term for 'governmental immunity'. Both refer to the presumption that the government, its employees and agencies are not bound by its legislation or that of another polity. To rebut this presumption, legislation will often state expressly that it intends to bind the government or other polities (see, eg, *Age Discrimination Act 2004* (Cth) s 13).

2 *Intergovernmental immunity*

Because there are many areas in which both federal and state parliaments have concurrent legislative power, there exists potential for conflict between their laws. Though s 109 makes it clear that in the case of inconsistency the federal law will prevail, where no federal law exists the issue arises as to whether the states can bind the Commonwealth (and vice versa, where the Commonwealth has power to legislate).

Issue: does one level of government have the capacity to bind another in the federation? If not, is each government immune from the laws of every other? A state may establish a corporation to conduct its affairs. Is a Commonwealth law regulating corporations applicable to that state corporation? Conversely, are state laws applicable to federal agents and instrumentalities?

This issue most frequently arises in the context of deciding whether Commonwealth laws can bind state governments. The present authority is *Austin*'s case, a recent decision of the High Court of Australia. In short, Commonwealth Acts which expressly declare that they bind the states are binding. However, there is an exception. A narrow sphere of limited immunity is said to be implied by the *Constitution* (which makes no express statement about the issue). The result is that the federal Parliament may use their legislative power to enforce national policy objectives and, in large part, bind the states and their governments.

E The Doctrine of Implied Immunities

1 *Initial position: blanket immunity*

The starting position was that states and Commonwealth were normally to be immune from each other's laws. This was known as 'the implied immunity of instrumentalities'.

D'Emden v Pedder (1904) HCA:

<u>Facts</u>

Tasmania passes a law authorising the collection of state income tax. A Commonwealth servant living in Tasmania argues that he is not obliged to pay the tax because this would interfere with the Commonwealth's decision to pay a particular wage to their employees.

<u>Decision</u>

In *Demden v Pedder*, the High Court of Australia declared the Commonwealth to be completely immune from state laws. The Commonwealth employee is therefore not required to pay the

state tax.

'When a state attempts to give to its legislative or executive authority an operation which, if valid, would fetter, control, or interfere with the free exercise of the legislative or executive power of the Commonwealth, the attempt, unless expressly authorised by the *Constitution*, is to that extent invalid and inoperative.'

These strong statements of complete immunity continued up until the *Engineers' Case*. Ironically, their effect was to reduce the effectiveness of the Commonwealth's ability to regulate national policy and state laws. They proved difficult to rebut, especially given the fact that the original High Court justices were often framers themselves. This made it difficult to overturn the doctrine on the basis of accepted interpretative criteria (ie, 'the framers' intentions').

Railway Servants' Case **(1906) HCA:**

Facts

The Commonwealth attempts to enforce an industrial award upon a state railway authority.

Decision

The later *Railways Servants' Case* confirmed the reverse; namely, that the states are completely immune from Commonwealth laws purporting to bind them. The states are therefore not bound by the Commonwealth industrial award.

When first applied by an infant federation, the doctrine was thought to protect states and their agencies from Commonwealth interference.[8] In practice, however, it made it difficult to implement policy on a national level, since states were free to disregard it.

2 Engineers' Case: *Overturning implied immunity*

This position was overruled by the High Court of Australia in the *Engineers' Case*. Knox CJ, Isaacs, Rich and Starke JJ reasoned that the doctrine

> finds no place where the ordinary principles of construction are applied so as to discover in the actual terms of the Instrument their expressed or necessarily implied meaning. **The principle we apply to the Commonwealth we must apply also to the states**, leaving their respective Acts of legislation full operation within their respective areas and subject matters, but, in case of conflict, **giving to valid Commonwealth legislation the supremacy expressly declared by the *Constitution***, measuring that supremacy according to the very words of s 109. … We therefore hold that **states, and persons natural or artificial representing states**, when parties to industrial disputes in fact, are **subject to Commonwealth legislation** under pl[9] (xxxv) of s 51 of the *Constitution*, if such legislation on its **true construction** applies to them.

[8] Blackshield and Williams, 289.
[9] 'Pl' is a common abbreviation for 'plenum'.

***Engineers' Case* (1920) HCA:**

Facts

- A union of engineers lodges a claim for an award concerning 843 employers across Australia, including 3 governmental employers in Western Australia

Issue

- Can a Commonwealth law made under the 'conciliation and arbitration' power (s 51(xxxv)) make an award binding upon the state government employers?

Decision

The High Court declares Commonwealth legislation binding upon state government instrumentalities. In obiter, this denial of intergovernmental immunity is described as being reciprocal (ie, it also allows states to bind the Commonwealth).

The *Engineers' Case* marked a turning point in how cases were interpreted by the courts. They would now look exclusively at powers granted to the Commonwealth by the *Constitution*. There is no logical reason to constrain their exercise by reference to immunity implied by the grant of power; on their true construction, the powers *do* extend to the states, which are therefore bound by Commonwealth legislation.

3 State Banking Case*: Qualifications to* Engineers

In general, the Commonwealth can pass legislation binding the states. However, the post-*Engineers* position still imposed limits upon Commonwealth legislation:

- The Commonwealth still has to find a head of power under which to enact a new law;
- Any legislation which breaches an express or implied prohibition on Commonwealth power will be invalid
  - Such prohibitions can be derived from the inherent nature of federalism, which requires that states are functioning governments
  - Because the *Constitution* implies that states exist as functioning governments, the Commonwealth cannot pass a law which interferes with the ability of states to function as governments

In particular, the general rule that the Commonwealth can bind the states is qualified by two important exceptions (*State Banking*):

- **Discriminatory laws**
  The Commonwealth may not discriminate against the states by singling them out for special treatment; and

- **Laws curtailing essential governmental function**
  The Commonwealth may not enact laws – even if they are of general application – which prevent or impede states from carrying out normal and essential functions of government.

These exceptions to *Engineers* constitute implied limitations on the Commonwealth Parliament's power to legislate with respect to the states. Such limitations are said to be derived from the very

nature of Australian federation, which implies that states are discrete government entities capable of exercising independent governmental functions.

Melbourne Corporation v Commonwealth **(1947) HCA ('*State Banking Case*'):**

Facts

- Under s 48 of the *Banking Act 1945* (Cth), a bank engaging in business with a state government must obtain permission from the Commonwealth treasurer to do so
- Because the Commonwealth wanted to create a uniform national bank (and not a series of discrete, private, state banks), the treasurer would often refuse his permission
- The Melbourne City Council is notified that it would be treated as an authority to which s 48 applies
- The Council seeks to declare s 48 constitutionally invalid (and so be able to conduct banking without the approval of the treasurer)

Issues

- Is there a head of power within which the legislation is enacted?
  - Majority: yes; 'banking, other than state banking': s 51(xiii)
  - The law appears to pertain to banking, but this *may* not be the case
- Does the legislation discriminate against state entities?
- Does the legislation curtail the ability of states to exercise their essential governmental functions?

Reasoning

- Starke J:
  - States have no general immunity to Commonwealth laws, subject to the limitation that such laws do not impede the states functioning as governments (to do such would be to contravene an implied limitation in the *Constitution*)
  - The nature of this limitation is to prevent a law which 'curtails or interferes in a substantial manner with the exercise of constitutional power' by a state (at 75)
  - 'Discrimination' means: are state entities being singled out from non-state entities?
    - If they are, then are they prevented from performing their normal acts as a result?
    - If not, then does the law impede essential government functions?
  - The focus is on the ability of states to exercise their functions as governments
  - This limitation is implied from the *Constitution*, which implicitly treats states as functioning independent governments
  - The limitation also applies to executive power (at 75)

- Dixon J:
  - If a law has 'an actual and immediate operation' in a head of power assigned to the Commonwealth under the *Constitution*, this is prima facie evidence that the law is valid
  - The fact that a law is enacted with an intention or purpose falling outside the area of power will not invalidate it
  - However, a head of power will not support a law 'which places a special burden upon the states' – they 'cannot be singled out'
  - 'The federal system itself is the foundation of the restraint upon the use of the power to control the states. The same constitutional objection applies to other powers, if under them the states are made the objects of special burdens or

disabilities.'
  - Because the *Constitution* conceives of states as bodies 'whose existence and nature are independent of the powers allocated to them' by the Commonwealth, the distribution of powers – though allowing interrelation – cannot allow exercises of power 'calculated to destroy or detract from the independent exercise of the functions of the one or the other'
  - 'The *Constitution* is a political instrument … But it is really meaningless. It is not a question whether the [arguments] are political, for nearly every consideration arising from the *Constitution* can be so described, but whether they are compelling.'
  - The case of Commonwealth power being exercised over states is different from state power being exercised over federal agents: the Commonwealth has a stronger position (with enumerated powers affirmatively granted) and supremacy in cases of inconsistency
  - States are separate governments and exercise independent functions; this logically entails that the Commonwealth may not enact laws aimed at 'the restriction or control of a state' – such a restriction is 'plainly seen in the very frame of the *Constitution*'
  - The nature of this limitation is to prevent 'a law which discriminates against states' or which 'places a particular disability or burden upon an operation or activity of a state' and 'upon the execution of its constitutional powers' (at 79)

- Rich J:
  - Twomey: the nature of the implied limitation is to prevent laws which *either* 'single out' the states and impose on them restrictions that prevent the exercise of their normal and essential functions of government, *or* laws of general application which would have this effect (at 66)

- Williams J:
  - Twomey: the nature of the implied limitation is to prevent the exercise of legislative power 'for the purpose of affecting the capacity of the other [the state] to perform its essential governmental functions' (at 99)
  - Ultimately decides the matter on the basis of characterisation

- Latham CJ:
  - The issue is one of characterisation: is the legislation concerned with state functions or a Commonwealth head of power?

