

UNIT 3 AOS 2- THE CONSTITUTION (50 Marks)

Key Dot Point #1: The division of law-making power between state and Commonwealth parliaments under the Commonwealth Constitution, including specific (concurrent and exclusive) and residual powers, and the impact of Section 109.

Note: Each colonial parliament was responsible for law-making in its own colony. This meant that each colony had different laws on such matters as tariffs and defence. As society changed, there was a fear of invasion and a need for a central body to take charge on matters that affect Australia as a whole. During Federation, **separate colonies became states** with their own parliaments and a central body, Commonwealth Parliament was formed. The **Constitution is a formal document by which the process of federation was achieved. (Commonwealth of Australia Constitution Act 1900 (UK)).**

Note: 6 states, 2 territories- NT and ACT come under jurisdiction of Commonwealth Parliament, although both have gained self-government in many areas of law-making.

Reasons for Federation:

- DEFENCE, IMMIGRATION, INDUSTRIAL DISPUTES, TARIFFS, UNIFORM LAWS (Marriage, banking, currency and divorce)

The Commonwealth Constitution:

A statement of the rules or principles that dictate the way a country or state is governed. This is set out in Commonwealth of Australia Constitution Act 1900 (UK), and outlines the structure and powers of Australia's legislature, executive and judiciary.

Roles:

- **Facilitate division of law-making powers:** sets out types of laws that can be passed by the Cth Parliament- the states can make laws in any area that is not mentioned in the Constitution or not specifically made exclusive to the Commonwealth Parliament
- **Provide legal framework for the creation and structure of the Cth Parliament:** House of Representatives and the Senate's composition
- **Provides for direct election** of members of House of Representatives and Senate by the **people of Commonwealth of Australia**
- **Gives High Court the power to interpret the Constitution** if the need arises.
- **Provides protection for a limited number of rights (s.116), places restrictions on law-making powers of the Cth Parliament and making provision for the High Court to act as the final arbiter of the power of the Commonwealth.**
- **Provides for representative and responsible government:** if government is not protecting the rights of its citizens, the citizens can vote the government out of office at next election.

Division of Law-Making Power under Cth Constitution:

Specific Powers:

Powers that are enumerated in the Constitution and are the law making powers given to the Commonwealth Parliament in the Commonwealth Constitution. The purpose of these powers is to 'make laws for the peace, order and good government of the Commonwealth'. Most of these powers are set out under s.51, known as the 'heads of power'.

EXAMPLES- s.51 (i) Trade and commerce, s.51 (ii) Taxation, s.51 (xxix) External affairs.

UNIT 3 AOS 2- THE CONSTITUTION (50 Marks)

Specific powers can either be exclusive or concurrent powers.

Exclusive Powers:

Is a power which can only be exercised (exclusively or solely) by the Commonwealth Parliament. Hence, state parliament cannot make laws in these areas. These are outlined in s.51 of the Constitution, and s.52 contains a small list of powers that are also exclusive powers.

Some specific powers are made exclusive:

- by virtue of other sections of the Constitution
- by their nature

BY VIRTURE OF OTHER SECTIONS OF THE CONSTITUTION	
<i>Specific Power given to the Commonwealth</i>	<i>Section of Constitution that makes it exclusive</i>
S.51 (iii) Power to Cth to make laws regarding customs and excise	S.90 States that power is exclusive to Cth Parliament
S.51 (vi) Power to Cth to make laws regarding naval and military forces	S.114 States shall not raise naval or military forces, making it exclusive to Cth Parliament.
S.51 (xii) Power to Cth over currency, coinage and legal tender	S.115 States shall not coin money. Hence it is exclusive to Cth Parliament.

BY THEIR NATURE	
S.51 (xix)	Naturalisation (becoming an Aus. Citizen)
S.51 (xxv)	Recognition through Cth of state laws and records
S.51 (xxxii)	Control of railways for defence purposes

Concurrent Powers:

Law-making powers over which both the Commonwealth and state Parliaments share jurisdiction (shared powers). These are specific powers that have been given to the Commonwealth Parliament to make laws, but have not been made exclusive. Many of the specific powers in s.51 are concurrent powers.

