

## Constitutionalism

<b>Constitutionalism</b>	<p>The constitution is what underpins our concept of government</p> <ul style="list-style-type: none"> <li>- Government in a broad sense, relationships between legal entities</li> </ul> <p>Arms of government</p> <ul style="list-style-type: none"> <li>- Legislature – make laws</li> <li>- Executive – enforce laws</li> <li>- Judicial – interpret laws</li> </ul>
<b>Beginnings</b>	<p>Divine rights of kings Regulated in 1215 by the Magna Carta – many of the principles of which still make up Australian law today Although we can pass legislation in contrast to these principles, in doing so we must examine the effects it will have on our rights</p> <p><b>Reasons for federation</b></p> <ul style="list-style-type: none"> <li>- Defence</li> <li>- Trade and tariff</li> <li>- Diplomacy</li> <li>- Culture</li> </ul> <p>Colonies were unwilling to give up powers – hence current separation of power in Aus const</p>
<b>The rule of law</b>	unwritten but still a principle of Australian law

## The Constitution

<b>Move to Federation</b>	<p>1889 – NSW Premier speech to federate 1890 – Conventions in which elements such as separation and division of powers were begun. 1895 – Colonial agreement 1899 – Referendum 1900 – UK passed laws</p>
<b>Influences</b>	<p><b>US influences</b> Adoption of a written constitution as supreme law Separation of powers Division of powers Powerful elected upper house to represent states interests</p> <p><b>British influences</b> Non-elected head of state Parliamentary democracy and responsible government Westminster system -</p>

Section 74- appeals to the Privy Council – have never been used and since Australia acts of 1984 cannot occur anymore

Unlike the American const the Aus const is a political statement rather than a personal one. It contains little evidence of rights etc.

The constitution is not an Australian act it is an enactment of another state, the British Empire

## Separation of powers

<b>Theoretical foundation</b>	<p>When legislative power is united with executive power in a single person or in a single body of the magistracy, there is no liberty, because one can fear that the same monarch or senate that makes tyrannical law will execute it tyrannically. <i>“Charles – Louis de Secondat”</i></p> <p><b>Divide power to prevent abuse of power</b></p>
<b>The three powers</b>	<p><b>Legislative</b> – enact amend and repeal laws  <b>Executive</b> – administration  <b>Judicial</b> – resolution of disputes, interpretation and application of the law</p> <p>Horizontal separation – standard Separation of powers  Vertical separation – federalism separation between states and commonwealth</p> <p>Due to its size the exec is the most powerful arm, therefore controlling the exec is important  The exec is controlled by the people primarily</p>

## Separation of powers in the constitution

<p>Ch1 – leg  Ch2 – exec  Ch3 – Jud</p> <p><b>Legislative power</b>  <b>S1</b> – the legislative power of the commonwealth shall be vested in a federal parliament which shall consist of the queen, a senate a House of Reps  <b>S51</b> – cth parli can make laws regarding the following  <b>S52</b> – exclusive powers, only commonwealth</p> <p><b>Executive power</b>  <b>S61</b> – executive power of the commonwealth is vested in the queen and is exercisable by the GG as queens representative and extends to the execution and maintenance of the const and laws</p> <p>GG must generally act on advice  Real executive power lies in the federal executive council.  GG calls elections on advice of PM  <b>S62</b> – FEC to advise governor general in the government of the commonwealth  <b>s63</b> – GG in council acting on the advice of the FEC  <b>s64</b> – governor general may appoint officers to administer departments of state</p> <p><b>express powers</b>  <b>s 5</b> – times for holding parliament  <b>s 32</b> – writs for general elections  <b>s 68</b> – command in chief of military  <b>s 72</b> – appointment and removal of judges</p> <p><b>Implied nationhood power</b>  Allows them to do things which are beneficial to the nation - <b>Victoria v commonwealth</b>  Must be reasonable - <b>davis v commonwealth</b></p> <p><b>Reserve powers</b></p>
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Unwritten but held by convention

Rarely exercised

They are powers exercised by GG not on advice of FEC

- Choice of PM in hung election
- Failure to obtain supply bills

**Prerogative common law powers**

Residue of the king's undefined powers – all things that English kings used to be able to do that hasn't been taken away.

**Judicial Power**

**S71**

The judicial power of the commonwealth shall be vested in a federal supreme court, to be called the HCA and in other such federal courts as parliament creates and invests with federal jurisdiction.

**S72** - tenure and remuneration and appointment

Upheld in **Workers federation v J W alexander**

<b>Responsible government</b>	<b>S 64</b> – no minister may hold office for longer than 3 months unless become a senator or HOR Doctrine whereby parliament brings executive to account – <b>Egan v Willis</b>
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<b>Boilermakers</b>	<b>First limb</b> Federal judicial power can only be vested in a chapter 3 court <b>Second limb</b> A chapter 3 court can only wield judicial power
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## Judicial Power

Boilermakers case is integral do not forget to include it in an answer

### Jud power

It has not been possible to frame an exhaustive definition of judicial power  
**R v trade practises tribunal**

The court has established *indica* (indicators) for whether something is an exercise of judicial power or not, some are required others are not

1. **To be judicial must possess sovereign authority** - *Huddart Parker & Co v Moorehead*
  2. A court cannot act in absence of controversy - authority
  3. Using established rights of law, as they are not as they ought be – *Australian Broadcasting Corporation v Lenah*
  4. **If the decision is not binding it is not a court** – *r v trade practises tribunal*
  5. Inter partes – parties are present
  6. Court waits for parties to bring dispute and identify it before it makes a decision – re Judiciary and Navigation Acts
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1. The court must behave in a judicial manner – *lim v minister for immigration*
  2. Inquiry of processing using the law and facts as they are - *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Barrett*
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1. Must be impartial – *R v Spicer*
  2. Give parties right to defend charges

Interpartes – between parties, parties are before the court

Exparte – in absence of one of the parties

Exec or leg cannot implore the court to make a statement of law unless a matter is brought before them – re judiciary and navigation acts

The role of Australian courts is to do justice according to the law – not to do justice according to idiosyncratic notions as to what is just in the circumstances  
**– ABC v Lenah**

Where the court has a discretionary means of interpreting actual law it is a judicial function. – **r v commonwealth court of arbitration and conciliation**

#### **Thomas v Mowbray**

- Judges were permitted some discretion in their decision, to protect from a terrorist.

If a control order provides judges with terms such as reasonably necessary, then it is providing **permissible discretion**

### Chameleon powers

Can be conferred upon either judicial or exec

However the power of legal rights and obligations is extrinsically judicial

**The distinction between the two**

**Court –**