Decision

Five judges (McTiernan J dissenting) hold that s 48 is invalid. However, they each emphasise different aspects of the test for intergovernmental immunity, leaving in doubt the precise criteria according to which Commonwealth laws are to be judged as interfering with or restricting a state's activities. The extent to which *State Banking* departs from *Engineers* is also unclear.

(a) *Discriminatory laws*

According to *State Banking*, a two-stage test is applied to determine whether a law breaches the immunity granted in cases of discriminatory Commonwealth (and state) laws:

1 *Does the law discriminate against or single out the government or agents of a state or states, whether in form or effect?*

Discrimination can be either direct — inferred from the form and express words of the statute — or indirect — where law of apparently neutral application has a disproportionate detrimental impact on the government of a state or states.

- Indicia of direct (formal) discrimination
  - Singling out a state or entity controlled by a state
  - Laws having no effect on the activities of a non-state body, but penalising the same body where it is part of the state government
  - Eg, *State Banking*

- Indicia of indirect (substantive) discrimination
  - Where present circumstances dictate that the law will have a greater negative impact on a state provider
  - Where the state provider is the primary provider in the industry which is subject to the law
    - Eg, by regulating all entities of a certain kind in the same way when most entities of that kind happen to be owned by the state government
    - See *Queensland Electricity Commission*

Discrimination may be directed at a government itself, or an instrumentality or agent under its ownership (*Queensland Electricity Commission* per Mason J).

***Queensland Electricity Commission v Commonwealth* (1985) HCA:**

Facts
- A Queensland government authority generates 99.7% of the state's electricity
- The authority is engaged in an intractable union dispute
- The Commonwealth passes legislation to deal with the dispute, which consists of special rules applying to Queensland only
- The legislation is expressed as applying to both government and non-government entities in Queensland; it is thus a law of general application to any electricity disputes which the state may encounter

Issues
- Is this the kind of discrimination identified in *State Banking*?
- Does the law single out a government entity specifically?

Reasoning
- *State Banking* was concerned with laws distinguishing between state and non-state entities; here, the law is one of general application, but is distinguished from laws in other states
  - High Court: this is still 'singling out' for the purposes of the *State Banking* test
- Even though the law purports to apply to all entities, it can still be said to target a government entity because the substantive effect disproportionately affects it
  - High Court: the focus is on more than the *form* of a law
  - The real question is one of substance: is the *true effect* of the law, as applied, to isolate state authorities?
  - The fact that the Act is general in application is not determinative – it's the way in which the law operates in reality that is important
- Similarly, a law can be invalid because it discriminates against either a single state of all states together: at 217 (Mason J), 235–6 (Brennan J), 247 (Deane J), 262 (Dawson J)
- Not all discrimination by Commonwealth law will violate an implied immunity

- Eg, the acquisition of property on just terms necessarily singles out the state whose property forms the subject of the acquisition, but this is not in violation
- Deane and Brennan J:
  - Discrimination is permissible if it is reasonable
  - This is an imprecise test
- Merely depriving states of a right, privilege or benefit that other citizens don't possess will not amount to violation of the implied immunity from discriminatory laws
  - The discrimination must be 'impermissible'
  - That is, some disability or restriction must have been imposed upon the state or states' exercise of their constitutional functions
  - This need not threaten the continued existence of the state or states, however

2 *Does the law nevertheless fulfil a 'rational non-discriminatory purpose'?*

If the law formally or substantively discriminates (against states or the Commonwealth – though states are primarily the focus here), it becomes necessary to justify the legislation at the second stage.

The Commonwealth government will usually argue that its legislation is necessary in order to effectively be able to regulate one of its 'heads of power' under s 51 of the *Constitution*. However, just having a power does not entail the ability to use it for discriminatory purposes. Even so, the presence of such a power can sometimes – in exceptional circumstances – be used to justify a law discriminating against a state government. Such circumstances are to be inferred where

> *the relevant legislative power appears, 'from its content, context or subject matter', to be intended to authorise the discriminatory operation of the particular law.*[10]

Examples are to be seen in heads of power where

> *a particular exercise of the relevant legislative power necessarily involves distinctions between different geographical areas: defence (s 51(vi)), quarantine (s 51(ix)) and medical services such as immunisation (s 51(xxiiiA)) may provide illustrations.*[11]

Another example is arguably provided by s 51 (xxi), which provides for 'the acquisition of property on just terms from any State or States'. Such power necessarily involves geographical distinctions between different areas of property, and so appears to authorise legislation specific to (and thus discriminating against) the relevant 'State or States' in which the property is situated.

In *Richardson v Forestry Commission*, it was held that laws prohibiting logging in two Tasmanian forests constituted 'reasonable' discrimination and were therefore valid. Despite affecting only one state, the legislation was reasonably necessary to protect Heritage forests, thereby fulfilling Australia's obligations under an international treaty.

When considering a novel head of power, the following indicia may be used to determine whether it appears 'intended to authorise the discriminatory operation' of a law:

- Content of the power;

[10] *Queensland Electricity Commission*, 250–1 (Deane J).
[11] Ibid.

- Context of the power; or
- Subject matter of the power.

If the law fulfils a rational non-discriminatory purpose (ie, to enable the effective regulation of the subject matter of the power) then immunity will not survive and the relevant state will be bound.

(b) *Laws curtailing essential governmental function*

Another source of implied intergovernmental immunity concerns laws impeding essential government functions. In *Australian Education* Union, the majority (6:1) described this exception as preventing 'an impairment or curtailment of the capacity of a state to function as a government'. They went on to apply the limitation, invalidating the Commonwealth law.

Note that *Australian Education Union* is not an example of discrimination being used to invalidate a law. The outcome hinges not upon the singling out of state employees, but on the law's effect upon governmental functions.

***Re Australian Education Union; Ex parte Victoria* (1995) 184 CLR 188:**

Facts

- The Commonwealth Industrial Commission regulates employment, specifying certain minimal requirements for dismissal, remuneration and other working conditions
- The Commission frequently makes awards concerning state employers; the Victorian state government is one such employer

Issue

- Can the Commission bind state governments and impose minimum standards of employment?

Reasoning

On the facts, two rights are crucial to the functioning of the state and are therefore protected by the immunity:

- **Right to hire and dismiss employees**
  If employees become redundant, a state should be able to dismiss them as it becomes necessary, rather than be bound by the employment laws passed by federal Parliament; and
  - States need to be able to choose who they employ and for how long, as well as the conditions of their dismissal

- **Right to control senior members of government**
  Senior employees of state governments are also immune from federal laws regulating wages and employment conditions. This includes:
  - 'Ministers,
  - ministerial assistants and advisers,
  - heads of departments and high level statutory office holders,
  - parliamentary officers and
  - judges' (at 233).

- The Commonwealth can regulate minimum wages and maximum working hours, but regulations relating to termination are invalid to the extent that they apply to state

governments
  - The Commonwealth can't regulate these things because states should be able to decide for themselves how many employees to retain year to year
  - Because conditions frequently fluctuate, state governments must be able to jettison unnecessary employees – without being subjected to unfair dismissal laws enacted by the Commonwealth – to be able to carry out their governmental functions with currency and efficiency
  - Regulation of employment by the Commonwealth would impair their ability to employ staff to carry out their democratic mandate

- If states are to have the 'integrity and autonomy' provided for by the *Constitution*, they require freedom to determine the terms and conditions relating to their employment of 'higher level' officials (eg, judges, Ministers, etc)

- Thus, even where the law is not discriminatory, it may still breach an implied prohibition where its provisions 'operate to destroy or curtail the continued existence of the states or their capacity to function as governments'

<u>Decision</u>

Majority

The Commonwealth's ability to regulate state employment conditions is constitutionally limited. Though the right to hire and dismiss its employees is critical to a government's functioning, the right to regulate their minimum wages and conditions of employment is not so essential. Consequently, these matters are able to be legislated for by the federal Parliament, subject to the proviso that it 'takes appropriate account of any special functions or responsibilities which attach to the employees in question' (majority, 232–3). This means that the Commonwealth cannot even regulate the remuneration of more senior employees (eg, Ministers).

The reasoning behind the majority's support of the second immunity is that the right to regulate all aspects of the employment of its senior staff is crucial to the functioning of a state.

Minority

Dawson J is critical of the distinction between hiring/dismissal and regulating wages/conditions. His Honour views wages and conditions as being just as crucial to a state's proper exercise of governmental functions as hiring and dismissal of their staff (at 249–50).

Dawson J also dismisses the distinction between 'senior' and 'other' employees, arguing that all are crucial to the functioning of a state (at 250). He proposes a return to pre-*Engineers* blanket immunity – for both state and Commonwealth – in relation to industrial laws. However, this would undermine the ratio of *Engineers* in principle and prevent the effective setting of minimum and universal industrial conditions by the federal government.