EXAMPLES:

- S.51 (i) Trade, (ii) Taxation, (xxi) Marriage
- s.51 (ii) Taxation: Power to make laws in relation to taxation is given to the Commonwealth Parliament, but state parliaments can also levy taxes. State taxes include stamp duty and payroll tax, while Commonwealth taxes include income tax and GST.

S.109 of Constitution/Impact- Mechanism to resolve conflict:

If Cth and state parliament make a law on the same area of law under concurrent powers, and the state law is inconsistent with Cth law, then there is conflict between state and Cth legislation.

When this inconsistency arises, the Commonwealth law shall prevail, and the former shall, to the extent of the inconsistency, be invalid.

UNIT 3 AOS 2- THE CONSTITUTION (50 Marks)

Note: s.109 does NOT apply to inconsistencies between Commonwealth and Territory laws since they derive their law-making power from the Commonwealth rather than the Constitution.

EXAMPLE OF S.109 CASE- McBAIN CASE:

Infertility Treatment Act 1995 (Vic) – assists infertile couples to have children using their own donor sperm or ova. S.8 of this Act provided that a woman must be:

- married and living with a husband on a genuine domestic basis
- living with a man in a de facto relationship

S.22 of the Commonwealth *Sex Discrimination Act 1984 (Cth)* makes it unlawful for a person to refuse to provide a service to another person on the grounds of the latter person's marital status. Marital status- status or condition of being single, married, married but living separately from one's spouse, divorced, widowed or the de facto spouse of another person.

Dr. John McBain (specialist IVF doctor) was **directly affected** by the inconsistency in legislation. By denying single/lesbian patients access to the IVF, he was meeting the Victorian Act requirements but contravening the Commonwealth Act. He had been **finned under the Sex Discrimination Act (Cth)**. Under the Victorian Act, it was an offence for a doctor to treat a woman who is not married. Under the Commonwealth Act however, it is an offence to discriminate against a person on the basis of marital status.

To argue the inconsistency, McBain was **required to show that a patient was being denied the service (Leesa Meldrum)**. After the decision of the court case, the Victorian Infertility Treatment Authority decided that although providers cannot discriminate on marital status, they could **only provide treatment to infertile women**. Under the **Assisted Reproductive Treatment Act 2008 (Vic)**, a fertile woman can access IVF treatment if the woman is unlikely to become pregnant in any other way. This Act is therefore no longer in conflict with the Commonwealth legislation.

The High Court held that provisions of the Infertility Treatment Act 1995 (Vic) were inconsistent with the Sex Discrimination Act 1984 (Cth). Specifically, s.8 of the Infertility Treatment Act required that fertility treatments such as IVF were only available to women who were married or living in a de facto relationship with a man. This was held to be inconsistent with the Commonwealth Sex Discrimination Act, which prohibits discrimination against women on the basis of marital status. Under s.109, the Federal Court determined that the Commonwealth law had to prevail and the section of the Victorian law that limited IV treatment based on marital status was invalid. Dr McBain's patient was therefore able to receive treatment.

Residual Powers:

Those law-making powers left with the states at the time of federation and are not listed in the Constitution.

The Constitution protects the power of the states, as each state has its own constitution setting out guidelines for its law-making powers. The Commonwealth Parliament has no right to make laws in areas of residual power, although some inroads have been made into these areas by Commonwealth Parliament through HC interpretation, tied grants (money by Cth granted to states that specify what states must do with the funds) and changes to the Constitution.

Note: States can refer some of their law-making power to the Commonwealth in areas such as children of de facto relationships.

UNIT 3 AOS 2- THE CONSTITUTION (50 Marks)

EXAMPLES OF RESIDUAL POWER: Law enforcement, education, public transport, healthcare.

S.106,107,108 protect the laws and Constitutions of the states.

S.121- New states may be omitted or established- the parliament may admit to the Commonwealth or establish new states.

Key Dot Point #2: Restrictions imposed by the Commonwealth Constitution on the law-making powers of the state and Commonwealth parliaments

State and Commonwealth parliaments are supreme law-making bodies within their own jurisdiction. Their jurisdiction is limited by restrictions in the *Commonwealth of Australia Constitution Act 1900 (UK)*.

Note: Parliaments may be restricted in their law-making if there is a strong opposition and the government does not have a majority in the upper house, or if government requires the support of independents/minor parties to get numbers for a proposed law to pass through parliament.

Restrictions on State Parliaments:

Specifically restricted from making laws in areas of exclusive power held by the Commonwealth Parliament. For example:

s.114- State shall not raise or maintain any naval or military force

s.115- A state shall not coin money

s.90- Imposition of duties of customs and excise is exclusive to the Commonwealth

Other examples:

s.92- Trade between states shall be free- no state can charge trade duties to another state

s.109- In areas of concurrent power, federal legislation will prevail over state law in all cases where two laws are inconsistent, and state law will be declared invalid.

Restrictions on Commonwealth Parliament:

The Commonwealth Parliament **is restricted from legislating in areas of residual powers**, it must pass laws on areas of power provided to it under the Constitution:

- s.116: Prevents Commonwealth Parliament from legislating with respect to religion, thereby guaranteeing freedom of religion

- s.117: No discrimination against people based on their state of residence

- s.99: The Commonwealth cannot give preference to one state over another

- s.92: Commonwealth cannot restrict free trade between the states

- s.51 (xxxi): Acquisition of property by Commonwealth must be done on just terms

- s.128: Restricts Commonwealth Parliament from changing the Constitution without a referendum and vote of the people

- Separation of Powers: Commonwealth cannot form a body that combines judicial and legislative powers

- HC through its interpretations of the Constitution, eg. Cannot make laws restricting freedom of political communication

Note: The Commonwealth Parliament is a supreme law-making power in that it can pass laws that change previous laws made by Commonwealth Parliament or the courts. However, it **cannot override an interpretation of the Constitution and make a law that is in conflict with an interpretation of the Constitution by the High Court.**

UNIT 3 AOS 2- THE CONSTITUTION (50 Marks)

Key Dot Point #3: The process of change by referendum under Section 128 of the Commonwealth Constitution and factors affecting its likely success

The division of law-making powers in the Constitution can be changed by:

- a **successful referendum** which changes the **wording** of the Constitution
- **HC interpretation** of the Constitution, changing the **meaning of words** in the Constitution
- **Referral of powers** from states to Commonwealth Parliament, where **law-making powers are given to the Commonwealth by the states**

Changing Wording of the Constitution: S.128

Definition of Referendum: Process by which electors vote to determine whether a proposed change to the Commonwealth Constitution should be allowed.

The writers of the Constitution included s.128 as a means by which the words of the Constitution can be changed. The Cth Parliament can ask the public to agree to a change in the wording, **resulting in a greater power to the Cth Parliament in an area of law that was previously left with the states**. Out of 44 referendums, only 8 have been successful, and of those 8, only 4 altered the division of law-making powers. (difficult to achieve success)

IMPACT- law-making power of the states and Cth Parliaments may be altered. Note that not all successful referendums have altered the division of powers (eg. 1977).

Process of a Referendum: Parliament, People (Double Majority), GG

Parliament:

- ✚ There must be a **perceived need for change**.
- ✚ Propose for change and a **Constitutional Alteration Bill** is prepared, which sets out the proposed alteration to the Constitution.
- ✚ The Constitutional Alteration Bill is **introduced to Commonwealth Parliament**. It must be **passed by both houses, or one house twice**. If either house passes the proposed change and the other house rejects it, or requires amendments that are not acceptable to the first house, it **can be passed through the first house again after 3 months**.

The People:

- ✚ The referendum outlining the proposed change is **put to the people not less than 2 months and no more than 6 months after being passed in parliament**.
- ✚ All electors required to vote for the election of members of House of Representatives in each state and territory must vote on the referendum.
- ✚ Before the vote is put to the people, the **Australian Electoral Commission must send information to each household explaining the proposed change**, with arguments for and against these proposals.
- ✚ Voters are required to **answer YES or NO to the question asked**.
- ✚ Bill must satisfy the '**double majority provision**'- more than **half of all voting Australians must vote YES to the change**, as well as the Bill receiving support of a majority of voters in a **majority of states** (ie. At least four of the six must be YES states).