Since *Melbourne Corporation*, *Victoria v Commonwealth*, and *Australian Education Union*, the exception to the *Engineers* principle (that no intergovernmental immunity exists) has been described as having two limbs:

- **Discrimination**
  A prohibition on Commonwealth laws that impose special burdens or disabilities on

states; *or*

- **Government function**
  A prohibition on Commonwealth laws that prevent states from functioning as independent and autonomous governments – even where the laws apply generally.

In the *Tasmanian Dams Case*, it was noted that element (2) should prevent 'impairment of the *capacity* of the state *to function as a government*, rather than to prohibit interference with or impairment of *any function* which a state government *undertakes*.'[12] It is not enough that a Commonwealth law merely adversely affects a state when carrying out a function or prerogative. There must be 'substantial interference with the state's capacity to govern, an interference which will threaten or endanger the continued functioning of the state as an essential constituent element in the federal system'.[13]

Note, however, that the High Court has applied the 'impairment of governmental function' test relatively loosely, as in *Australian Education Union*, where the rights of a state to determine the number, identity, term, and manner of dismissal of its employees were found to be 'critical' to their capacity to function as states.

It has been remarked by numerous justices that this exception is inherently imprecise: see *Victoria v Commonwealth* (1971) 122 CLR 353, 411 (Walsh J), 424 (Gibbs J); *Re Australian Education Union; Ex parte Victoria* (1995) 184 CLR 188, 228.

How, then, is impairment of government function to be established? In *Victoria v Commonwealth*, Gibbs J notes that where a law has been in operation for a sustained period of time without ill effect, this is often an indication that it does not impair governmental function.[14] In that case, the law in question had been enacted for some 30 years before being questioned. Such a long period of operation allows retrospective determination of whether it affects the ability of states to function. Merely having less money available to spend on state functions was held not to constitute, at least by itself, a sufficient impairment.

Usually, however, the benefit of hindsight will not be available because laws are challenged immediately. In such cases, it is useful to examine whether the law impacts upon any of the state's arms of government. For example, in *Western Australia v Commonwealth* ('*Native Title Case*'), the High Court held that having to pay compensation to indigenous inhabitants is not an example of a law impeding effective governmental function because it does not directly affect any of the three branches of state government (executive, legislature and judiciary). The law does not, for example, affect their ability to employ public servants (unlike *Australian Education Union*) or maintain an independent judiciary (unlike *Austin*). The only real effect is to limit its financial capacity to acquire land and resources.

This suggests that in determining whether a law breaches the intergovernmental immunity implied from the requirement that states exist as functioning and independent governments is to examine how the law would impact the three branches of state government. If it can be said that the function of any one is impeded by the law, it is likely to be constitutionally invalid.

4 Austin's Case*: Present-day intergovernmental immunity*

In 2003, the High Court reformulated the test for intergovernmental immunity in *Austin v Commonwealth*. As a result, the general principle has been restated in terms of a single test (with arguably little difference to the substantive outcome).

---

[12] *Tasmanian Dams Case* (1983) 158 CLR 1, 139 (emphasis added).
[13] Ibid.
[14] *Victoria v Commonwealth* (1971) 122 CLR 353, 425.

***Austin v Commonwealth* (2003) HCA:**

Facts
- Federal legislation has the effect of imposing a special superannuation regime on state judges (in particular, NSW judges)
- The effect was to impose a tax (the superannuation contributions surcharge) on state judges alone
- The legislation treats judges of all states separately to other citizens
- The burden imposed on state Supreme Court judges is substantial; it grows even larger where a judge remains on the bench beyond their earliest pensionable retirement date
- Justice Austin will become eligible for a pension at age 62; if he retires at that point, his accumulated 'superannuation contributions surcharge' would be over $300 000; if he stays on the bench until age 72, it would be over $550 000
- In 1998, New South Wales amends its *Judges' Pensions Act* to reduce the impact of the surcharge

Issues
- What is the status of intergovernmental immunity?
- Does the law infringe one of the established prohibitions so as to render it invalid?
  - The judges argue that the tax interferes with the ability of state governments to function by deciding the effective remuneration of their judiciaries

Reasoning
- The test for intergovernmental immunity
  - Gaudron, Gummow and Hayne JJ (at 124):
    - Examine the substance and operation of the Commonwealth law to see if it sufficiently impairs the states' abilities to discharge their constitutional functions
    - There is 'but one limitation, though the apparent expression of it varies with the form of the legislation under consideration. The question presented by the doctrine in any given case requires assessment of the impact of particular laws by such criteria as "special burden" and "curtailment" of "capacity" of the states "to function as governments". These criteria are to be applied by consideration not only of the form but also "the substance and actual operation" of the federal law.'
      - There is only one true test of state immunity: does the law impair a state's ability to function as a government?
      - To distinguish between two tests on the basis of whether a law applies generally or specifically discriminates against states is to favour form over substance
      - This seems like a valid criticism of the *Melbourne Corporation* and *Queensland Electricity Commission* approaches
      - However, discrimination still appears to influence their application of the (now singlular) test in a way that makes it appear determinative
    - '[T]hough differential treatment may be indicative of infringement of the limitation upon legislative power with which the doctrine is concerned, it is not, of itself, sufficient to imperil validity.'
      - Thus, discrimination is not, of itself, sufficient to invoke the doctrine of intergovernmental immunity
      - Reject the dictum of Mason J in *Melbourne Corporation* that the test for immunity 'consists of two elements' (one of which is a

'prohibition against discrimination which involves the placing on the states of special burdens or disabilities' – which is itself sufficient for immunity – and of which the other is the existence of 'a discriminatory law' which 'singles out the states' – which is neither necessary nor sufficient)

- Propose a fundamental conceptual return to the earlier understanding of immunity
- Arguably a much more lucid interpretation: since discrimination is neither necessary nor sufficient, it should not form a central component of the test for immunity

- On the facts, the legislation has the practical effect of requiring states to amend their judicial pension schemes; this constitutes significant curtailment of or interference with the exercise of state constitutional power (at [168]–[170]
- Also relevant is the decision in *Australian Education Union*, which held that states need freedom to dictate the conditions of employment of high level employees, such as judges – imposing the surcharge has the practical effect of impeding this freedom

- Gleeson CJ:
  - Agrees with the above reformulation
  - 'Discrimination is an aspect of a wider principle; and what constitutes relevant and impermissible discrimination is determined by that wider principle' (at 24)
  - 'A law which singles out a state or state agency may have as its object to restrict, burden or control state activity. Or a law of general application may so interfere with or impede state activity as to impose an impermissible burden on the exercise of its functions… Just as the concept of discrimination needs to be understood in the light of the general principle, so also does the concept of burden. … It is the impairment of constitutional status, and interference with capacity to function as a government, rather than the imposition of a financial burden, that is at the heart of the matter, although there may be cases where the imposition of a financial burden has a broader significance' (at 24)
  - Impeding the capacity of a state to function as a government is therefore another limit on legislative power (and a source of intergovernmental immunity)
  - The general principle is infringed on these facts because the federal taxation power had been used to single out state judges for a special financial burden
    - The federal law is therefore discriminatory, even though it is a law of general application
  - It also interferes with an important state function: the capacity of a state to recruit and retain judges past the possible date of retirement (at [28])
    - Even though the formal statement of the Act may not indicate an intention to impede governmental functioning, the substantive outcome is to have this effect

- Kirby J (dissenting):
  - Though Kirby J dissents on the facts (finding the legislation to be valid), his Honour agrees to the majority's reformulation of the test for immunity
    - Here, the superannuation surcharge could have neither a

significant detrimental impact on the ability of states to determine the terms and conditions of their employment of judges (at [291]–[293]), nor upon their ability to recruit or retain judges (at [299])

- Unlike Starke J in *Melbourne Corporation*, there are not two links (discrimination and impairment), just one: impairment
- Discrimination is thus insufficient of itself: there *must* be impairment of governmental functioning
    - Discrimination may, however, be a feature of impairment
    - The majority appears to emphasise discrimination

- McHugh J (agreeing in outcome but dissenting as to the relevant test):
    - Rejects the majority's reformulation, endorsing the traditional view that there are two separate elements
        - The Court should respect established precedent: there is strong authority for a two-limb test
        - The two-limb test offers clearer criteria for determining whether a state's constitutional functions are impeded
    - However, the focus should be on whether the ability of a state is impeded from proper functioning
    - There is no sound basis on which to overturn the 'settled doctrine' of intergovernmental immunities
    - Reformulation probably won't change substantive outcomes: 'Perhaps nothing of substance turns on the difference between holding that there are two rules and holding that there is one limitation that must be applied by reference to "such criteria as 'special burden' and 'curtailment' of 'capacity' of the states 'to function as governments'".' (at 224)
    - But on the chance that there is a difference, the reformulation 'may lead to unforeseen problems in an area that is vague and difficult to apply' (at 224)
    - On application of the traditional test (at 229):
        - 'Here the federal law discriminates against State judicial officers in a way that interferes in a significant respect with the states' relationships with their judges. It interferes with the financial arrangements that govern the terms of their offices, not as an incidence of a general tax applicable to all but as a special measure designed to single them out and place a financial burden on them that no one else in the community incurs.'

- Callinan J (did not sit)

<u>Decision</u>

Majority: the tax could impact the ability of states to attract judicial officers. For example, NSW had been forced to pass a law changing the remuneration of their judges. The federal legislation is therefore invalid to the extent that it applies to state judges. Note, however, that the requirement that state judges be subject to Commonwealth income tax is perfectly constitutional: [176], [22] (Gleeson CJ), [287] (Kirby J).

Minority: agrees with the majority test (only one limb), but on the facts the legislation is valid.

As a result of the decision in *Austin*, several aspects of the test for intergovernmental immunity have become apparent:

1. **There is only one true test of state immunity**
   Does the law impair a state's ability to function as a state or as a government? It is enough that the Commonwealth law inhibits or impairs the continued existence of a state or its capacity to function
   Per Gleeson CJ, Gaudron, Gummow, Hayne and Kirby JJ

2. **Discrimination is not a separate test of state immunity**
   By itself, it is insufficient to invalidate a law – this has now been relegated to the position as a 'sub-test' of government impairment (Joseph and Castan)
   Per Gleeson CJ, Gaudron, Gummow and Hayne JJ

3. **There is some overlap between the test and the general principles underlying it**
   Most laws that 'impermissibly discriminate against … a state' (Gleeson CJ and Kirby J) will also unduly impair their ability to function as a government or governments; there may thus be little difference in outcome as a result of the reformulations in *Austin*

Given that McHugh J reached a similar conclusion to the majority, it is arguable that the alteration of the test has had little (if any) difference to the scope and nature of intergovernmental immunity. On this point, various academic commentaries have concurred.

See especially:

- Graeme Hill, '*Austin v Commonwealth*: Discrimination and the *Melbourne Corporation* Doctrine' (2003) 14 *Public Law Review* 80
- Anne Twomey, 'Federal Limitations on the Legislative Power of the States and the Commonwealth to Bind One Another' 31 *Federal Law Review* 507

For factual background and public reactions to the case, see:

- Justice Simon Sheller, 'Judges' Superannuation Surcharge Case' (2003) 12 *Queensland Bar News* 20

In summary, then, the present state of the doctrine of intergovernmental immunity is as follows:

- Prima facie, no implication may be drawn from state or Commonwealth legislation that it does not intend to bind the other level of government; this is subject to any express statement to the contrary (*Engineers*);
- Immunity from Commonwealth laws will only be granted to state governments where it is established that the law breaches a prohibition implied by the *Constitution*;
- The presently-accepted form of that prohibition reads: the Commonwealth cannot restrict or burden states in the exercise of their constitutional powers (*Austin* per Gaudron, Gummow and Hayne JJ [124], [143], Kirby J [281], contra McHugh J [223]).

F *Jurisdiction and Parliament*

Federalism also has implications for the judicial system. Two levels of courts exist – one for each level of government, and only courts with the relevant jurisdiction are able to hear a matter brought before it.

Under s 77(iii) of the *Constitution*, federal Parliament 'may make laws … [i]nvesting any court of a state with federal jurisdiction'. Although, in theory, Parliament might allow a minor court to try a federal or constitutional matter, in practice all constitutional cases concerning the boundaries between state and federal power go directly before the High Court under s 40 of the *Judiciary Act*.

The *Constitution* does not specify whether the reverse is also possible (ie, whether a federal court can be invested with state jurisdiction). However, the High Court has held (Kirby J dissenting) that legislation purporting to cross-vest federal courts with state jurisdiction under state legislation is invalid (see *Wakim*). The majority there reasoned that Ch III of the *Constitution* contained implied limitations on the power of Parliament to legislate with respect to judicial power, concluding that the chapter does not authorise the sharing of judicial jurisdiction. By contrast, Kirby J (dissenting) found that the cooperative arrangements inherent in federalism gave rise to an implied nationhood power that supported the legislation.

IV *Parliamentary Sovereignty*

A *Theoretical Background*

A sovereign Parliament has ultimate legislative power. That is, they can create, amend and repeal laws with respect to any subject matter they wish.

The argument in favour of parliamentary sovereignty is that because its members are (at least in Australia) democratically elected, they should be at liberty to pass any law they please (since, at least in theory, they have popular support). Related to this argument is the idea that it is undemocratic for judges to strike down laws of Parliament (or make laws of their own) since they are not elected by the people. This argument characterises the dominant understanding of parliament's power in the United Kingdom.

Parliamentary sovereignty was historically considered in relation to the power to overturn monarchical decrees. Likewise, could the King set aside an act of Parliament? The concept of parliamentary sovereignty is thus an assertion of democratic will against monarchical power.

Dicey links parliamentary sovereignty to democracy: electors determine the composition of Parliament, so it should be sovereign. This democratic foundation is said to be the justification for all parliamentary power. By its essence, Parliament is a democratic institution: power is exercised by the people through their representative (ie, representative democracy). According to this view, the only mechanism for overturning Parliament's laws is to vote in new representatives, by general election, who will promise to act differently.

But can a Parliament pass a law requiring something outrageous (eg, that all people with a certain eye colour must immediately leave the country)? Need it be obeyed? Are courts bound to enforce it? These are issues that arise when considering the limits of parliamentary sovereignty in a modern federation like Australia.

B *Limits to Parliamentary Power*

Constraints upon the exercise of parliamentary power may be either internal (influencing the way parliamentarians act or think) or external (practical or legally-imposed limits). In Australia, several such constraints exist.

External constraints	**Internal constraints**
The *Constitution* proscribes certain areas of lawmaking by only allowing laws to be passed in relation to a defined head of power	Members of Parliament must behave in accordance with the values of their constituency if they are to be re-elected (likely to prevail over personal morals)
Electors (subjects) will rise up against the government if Parliament passes to many unsatisfactory laws ▪ But where a law targets a minority group, this is of limited effectiveness ▪ For small enough minorities,	A tacit awareness of institutional norms/morality and respect for the rule of law

dissidents can be jailed or otherwise punished ▪ Minorities already discriminated against by the majority will be unable to dissent (eg, same sex marriage)	
Courts can strike down laws as being unconstitutional. However, they can only decide if a law is within power – not whether the law's content is good or bad ▪ However, they can interpret it narrowly or in such a way as to render it useless ▪ They might also reinterpret it to achieve justice or moderate the law in order to prevent absurdity or injustice	Domestic and international politics are checks on bad laws

Dicey has been influential in the formation and development of Australian parliamentary sovereignty.

C *Indigenous Sovereignty*

As of 2005, there has been no formal recognition of indigenous sovereignty in Australia. This may be compared with the governments of the United States of America (established reservations exclusively for the occupation of indigenous peoples), Canada (which signed treaties and established an independent province), and New Zealand (which acknowledges their original sovereignty and signed a treaty with the Waitangi people to cede it to the Queen), which have all formally acknowledged original (and, in the case of the United States of America and Canada, continuing) indigenous sovereignty.

Note that recognising native title does not amount to recognising indigenous sovereignty. Private property rights are quite distinct from concepts of nationhood or governmental authority.

1 *Aboriginal franchise*

Formation of the constitution: some indigenous people were capable of voting on the draft constitutional proposals in 1898. However, many were not so entitled, and many that were entitled did not avail themselves of the right.

Early federation: the *Franchise Act* (Cth) regulated who could vote in elections and referenda. Section 41 of the *Constitution* provided that some could vote, but generally did not extend the franchise to aborigines.

1948: Australian citizenship was introduced.

1962: aborigines were allowed to vote.

1983: equal treatment between aboriginal and non-aboriginal people was granted in respect of voting. This Act made voting compulsory for all voters – not just settlers.

Allen argues that courts may refuse to give effect to a law which makes Parliament unrepresentative (eg, by denying voting rights to a portion of the population). This means that legislation like the *Franchise Act* would, according to Allen, be justifiably invalidated by the judiciary.

2 *The races power: s 51(xxvi)*

Could Parliament pass a law preventing aborigines from voting?

Possible arguments against such a law:

- Implied limitation in s 51 – laws only for 'peace order and government'?
  - No, not relevant – largely meaningless
- *Racial Discrimination Act*?
  - No, this would be impliedly repealed by the new legislation
- Taking back rights steadily granted to such people is consistent with the *Constitution*?
  - Maybe, but not probable
- Section 51(xxvi)?
  - Amended in 1967 to allow Commonwealth laws in respect of aborigines
  - The purpose was to regulate (by making laws about) aborigines
  - Part of the same amendment is to treat them the same as everyone else (ie, subjects capable of legislation)
  - However, it was largely symbolic to bring them within the people of the Commonwealth

The *Hindmarsh Island Bridge Case* provides an example of the application of the races power under s 51(xxvi) of the *Constitution*. Specifically, the issue arises of whether laws enacted under that power must be for the benefit of the race involved.