NOTE: This provision protects smaller states from being dominated by larger and more populated states. If the proposed change affects the parliamentary representation of a particular state, then a majority of voters in that state must vote YES to the change for it to

UNIT 3 AOS 2- THE CONSTITUTION (50 Marks)

pass. If these provisions are not met, the referendum will fail and no change to the constitution will apply. **If all provisions are met, the bill will receive Royal Assent from the Governor-General, and the relevant sections (and words) of the Constitution will be changed.**

Key Dot Point #4: The way in which one successful referendum changed the division of law-making powers

Factors Affecting Referendum's Likely Success:

Since 1901 there have been 44 proposals for a change of the wording of the Constitution. Of these, only 8 have been accepted and only 4 have actually changed the division of law-making powers.

- ✚ Timing:
 - Referendums are often held at the same time as general elections to minimise voting costs. However, voters may be more concerned with who they will vote into government than the referendum questions before them, taking their focus away from the referendum issue. In the face of uncertainty, most people tend to vote 'no' to avoid change.
- ✚ Lack of Bipartisan support:
 - Unless both the Coalition and the ALP support the proposal, it is difficult to pass. This is because each political party will be urging its supporters to vote in a different way, thereby creating a division in the voting public. Henceforth, a clear majority is very difficult to achieve. If both parties do not support the proposal, it is also very unlikely that a successful referendum can occur.
- ✚ Voter Conservatism:
 - Voters may be reluctant to support a change in the wording of the Constitution, especially if the question put forth to the voters is a controversial issue. They may also deem that the status quo is already working well for them currently. This results in more people voting NO for the proposed change.
- ✚ OTHERS- Confusion and suspicion of voters, strong community support against change, influence of state governments, high cost and double majority provision (don't use)

EXAMPLE OF SUCCESSFUL REFERENDUM- 1967:

- ✚ 1967 Referendum on Indigenous persons that passed the Constitution Alteration (Aboriginals) Act 1967 (Cth).
- ✚ There was a desire to ensure that the Constitution did not discriminate against Aboriginal people. The Constitution Alteration (Aboriginals) Act 1967 (Cth) passed through Federal Government since it enjoyed the support of a majority of the members of parliament.
- ✚ IMPACT- In the 1967 case, the Indigenous referendum changed the division of law-making power since the words "other than Aboriginals" in s.51 (xxvi) were removed and s.127 was deleted. The impact of this successful change enabled the Commonwealth to make laws for Indigenous people. Aboriginal affairs became a concurrent power which allowed the Commonwealth to expand its law making powers and became involved in an area of law making that was previously held by the states (residual power).

UNIT 3 AOS 2- THE CONSTITUTION (50 Marks)

Key Dot Point #5: The role of the High Court in interpreting the Commonwealth Constitution

The High Court cannot change the wording of the Constitution, but it can change the way in which the words in the Constitution are interpreted via High Court interpretation.

- S.71 establishes the High Court, S.76 allows the High Court to hear cases involving interpretation of the Constitution
- A decision of the High Court arising from a constitutional challenge can alter the division of law-making powers between the federal and state parliaments. It generally causes a shift in law-making powers from the states to the Commonwealth.
- A person must have standing (directly affected) in order to bring an issue to High Court.
 - ✚ The role of the High Court in relation to the Commonwealth Constitution is to interpret and give meaning to the wording of the Constitution (as outlined in s.76 of the Constitution). This usually occurs when Commonwealth or State Parliament passes an act that another individual challenges in the High Court as being ultra vires. It helps to keep the Constitution relevant to the current needs of Australia, and also alter the balance of power between the Commonwealth and State Parliaments.
 - ✚ Acts as a guardian of the Constitution by influencing day-to-day application of the Constitution and ensuring it remains relevant to the Australian people
 - ✚ Keep the constitution up to date: there is a need for HC to interpret words within the Constitution which arise from changes in society, eg. Brislan's case and the term "other like services"
 - ✚ Act as a check and balance on any injustices that may arise or abuse of power from the state and Commonwealth parliaments. Any individual, group, state bodies and commonwealth bodies can bring a matter to HC (if they have standing) for a ruling to be made on the constitutional validity of a new law.

Key Dot Point #6: The significance of two HC cases involving the interpretation of the Commonwealth Constitution in terms of their impact on the law-making power of the state and Commonwealth parliaments

Tasmanian Dams (External Affairs Power) Case 1983:

- ✚ The Commonwealth Parliament passed the **World Heritage Properties Conservation Act 1983 (Cth)** to prevent the excavation of a dam at the Gordon and Franklin Rivers in Tasmania. The state of Tasmania, wishing to dam the site for a hydro-electric scheme, claimed that the Commonwealth had no jurisdiction to pass such a law; however, the Commonwealth argued that it could make laws in areas of national concern. The Tasmanian Government's challenge to federal legislation banning the building of a dam on the Gordon River failed. The High Court held that the Commonwealth's "external affairs" power under **s.51 (xxix) of the Commonwealth Constitution** enabled it to **preserve the river system in its natural state as it had been placed on a world heritage list**. Prior to this decision conservation of resources was a residual power. **The state legislation was declared invalid under s.109 of the Constitution. The impact of this High Court decision was to extend the meaning of the external affairs power to include law-making in areas necessary to uphold obligations under international treaty. This greatly expanded the law making powers of the Commonwealth as they were able to legislate in an area that was previously considered a residual power.**

UNIT 3 AOS 2- THE CONSTITUTION (50 Marks)

Brislan's Case- 1935:

- Mrs Brislan was charged under the **Wireless Telegraphy Act 1905 (Cth)** with having a wireless without holding a license for it, as was required by the Act. She challenged the constitutional validity of this act, claiming that the Constitution did not give the Commonwealth Parliament power to make laws about wirelasses. The High Court was required to interpret s.51 (v) of the Constitution, giving the Federal Parliament power to make laws with respect to 'postal, telegraphic, telephonic and other like services'. **The phrase 'other like services' was deemed to include wirelasses, as they were a communication device like the other devices in the section.** Therefore the Wireless Telegraphy Act was valid. **The impact of the High Court decision on the law-making power of the State and Commonwealth Parliaments is that it extended the meaning of s.51 (v) thereby giving the Commonwealth Parliament more legislative powers (it now includes wirelasses) and it also brought the Constitution up to date. Any state laws regarding wirelasses could not be inconsistent with this Commonwealth law so s.109 would apply if any inconsistency did arise.**

Key Dot Point #7: The capacity of the states to refer law-making power to the Commonwealth Parliament

- Any or all of the six states can independently or collectively refer their law-making powers to the Commonwealth Parliament.
- S.51 (xxxvii)** gives the Commonwealth power over any matters referred to it by the states, but that power can only operate in those states that have referred their power to the Commonwealth.
- Referral of powers (voluntary transfer of power) is rare since **states are reluctant to hand over their diminishing power to the Commonwealth.**
- PROCESS:
 - States pass an Act giving their law-making power to the Commonwealth.
 - The Commonwealth passes an Act accepting the power from the state
 - Impact: Broadens the powers of law-making for the Commonwealth

EXAMPLE: Ex-nuptial Children

Prior to 1983, custody, guardianship and maintenance disputes involving children who were not the natural/adopted children of either party to a marriage could not go to Family Court. In 1986 Victoria referred its power over ex-nuptial children- children born outside of a marriage- to the Commonwealth, so the custody of, maintenance of and access to those children could be decided centrally by the specialised Family Court. This referral was a 'general' referral, as Victoria left it open to the Commonwealth to decide how to use the power.

Internal Security – Terrorism – the 2003 referral of power to legislate regarding terrorism was very specific. All the states wrote out in their referral act the exact text of the law the Commonwealth was allowed to pass with the power, and stated in the act, that if the Commonwealth wanted to change that text, they could only do so with the consent of the majority of states. This is therefore an example of a specific referral (also known as test-based referral) and it gives the Commonwealth less power than the general referrals.