***Kartinyeri v Commonwealth* (1998) HCA ('*Hindmarsh Island Bridge Case*'):**

Facts

- Hindmarsh Island, located in South Australia, is until 1989 linked to the mainland only by means of cable-drawn ferry
- In 1989, the local council proposes to build a bridge linking the island with the mainland
- The bridge's construction is objected to on the grounds that it would harm the local environment and destroy the traditional of the Ngarrindjeri people, who occupy the island
- The *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) ('the *Heritage Act*') provides for the preservation of land of spiritual significance to aboriginal people by allowing the responsible Minister to make relevant declarations
- Aborigines, who live in the area, complain to their local government, and make extensive submissions relating to 'secret women's business' to the Minister through a female professor
- On 9 July 1994 the Minister makes a declaration under s 10 of the Act that the relevant land is to be protected
- However, the declaration is overturned in court and subsequent political changes
- The *Hindmarsh Island Bridge Act 1997* (Cth) ('the *Bridge Act*') is passed, which prevents the protection of the aboriginal sacred land under the original *Heritage Act*
- Section 4 provides for the removal of 'the Hindmarsh Island bridge area' from the scope of the 1984 Act, and effectively bars any claim by the Ngarrindjeri

- The *Bridge Act* is enacted under s 51(xxvi) ('the races power'); Kartinyeri, a member of the Ngarrindjeri, challenges the validity of the Act

<u>Issues</u>

- Is the *Bridge Act* within s 51(xxvi) of the *Constitution*?
  - Kartinyeri argues that it does not fall within that head of power and is therefore unconstitutional
  - The Commonwealth argues that there are no limits to the power, providing that the law relates to race – the Court should not evaluate the substantive value of the law
- Could the head of power allow a law to be passed which has the effect of disadvantaging aborigines?
  - Griffith QC acknowledges the racist content of the races power, in that it is 'infused with a power of adverse operation'

<u>Reasoning</u>

- Brennan and McHugh JJ
  - Parliament can repeal what it can enact
    - 'Once the true scope of the legislative powers conferred by s 51 [is] perceived, it is clear that the power which supports a valid Act supports an Act repealing it' (at 356)
    - It is common ground that the original Act was valid
  - Parliament is therefore able to repeal the *Heritage Act* by means of the *Bridge Act*; this makes it unnecessary to decide the scope of the races power
  - Their attitude towards its scope is unclear; they thought it 'not only unnecessary but misleading' to consider it (at 358)

- Callinan J
  - Did not sit due to a conflict of interest (financial relationship to the property developer's company)

- Gaudron J
  - Rejects the argument that 'for whom' entails 'for the benefit of'
    - Laws need not be for the benefit of the race concerned
    - Adopts an 'originalist' approach: looks to the framers' opinion to decide the power's present meaning and scope
    - The power was amended in 1967, so what needs to be looked at is the intention of the more recent change
    - However, this change did not alter the character of the power: it still permits laws that disadvantage the race concerned
  - Proposes an alternative limit
    - '[T]he words "for whom it is deemed necessary to make special laws" must be given some operation. And they can only operate to impose some limit on what would otherwise be the scope of s 51(xxvi) …'
    - Two limits are implied by the wording of the power
    - First, there must be a material ('real and relevant') difference to justify Parliament making the special law
      - This means that the races power 'may only be exercised if there is some material upon which the Parliament might reasonably form a judgment that there is a difference necessitating some special legislative measure' (at 365)
      - As a result, the races power 'does not authorise special laws … in areas in which there is no relevant difference between the people of the race to whom the law is directed and the people

of other races' (at 366)
- Eg, race is irrelevant to the existence of citizenship rights, so a law purporting to take away citizenship from a particular ethnic group would be outside the scope of s 51(xxvi)

- Second, 'the law must be reasonably capable of being viewed as appropriate and adapted to the difference' (at 366)
  - This doesn't entail an evaluation of the 'reasonableness' of the law itself – that is the task of Parliament
  - It means an assessment of how closely the law is related to the identified difference
  - Eg, a law which is said to be justified by a difference in 'mortality rate' between two races must be reasonably capable of being adapted to infant mortality (it could not, thus, impose limits on remuneration because this would not be in any way capable of adaptation to the relevant difference)
  - If the law is not reasonably capable of adaptation to the difference, it can be inferred that Parliament did not form the view that there was a difference

- Seems to support a 'manifest abuse' test
  - The two-stage test is designed to determine whether the law *is* a 'manifest abuse' of the power
  - Thus, a law that is not reasonably capable of adaptation to a relevant difference, or which is enacted despite Parliament not reasonably forming the view that there is actually a difference, 'has no rational basis and is, thus, a "manifest abuse of the races power"' (at 366–7; citation omitted)
- Because the power is dependant on there being 'some matter or circumstance' giving rise to 'a real and relevant difference', its scope will vary at any given moment – what the law supports in 1995 it may not support in 2025
  - The power is thus similar to s 51(vi) (defence) in that laws dependant on present circumstances may become constitutionally invalid when those circumstances change
- Looking at the present position of aborigines, it is 'difficult to conceive of circumstances in which a law presently operating to the disadvantage of a racial minority would be valid', and 'even more difficult to conceive' when that law pertains to aborigines
  - Prima facie, aborigines are seriously disadvantaged (material circumstances and vulnerability of culture)
  - Prima facie, 'only laws directed to remedying their disadvantage could reasonably be viewed as appropriate and adapted to their different circumstances'
  - However, constitutional validity is not determined by reference to whether a law is beneficial
  - It is determined by application of the two-stage test derived from the wording of the races power
- Example
  - Eg, is there a material difference between the employment statuses of white people and migrants? Probably not, so: is a law guaranteeing fixed quotas of jobs to white people reasonably capable of being adapted to the difference? No, because there is no difference
  - Note that a future (anticipated) difference (as opposed to a presently existing difference) is not problematic in itself: Parliament just needs to *reasonably* anticipate such a difference and the resulting law must be able to be *reasonably* adapted to address it)

  - Ultimately reaches the same conclusion as Brennan and McHugh JJ: parliamentary sovereignty entails that it can repeal what it can enact
    - This reasoning might be avoided where the original Act is based on a different head of power to that under which it is repealed (eg, where a grant of land is made under s 51(xxi) and then taken away from the aboriginal community possessing it under s 51(xxvi))
    - In such a circumstance, it might be necessary to apply the manifest abuse test, since it is not inherent in the grant of some benefit under one power that Parliament can repeal it under another
    - If this argument is not possible, then this reasoning provides a very large scope for Parliament taking back what it gives
  - Summary of findings
    - The races power can support a law applicable only to a racial sub-group
    - The races power does not operate differently in relation to aboriginal people as compared with other races
    - The question of justiciability is not for a court to decide: a court cannot evaluate whether a law is necessary, but it can evaluate whether Parliament's judgment was reasonable in the circumstances
    - The test of constitutional validity is not whether it is a beneficial law
    - Prima facie, however, the races power only authorises laws pertaining to aborigines which operate to their benefit, due to their present circumstances of disadvantage

- Gummow and Hayne JJ
  - What the Parliament may enact it may repeal
    - The *Bridge Act* repeals a statutory right, not a common law right
    - It limits the authority of the Minister under the *Heritage Act*
    - Any declaration made by the Minister would have been subject to Parliamentary disallowance, so there can be no 'manifest abuse' in choosing to 'accelerate maters' by withdrawing the power of declaration
  - A law under the races power need not be beneficial
    - Here, the *Bridge Act* confers a disadvantage in its 'contraction of the field of operation of the [*Heritage Act*]'
    - If the submission of the plaintiffs was accepted, this would deny Parliament the ability to limit the scope of a law if they subsequently realise less than the original measure was necessary
    - Eg, if the circumstances change so as to alleviate the need for the special law
  - The fact that a law conferring a benefit on one race disadvantages another is not a cause of invalidity – rather, such differential operation is (as suggested by the phrase 'special laws') 'a criterion of validity', and 'of the essence of a law supported by s 51(xxvi)'
    - Otherwise, all laws passed under it would be invalid (since to benefit one race they must discriminate against every other)
    - For a law to be valid, it *must*, by virtue of applying only to one race, discriminate in some sense
  - Though it need not be beneficial, a law must not be a 'manifest abuse' of the power
    - No clear guidance is given about the content of this limitation
    - It appears that a 'manifest abuse' will be evident when the power is used to support legislation beyond its scope
    - However, this is not especially helpful in determining whether, in a given case, legislation does exceed the scope of its supporting power

- Kirby J
  - Laws passed under the races power must be beneficial – that is, they cannot be detrimental to the people of the race in question (though other races need not be so benefited)
    - ‘Manifest abuse’ is not a sufficient limit on the power of Parliament because it could not be used to prevent Parliament legislating discriminatively
  - However, this limit may be easily sidestepped by phrasing a law as one which benefits a particular race – even though the implicit effect is to discriminate against another race
    - Eg, a law guaranteeing a 50% quota on university places for Australian natives may actually be able to sidestep Kirby J’s limit, despite being clearly discriminatory, because it benefits the race at which it is directed (Anglo-Saxons)
  - However, the scope of the power is also limited by ‘people of any race’ – which may not extend to the dominant (white) race
    - The assumption is that the background of the dominant people is not a ‘race’ at all
    - Is there such a thing as a ‘dominant race’ or ‘the white race’? Arguably, race is an often incoherent and outmoded form of human taxonomy
    - Note the insights of critical race theory, which deconstructs race as social (rather than scientific) category, and argues that ‘race’ is an obsolete concept (a relic of 19th century colonialism)
    - In this way, the power can be interpreted so narrowly as to make it ineffectual (ie, ‘people of any race’ means ‘no-one’)
    - However, this would be tantamount to amendment without referendum
    - Additionally, the races power is still being used by the Commonwealth government as a basis for legislation
      - Eg, post-*Mabo* native title recognition
      - While inequality exists between races, the races power is still necessary
      - However, a Court should not to decide the substantive value of a law or the head of power supporting it (Parliament’s job)
  - Notes that the framers were not always united in their opinions: in the event of disagreement, which intention should be preferred? Similarly, what is the relevance of the constitutional referenda (here, the 1967 referendum is most relevant)?
  - Does not consider affirmative action
    - There might conceivably be a good reason to redistribute resources among different racial groups
    - Eg, social security

<u>Decision</u>

(5:1) The legislation is constitutionally valid, Kirby J dissenting. A summary of possible limits upon the exercise of the races power (and their treatments) follows:

- *‘For the benefit of’*: three judges reject outright, two judges don’t decide, one judge accepts as a limit;
- *Manifest abuse*: three judges support (including one test to determine its existence); one rejects; two don’t consider;
- Four judges hold the view that there is, in fact, a limit on the use of the power, but that it

is difficult to articulate precisely.