UNIT 3 AOS 2- THE CONSTITUTION (50 Marks)

Areas of Uncertainty with Referral of Powers:

- Is ROP able to be revoked? If a state has referred power to the Commonwealth, can the state decide to cancel this referral of powers, or would a referendum be needed to make a change to a referral of powers?
 - Is a ROP exclusive? If a state has referred power in an area of law-making to the Commonwealth, does the state still have power to make laws in this area or does it automatically become an area of exclusive power once the referral has been made?
- NOTE: these have not been tested in court as the need has not arisen for the states to take back a referral of power.

Commonwealth Parliament influencing states in areas of residual power

- Financial Dominance- can be used to gain support from the states. The states rely on the Commonwealth for money, as a consequence of this the Commonwealth is able to exert influence over the states
- Tied Grants- Commonwealth can use its power under s.96 to give tied grants to the states. It gives the Cth Parliament the right to grant financial assistance to states on such terms and conditions as Parliament thinks fit
- The right to use money- s.81 gives the right to use money for purposes of the Commonwealth and subject to the charges and liabilities imposed by the Constitution.
- Unchallenged legislation- Can pass legislation that may be outside its power, but may stand if challenged

Key Dot Point #8: The means by which the Commonwealth Constitution protects rights, including structural protection, express rights and implied rights

Right- an interest recognised and protected by the law, respect for which is a duty, and disregard for what is wrong.

Approaches Taken to Protection of Rights:

Rights	Protection of Rights	Countries
Express	Rights written into a rights document . If these are part of a constitution, they are entrenched and cannot easily be changed . The process for changing these rights is set out in the relevant constitution and must be followed by present and future governments. Australia= Referendum	US, Canada, South Africa, Australia
Statutory	Contained in a bill of rights set out in a statute (Act of Parliament) , which contains rights that can be amended or repealed by parliament . - Express rights but are not entrenched in the Constitution. Parliament is a supreme law-making body so it prevails over court or regulation, but can be amended by Parliament.	NZ, ACT, VIC
Rights protected by legislation and common law	Where there is no bill of rights Australia has 5 express rights entrenched in the Constitution, but human rights are mostly protected by Acts of parliament , eg. Sex Discrimination Act 1984 (Cth) and Racial Discrimination Act 1975 (Cth) and common law.	Australia

UNIT 3 AOS 2- THE CONSTITUTION (50 Marks)

Approaches to the Enforcement of Rights

Approach	Method	How changes are made
Interpretive	Court-based Allows courts to declare that a law is incompatible with the bill of rights. It is then up to Parliament to change the law so as not to interfere with a right contained in a bill of rights or to explain why infringement of a right is necessary.	Parliament can change the law
Watchdog	Protected under Acts of parliament and it is the role of a human rights body to check that rights are not interfered by with Acts of parliament	Parliament can change the law on recommendation of a human rights body
Complaints-based	Requires individuals/groups to bring a breach of rights action in a court to obtain an appropriate remedy. Court can declare legislation invalid because it is incompatible with the bill of rights.	Courts can declare law invalid

Rights covered by structural protection | Express rights in Cth Const | Implied rights in Cth Const

Structural Protection of Rights:

The structure and text of the Commonwealth of Australia Constitution Act 1900 (UK) provide mechanisms for the indirect protection of rights in their dealings with the Commonwealth Parliament by preventing the abuse of power.

NOTE: These constitutional principles underlie our democratic system of government and provide checks and balances to prevent the abuse of power and thereby indirectly protect human rights.

Separation of Powers

- ✚ **Legislative Power- make laws, which resides with the parliament** as provided under Chapter 1 of Constitution
- ✚ **Executive Power- administer the laws and manage the business of government** as provided under Chapter 2 of Constitution; **vested in GG** as Queen's representative, although in practice is **carried out by PM, senior ministers and government departments**
- ✚ **Judicial Power-** power given to **courts and tribunals to enforce the law** and settle disputes under Chapter 3 of Constitution; **vested in HC and other federal courts.**
- ✚ Legislative and Executive power are combined at a federal level. The judicial power is separate and independent, though the courts are created by parliament and judges are appointed by the executive.

Principle of separation of **powers prevents power being concentrated in one set of hands** and helps protect individual rights by **providing checks and balances** on power of the Commonwealth Parliament. No one body holds the power to make, administer and rule on its legality.