At the very least, manifest abuse – though not a particularly strong limit – seems likely to curtail the exercise of power under s 51(xxvi). In the middle, Gaudron J's test provides some content to the notion of manifest abuse, and seems capable of wide application. At the other end, Kirby J's 'non-detrimental' and 'adverse discrimination' test provides a very strong limit upon the use of the head of power.

How the approach of Gummow and Hayne JJ will be applied in practice remains largely unpredictable because the content of their limit is not articulated. The tests of Gaudron J and Kirby J are more predictable, their content and application having been set out in full.

A number of tests have emerged out of *Kartinyeri*. The limit identified by Gaudron J requires the following elements to be satisfied for a law to be a valid exercise of the races power:

- **Difference**
  Is there a real and relevant difference between the relevant race and others?

- **Relevance**
  Is the law reasonably capable of being adapted to the difference?
  - Ie, can it be reasonably interpreted as addressing the difference in some manner

The test of Kirby J imposes a stronger limit on the exercise of the races power:

- **Adverse detriment**
  Does the law adversely and detrimentally discriminate against a particular race?
  - If so, the law will exceed the scope of the races power

- **Express limitations**
  In the judgment of the Court, bearing in mind contemporary views, was the law 'necessary' for the race in question and was that law 'special' in character?
  - A 'special' law is unlikely to be one which applies to Caucasians
  - There must be a particular '*need*' that 'enliven[s] the *necessity* to make a special law'
  - Whether such a need exists or the law is of a sufficiently especial character are matters 'subject to judicial review'

3 *Hypothetical*

An essay might be structured according to the following format:

1 *Introduction*
  (a) The head of power (s 51(xxvi)) – introduce the subject matter by examining the power itself
    (i) 'for whom it is deemed necessary' (by Parliament?)
    (ii) 'special laws' (differential treatment? What must be 'special'?)
    (iii) 'for whom' (for the benefit of? Or just in relation to?)
  (b) Outline of argument (briefly) – describe your approach and its outcome
  (c) Cover common aspects of judicial reasoning

2 *Limits identified and applied*

(a) Go through each judge in *Kartinyeri* – include judges who did not sit: cover <u>every</u> judge

3 *Conclusion and evaluation*

(a) Acknowledge that there is no definitive answer
(b) Note that the Court's composition has changed
(c) Conclude: disadvantage? Note the types of limits applied, and the number of judges supporting them – is this a majority?
(d) Will the Act be valid?
(e) Comment on the result in evaluative terms

V *Federation to Popular Sovereignty*

A *Colonisation*

English law is said to have been brought to the infant Colony of New South Wales by the English settlers, whose 'birthright' it was to receive the benefits of the common law. Because the indigenous inhabitants 'were regarded as barbarous … and without a settled law, the law of England including the common law became the law of the Colony'.15 Australia was effectively considered 'an uninhabited country … discovered and planted by English subjects'.

According to Blackstone, there are several ways in which land can be acquired by a sovereign:

- **Conquest**
  Cultivated land is gained by conquest over the native inhabitants;

- **Cession**
  Cultivated land is gained by treaty or agreement with its native inhabitants; see, eg, the cession of sovereignty by the Waitangi people in New Zealand to the Queen; and

- **Discovery**
  Land that is 'desart and uncultivated' or terra nullius is discovered and planted.

In the event of discovery, all English laws then existing are immediately said to be in force, but only to the extent that such laws are applicable to the colony. For example, rules of inheritance and tortious liability would be in force, but more 'artificial refinements and distinctions' (such as taxation law) would be neither necessary nor convenient, and so not in force. Laws are subject to revision by the English Parliament and king in council.

In conquered or ceded territories with existing laws, such laws remain in force until otherwise altered by the English Parliament or king in council – unless they are 'against the law of God'. English law has no authority until Parliament renders it effective.

Had existing indigenous customary law been recognised, Australian settlement might have assumed a rather different legal character. Territory previously inhabited by the indigenous population may have been seen as being ceded to the English occupiers. As such, their laws would have remained in force until otherwise declared invalid by the English Parliament. However, it was instead assumed that the territory was *terra nullius* and thus capable of being settled immediately. The English common law was imported into the colonies and brought within the dominion of the Crown.

B *Reception of English Common Law*

- **1788:** with the establishment of the colony of New South Wales, Australia is settled with English law;

- **28 July 1828:** Australian settlements are formally recognised as settled colonies by the British Parliament. This Act receives broad interpretation by the New South Wales Supreme Court, so that all of the English common law is assumed to be applicable to the colony:

[15] *Mabo v Queensland (No 2)* (1992) 175 CLR 1, 37–8 (Brennan J).

  - Throughout the 19th century, courts reject the idea that local conditions can limit general principles of English law;
  - But note *R v Farrell*, where – on account of Australia's penal origins – an ex-convict is allowed to testify;

- **28 July 1828:** any English statute passed before this date is applicable to the four Eastern colonies unless clearly unsuitable for colonial conditions or repealed by competent legislature:
  - Statutes enacted after this date can only apply if – expressly or by 'necessary intendment' – they were intended to do so by paramount force;
  - Such statutes might apply generally – ie, to all British colonies – or to the Australian colonies specifically and by paramount force;

- **1 June 1829:** a similar 'cut-off' date is reached for English statutes as they apply to Western Australia;

- **28 December 1836:** another 'cut-off' date is reached for South Australian statute law;

- **1851:** Victoria separates from New South Wales, receiving English law as per the 1828 Act;

- **1858:** by this stage, bicameral Parliaments with legislative power had been created in New South Wales, South Australia, Victoria and Tasmania; it soon became necessary to determine whether state Parliaments could enact laws contrary to the English statutes an common law:
  - Boothby J of the Supreme Court of South Australia frequently voided statutes on the basis of repugnancy to the laws of England;

- **1859:** Queensland separates from New South Wales, again receiving English law in the same fashion; the colonies gradually begin to want greater legislative autonomy, as they are presently constrained by British Acts of Parliament;

- **1865:** the *Colonial Laws Validity Act 1865* (Imp) was enacted by the British Parliament after approval by the South Australian Parliament:
  - The statute applied generally to all colonies of England (with several exceptions, none relevant to Australia);
  - Sections 2 and 3 were interpreted as meaning that colonial legislatures could substantially amend or repeal English statutes; they would only be bound by such statutes as applied by paramount force;
  - *Phillips v Eyre* (1870) LR 6 QB 1: repugnancy occurs where a law is inconsistent to an Imperial statute or related order that is 'applicable to the colony by express words or necessary intendment' (Willes J);
  - This meant that statutes originally applicable under the 1828 Act could be amended or repealed by state Parliaments; however, local laws were void where they were inconsistent with English law applicable to a state by paramount force;
  - Laws of paramount force are laws which by 'express Words or necessary Intendment' are made applicable to the Australian colonies; the *Colonial Laws Validity Act* nullified contrary colonial law to the extent of any inconsistency;

Statutes applicable to the United Kingdom only are, from this point, designated with the jurisdiction '(UK)'; Acts applicable to the imperial reach of the British Empire are designated '(Imp)'. Such imperial Acts had the effect of voiding any local and inconsistent legislation.

C *Towards Australian Independence*

Following two conventions during the 1890s, the *Constitution* was approved by a majority of people in the Australian colonies. The approved draft was enacted by British Parliament in the *Commonwealth of Australia Constitution Act* 1900 (Imp), which was enacted on 5 July 1900, assented to by Queen Victoria on 9 July 1900, and came into force on 1 January 1901.

- ***Statute of Westminster 1931* (UK):** the operation of the *Colonial Laws Validity Act* was excluded from the Commonwealth and removed all restrictions upon Commonwealth legislative power:
  - This Act marked a shift from Australia as being a part of the 'British Empire' to a member of the 'British Commonwealth of Nations', and with it a shift from colonial dependency to national independence;
  - Australia was not quite as vocal as Canada, South Africa and the Irish Free State in several imperial conferences convened from 1917; however, Australia nevertheless received status as an 'autonomous communit[y] within the British empire, equal in status, in no way subordinate[,] … united by a common allegiance to the Crown';[16]
  - (Arguably, the customs and practices of the time did not match such sentiments);
  - The report recorded that surviving British legislative and executive powers were, to the extent that they affected the Commonwealth, to be used only as request by the local government;
  - When some members of the Commonwealth demanded more formal recognition of the new conventions, the *Statute of Westminster* was enacted;
  - Australia was reluctant to accept legislative self-sufficiency under the Act:
    - Eg, Australia and New Zealand (along with Newfoundland) asked that they be left to 'adopt' the s 10 provisions relating to repugnancy in their own time;
    - Australia did not end up adopting s 10 until the passing of the *Statute of Westminster Adoption Act 1942* (Cth);
    - Section 9 of the act provided that the existing legislative status in the states was maintained (unlike, eg, Canada, for whom s 7(2) provided that provinces were – like their federal counterpart – to be free from legislative consistency with English law);

Copyright Owners Reproduction Society Ltd v EMI (Australia) Pty Ltd (1958) HCA:

<u>Reasoning</u>

The *Copyright Act 1911* (Imp) applies to Australia by paramount force. It has since been repealed and replaced with the *Copyright Act 1956* (UK). However, this later Act does not apply to Australia because it does not comply with the requirement of s 4 of the *Statute of Westminster 1931* (UK) that new legislation be requested and consented to by the Commonwealth of Australia. Even some 1928 amendments to the 1911 Act were held to be inapplicable as a result of similar Imperial conventions governing legislation of the time.

<u>Conclusion</u>

[16] Report of the 1926 Imperial Conference, *Cmd* 2768 ('the Balfour Report').

> As a matter of construction, the 1956 Act should not be interpreted as evincing an intention by the British Parliament to legislate in breach of the *Statute of Westminster*. The 1928 amendments should be similarly interpreted as evincing compliance with Imperial conventions. Therefore, the legislation is inapplicable to Australia.

Even after the *Statute of Westminster*, Australia was still tied to the United Kingdom in two respects:

- Under s 4 the Act, the United Kingdom could still legislate for the Commonwealth at their 'request and consent';
- The states were still bound by the *Colonial Laws Validity Act* and extraterritoriality;

It was not until 1986 that these relics of colonial rule were discontinued with the passing of the *Australia Act 1986* (Cth).

The *Australia Act 1986* signalled an end to the British Parliament's legislative authority over Australian states (s 1). It also prevented the doctrines of extraterritoriality (s 2) and repugnancy (s 3) from applying to the states. Similar legislation was enacted by the United Kingdom and Commonwealth Parliaments; the United Kingdom legislation was requested and consented to by the Commonwealth (see *Australia (Request and Consent) Act 1986* (Cth)), as required by the *Statute of Westminster 1931* (UK). Both the United Kingdom and Australian Acts had also been formally requested by every state's Parliament. Doubt about the legislation's universal effectiveness was thus removed at every level. The *Australia Act* was assented to on 4 December 1985. It came into force on 3 March 1986, on which day the Queen of Australia flew to Canberra to make clear her intentions.

One argument alleges that s 15 of the *Australia Act* enables the *Constitution* to be amended (especially s 128) without a referendum: it allows s 8 of the *Statute of Westminster* to be repealed, thereby enabling amendment of the *Constitution* by the British Parliament. However, if this was the case, none of the *Australia Act*s would be constitutionally valid, since they would breach s 128.

The irony of Australian federation is that in order to gain independence from British rule, the colony of Australia was wholly dependent upon an expression of British sovereignty (the enactment of the Act creating the *Australian Constitution*). With the passing of the *Australia Act*s, however, Australia's legislative independence is greater than ever before.

D *When Did Australia Gain Independence?*

There are several possible dates at which Australia may have become independent from England. These are outlined below, with comments as to their likelihood of being the defining event:

Year	Event	Comments
1901	Federation	Clearly no independence at this stage: ▪ Judiciary: appeals to Privy Council

	[Expression of sovereign nationhood, but dependence in all arms of government]	▪ Executive: governor-general still acts independently of their advice ▪ Parliament: still bound by the *Colonial Laws Validity Act*
1926	Balfour report declaring governmental conventions *[Moving towards executive independence, but no change to judicial or parliamentary independence]*	Unlikely that independence was gained – merely conventions and not formal: ▪ Queen can still act on the advice of British ministers ▪ But a convention is established that the British Prime Minister won't so advise contrary to the Australian Prime Minister
1931	United Kingdom Parliament passes the *Statute of Westminster* *[Moving towards Commonwealth legislative independence; however, no change to states' legislatures]*	No independence because hasn't yet come into force in Australia: ▪ Parliament: freed from extraterritoriality (Commonwealth only – not states) ▪ Not really binding on the UK since their Parliament is sovereign and can repeal it at their discretion
1939	*Statute of Westminster* takes effect in Australia	Still contingent on adoption in 1942 (which is backdated to the outbreak of WWII)
1942	Australia adopts the *Statute of Westminster*	States are still not independent from the United Kingdom; other ties still present ▪ Australia not really striving for independence (belated acceptance of legislative authority)
1945	Australia becomes a member of the United Nations as nation state *[Moving towards symbolic independence, but no technical relevance]*	Purely symbolic (HCA in *Sue v Hill*); does not affect relationship with the United Kingdom ▪ There were other UN members who were not nations; eg, Ukraine and other former soviet bloc members
1948	Citizenship capable of being granted	Creates migration regime but doesn't free state legislatures from the United Kingdom ▪ Purely a statutory concept ▪ Migration from Britain no longer entails being an Australian citizen
1972	Enactment of the *Royal Style and Titles Act 1972* (Cth)	The Queen is now known as 'the Queen of Australia' – another symbolic change
1986		▪ Judicial independence: present to a *sufficient* degree (but not absolute)

	Australia Act 1986 (Cth) *Australia Act*s (state levels) *Australia Act 1986* (Imp) *[Moving towards state parliamentary and judicial independence. Executive is now largely independent by convention]* A good measure of Australia's independence at this stage is the fact that, if the UK were to exercise its legislative power and repeal the *Australian Constitution*, it would probably have little practical effect.	o Appeals from state supreme courts to the Privy Council are abolished o But the HCA *can* (at least technically) still grant leave to appeal, if it wishes, in specific categories of case (s 74 of the *Constitution*) o There is no prospect that it will, though (it hasn't since 1912) o This is largely because the HCA believes it is better qualified to hear constitutional cases ▪ Parliamentary independence: o Extraterritoriality limitations no longer apply to states o Repugnancy laws repealed o However, the UK Parliament might still repeal the enabling legislation (indeed, it could repeal the *Constitution* itself)
1999	*Sue v Hill* decided by the High Court of Australia *[Judiciary confirms Australian independence]*	Possible that some gradual evolution is here declared to have been completed
2005	Not yet… *[Symbolism aside, it seems unlikely that Australia is not yet independent from the United Kingdom in any real sense]*	▪ Queen of Australia is the same person as the Queen of England ▪ Reserve powers still *capable* of being exercised ▪ Other symbolic elements: preamble is still in UK statute, references to the governor general

Note that a distinction is drawn between power that is *capable* of being exercised even if not regularly done, and power that is, by *convention or technical incapacity*, never actually exercised.

In *Sue v Hill* the High Court of Australia determines 'independence' by reference to limitations acting upon each branch of government (at both Commonwealth and state levels). That is, it examines the technical and practical independence of the executive, parliamentary, and judicial arms of governments preceding and subsequent to each of the above events.

In establishing Australia's independence, this 'conceptual prism' is used in the following manner at each stage: is the relevant arm of the relevant independent, or can it yet be controlled by the United Kingdom?

***Sue v Hill* (1999) HCA:**

Facts

- Heather Hill is elected as a Senator for the One Nation Party in the October 1998 federal election
- She was born in the United Kingdom in 1960 and was granted Australian citizenship in 1998; at the time of election she does not renounce her British passport (though is unaware that she can or must do so)
- Hill's election is challenged on the basis that – at the time of nomination – she does not satisfy the requirements of s 44(i) of the *Constitution*

Issue

- Is the United Kingdom 'a foreign power' for the purposes of s 44(i) of the *Constitution*?

Reasoning

- Gleeson CJ, Gummow and Hayne JJ: yes; Ms Hill's election is invalid
    - Legislative independence from 1986 means that the United Kingdom is to be classified as a foreign power (at 492)
    - Since appeals can no longer be heard by the Privy Council, no institutions of the UK government can bring any influence to bear on Australia
    - Appointing governors-general (s 2): the Queen only acts upon the advice of the Prime Minister
    - Exercise of power by the monarch to appoint administrators of the Commonwealth (s 4): only performed upon advice
    - Reserving laws until assented to by the Queen (s 58) and annulment within one year of enactment (s 59): no Minister can be identified upon whose advice the Queen may be said to be acting
        - Even so, it was acknowledged in the Balfour report that for British Ministers to act against the views of Australian Ministers in matters concerning the Commonwealth would 'not be in accordance with constitutional practice'
    - Though the text of the constitution does not change, its operation does change to reflect new attitudes about how the Queen should be advised (eg, since 1926)
    - 'The *Constitution* speaks to the present and its interpretation takes account of and moves with these developments'
        - Their Honours support an evolutionary theory, whereby independence is a gradual and incremental process of development
        - However, note the criticisms of Callinan J
    - The fact that the UK exercises power under certain constitutional arrangements with Australia is not inconsistent with the UK being a foreign power under s 44(i)

- Gaudron J: yes, invalid
    - At the time of federation, the United Kingdom was not a foreign power, but today it should rightfully be considered so

- Callinan J:
    - Critical of the approach of the majority, but – like McHugh and Kirby JJ – does not find it necessary to decide the issue
    - It is dangerous to use 'evolutionary theory' to make legal decisions – the date at which the UK became 'foreign' cannot be identified with any degree of precision
    - A series of milestones may have occurred, but such reasoning introduces uncertainty into decisions about rights, status and obligations (at 571–2)

  - The 'defining event… can only be a decision of this Court ruling that the evolutionary process is complete, and … has been complete for some unascertained and unascertainable time in the past'
  - However, such a decision would, in effect, instigate the crucial change by holding that – though the *Constitution* 'did not treat the United Kingdom as a foreign power at Federation and for some time thereafter, it may and should do so now'
    - The evolutionary theory is therefore to be regarded with considerable scepticism
  - Some important consequences of renouncing a British passport have not been adequately articulated (eg, social security, pensions, etc)

- McHugh and Kirby JJ:
  - Found it unnecessary to decide the question of foreignness due to a finding that the Court does not have jurisdiction to decide the issue (due to the *Commonwealth Electoral Act 1918* (Cth))
  - Mc Hugh J: such a question might only be raised 'on a referral by one of the Houses of Parliament' or 'incidentally in determining whether an election should be set aside'

Conclusion

- Hill's election is invalid

E *State Constitutions*

Like the *Australian Constitution*, state constitutions were also once Acts of the British Parliament. Upon federation, the colonies' constitutions were transferred to the states. However, unlike the *Australian Constitution*, state constitutions were from that point simply regular Acts of Parliament. The *Victorian Constitution*, for example, was re-enacted in 1975 as the *Constitution Act 1975* (Vic), and could be amended as desired by that Parliament.

This means that the process of amending the state constitutions is not directly mandated by the people, except through their elected representatives.

However, since 2003, all changes now require a 60% majority in both the legislative assembly and legislative council to pass. Additionally, any modifications to its core provisions require a popular referendum to change. This is suggestive of a trend for the growing involvement of people in their constitutions. As a result, changes to the composition of the Victorian houses of Parliament, judicial system, Department of Public Prosecutions, and ombudsman (among others) must be directly approved by the people.

Under the *Colonial Laws Validity Act*, colonial Parliaments were required to comply with 'manner and form' requirements when changing their constitutions. This curbs parliamentary sovereignty and binds future Parliaments. The state *Australia Act*s carried forward this aspect of the original Act, so that new state constitutions must still follow relevant manner and form provisions.

F Commonwealth Constitution

1 *History*

- 1895 — popularly elected delegates produce a draft constitution;
- 1898 — referenda proposing to adopt to the draft constitution succeed in Victoria, Tasmania, and South Australia, but fail in New South Wales and Queensland; with insufficient support, the referendum fails;
- 1898 — in response to the first referendum, the constitution is redrafted and passed in all states the second time;
- 1899 — as part of the redrafted version, significant advantages are conferred to original states in the Commonwealth (ie, states present at the time of federation); these advantages are inserted in an attempt to attract Western Australia into the Commonwealth; this succeeds;
- 1900 — on 9 July, the British Parliament passes the *Commonwealth of Australia Constitution Act 1900* (Imp); this occurs only as a result of the second draft's popular support in the colonies;
- 1900 — the British Parliament enacts the state constitutions without any popular involvement; this may be contrasted with the process governing the *Commonwealth Constitution*;
- 1901 — on 1 January, the British Acts come into effect and the federation materialises into being.

Despite the commendably high involvement of the Australian people in the drafting and enactment of their *Constitution*, a number of criticisms may be made of the process:

- Women didn't vote in many states
- Aborigines were unable to vote
- Many were able to vote, but did not exercise the right

Of course, while not everyone voted, the process was – for its time – surprisingly democratic.

2 *Amendment procedure*

The people are also highly involved in changing the *Australian Constitution* (otherwise, the fact that it was democratically drafted would be meaningless today). This process consists of the following steps:

(i) The proposed change is introduced as a Bill (proposed law) by a member of the Commonwealth Parliament;

    (a) The process is essentially parliamentary in nature; the people cannot directly initiate the process of change (unlike in Switzerland);

(ii) The Bill must be passed by an absolute majority (that is, by $\frac{s}{2}+1$ members, where s is the total number of seats)

(a) If the Bill is passed by only one house, or passed by the second house with amendments, it can be put again after three months;
(b) If, after three months, the initiating house again passes the amendment and it again fails in the other house, the governor general 'may' (at his discretion and, by convention, on the advice of the Prime Minister) submit the Bill for assent in the form proposed by the first house (upon which the people will vote);

- The justification for this provision is that, if Parliament is so divided, it is likely that the people will also be divided
- If the Bill is assented to, it will be voted upon by the people and the matter will be clarified democratically

(iii) The amendment 'shall' (must) be submitted to the people of the states and territories; in order to pass, a double majority is needed:
(a) It must be passed by an overall majority of voters (eg, 51% of citizens);
(b) It must also be passed in a majority of states (eg, majorities in 4 out of 6 states) – note that this does not include territories;
(c) Additionally, if the amendment proposes to 'diminish the size, representation, or number of representatives' of a state, a majority is needed in the state so affected (eg, if an amendment provided that Tasmania is to give up disproportionate representation, it would need a Tasmanian majority to approve it in order to succeed);

(iv) If an amendment passes, the Act will be submitted to the governor general for assent.

Partly as a result of this elaborate amendment procedure (and partly, perhaps, as a result of widespread conservatism and politicised 'yes'/'no' referenda campaigns), very few proposals for constitutional reform have been successful. As many commentators note: Australian constitutional history is littered with failed referenda.

Out of 44 proposed changes, 8 have been adopted by the people. Of these, none have succeeded since 1977 (which gave the people of the territories the right to vote). There is also a very low rate of success for referenda initiated by the labour party. In general, only changes with cross-party support have succeeded.

Some argue that the *Constitution* should be more amenable to change. The obvious counter-argument is that its present firm confers stability. Nevertheless, it has been suggested that only half the states should need to support a referendum (ie, 3 out of 6, rather than 4 out 6, as is the case presently). Obviously, a referendum would be needed to make this change to the referendum process.

Another suggestion is to regulate the 'yes' and 'no' cases more stringently; they are meant to be a publicly-funded mechanism for informing the electors about the merits or otherwise of a change, but are traditionally emotional and party-biased. Making them more objective seems like a sensible suggestion, but one which manifests distrust of the electorate.

A further suggestion is to allow state governments to cede legislative power to the Commonwealth without a referendum.

G *Popular Sovereignty*

Issue: where does ultimate power lie in the Australian federation? One answer is that it lies with the people, in the sense that they control the mechanisms for amending (and, originally, adopting) the *Constitution*.

The people's direct and indirect involvement in this process suggests that change is fundamentally democratic. Because the instrument was originally drafted by popular representation, adopted by popular vote, was changed into its present state by popular vote, and remains effective by popular acquiescence, the argument runs that it is primarily a democratic document. A corollary is that the people are thereby guaranteed sovereignty by the *Constitution*.

A relationship of representation between people and their government is an important aspect of any democracy. So too, the people's involvement in their constitution is critical to its authority and legitimacy.

Issue: why is the *Constitution* binding? Is it binding for positivist reasons; that is, because of it was established by an authorised Act of the British Parliament? Or is it binding because of its continued acceptance by the people it governs?

Contemporary independence is a function of both popular sentiments (a desire for nationhood) and formal recognition (*Statute of Westminster*, *Australia Act*s). Because of this independence, it doesn't make sense to ascribe the authority of Australia's highest law to a foreign power by whom it is no longer bound.

It seems more persuasive to reason that the *present* authority of the *Constitution* derives not from a century-old Act of the British Parliament (though it once might have), but from its acceptance by the people. This is evidenced in several ways:

- **Creation**
  The drafters were popularly elected

- **Adoption**
  The draft constitution was adopted by a majority in all states

- **Modification**
  Popular referenda helped shape the instrument into its current form

- **Acquiescence**
  The people *could* jettison the *Constitution*, but don't; moreover, the Commonwealth Parliament, executive and judiciary all act as though they are bound by it

The popular authority of the *Constitution* is not nearly as clear in Australia as it is in countries like the United States of America. This may be explained by reference to the differing historical backgrounds against which their respective constitutions emerged (war of independence versus gentle and reluctant prodding). This difference was noted by Justice Dixon.

Certainly, the *Constitution* was originally seen as binding because of the authority of the British Parliament. Any initial acquiescence was therefore a result of this authority (colonial authorities thought it was desirable for the British Parliament to assist). Two questions may be posed:

1 *Is this still an appropriate explanation for constitutional authority?*

2 *If not, to what extent is popular involvement the legitimating factor? Can a precise date be articulated for the point at which the British Parliament ceased to authorise the people's acquiescence?*

Although it seems clear that there is more to the authority of the *Australian Constitution* than technical legitimacy, the second question proves difficult to answer. If popular involvement is to be reflected by the process of amendment, to what extent should consistent *rejections* of any change be taken as a rejection of the document or its processes as a whole? On the other hand, rejection is still participation: the fact that people participate in maintaining the status quo may also be evidence of its legitimacy.

Perhaps the strongest argument for the present authority of the *Constitution* is that it continues to be accepted by the vast majority of Australian citizens and the institutions and governments they embody. Were it otherwise, it could not properly be said that the constitution had any authority or efficacy. People expect to be popularly represented in government. It is tacit in a modern democracy that the people will refuse to give effect to undemocratic processes. To this extent, the continued effectiveness of the *Constitution* – that is, the fact that the people give effect to it – provides a strong basis for saying that constitutional authority derives from substantive (popular) and not formal (technical) processes.