Law-making powers given to the Commonwealth Parliament are laid out in the Constitution. If commonwealth parliament oversteps these powers and makes/passes legislation outside of its jurisdiction, the **HC can (if case if brought before them) declare that a law is unconstitutional and therefore invalid.** An independent judiciary gives confidence that the administration of justice will be impartial.

UNIT 3 AOS 2- THE CONSTITUTION (50 Marks)

Responsible Government

- ✚ **S.53 gives legal recognition to the principle of responsible government.**
- ✚ Government is **answerable and accountable** to the parliament, and parliament to the people.
- ✚ **It protects the rights of citizens to be governed by a government that has the confidence and support of the elected lower house. This protects against the possibility of a government abusing its power.**
- ✚ If government does not have the confidence of parliament, it should resign.
- ✚ Though members of government usually vote with their party, there are sometimes dissenting views and on occasion members of government vote with the opposition.

Representative Government

- ✚ Representative government refers to a government that **represents the view of the majority of the people.**
- ✚ This is underpinned by **s.7 and s.24** of the Constitution. S.7 directs that **senators** of each state shall be directly chosen by the people. S.24 directs that members of the **House of Representatives** shall be directly chosen by the people.
- ✚ **S.8 and s.30** further emphasise the ideal of representative government by requiring that **each elector shall only vote once.**
- ✚ The right to vote for all people ages 18+ is not expressly guaranteed in the Constitution. However, HC justices have expressed the view in obiter dictum that the Senate and House of Representatives could not directly be chosen by the people if sections of the people (eg. Those of particular ethnic background) were disqualified from voting.
- ✚ **Direct election by the people of their political representatives gives the people the right to expect that those representatives will represent their needs in parliament as much as possible.**
- ✚ If government does not meet the needs of majority of people, it is likely to be voted out at the next election.
- ✚ Protects right of the people to be governed by the people of their choosing (or that of the majority). A government cannot continue to govern without support of the people, hence people are protected from governments having too much power over people's lives.
- ✚ NOTE: Government may find it difficult to implement its legislative program if it does not hold a majority in the upper house.

Structural Protection Case- **Roach v Electoral Commissioner (2007) Case**

One High Court case relating to the Constitutional protection of rights is the Roach v Electoral Commissioner (2007) case. Prior to 2006, the **Commonwealth Electoral Act** prevented a person serving a **prison term over three years from voting**. In 2006, the Parliament amended the law so that **all people serving a prison term of any length were disqualified from voting**. Roach, a Victorian woman serving a 4-6 year prison term, **challenged the validity of the law**. She argued that it **breached her constitutionally protected right to vote**. The High Court confirmed that the Constitution establishes a democratic system of representative government, **underpinned by s.7 and s.24 protecting a constitutional right to vote since senators and members of House of Representatives must be directly chosen by the people**. The court recognised that the right to vote can be restricted, but that this is **limited to circumstances necessary to preserve representative government**. Restrictions could include unsoundness of mind, conviction for treason or treachery

UNIT 3 AOS 2- THE CONSTITUTION (50 Marks)

and prisoners serving sentences of more than three years. Thus, the 2006 amendment was declared invalid and the right to vote could be **removed for serious criminal misconduct, but not for minor offenders.**

IMPACT: The decision of the court **affirmed that there is a constitutional right to vote** for adult members of the Australian community, which is protected by the structural protection of representative government. The High Court **did not go so far as to call the right to vote an implied right**; instead this **right is a reflection of structural protection**. Thus, representative government can act as a limit on the powers and sovereignty of the Commonwealth Parliament, which cannot legislate away the right to vote without good reason.

Express Rights (5 in Australia) **116 | 92 | 117 | 51 (xxxi) | 80**

Constitution sets out five express rights. These are entrenched in the Constitution. This means they can only be removed by amending the Constitution using the referendum procedure established in s.128. Rights that exist in common law and those created by legislation can be abolished any time by the Commonwealth Parliament legislating to override them.

- ✚ S.116- freedom of religion (this does NOT apply to states):
Provides that Commonwealth Parliament cannot pass a law which:
 - establishes a state religion
 - imposes any religious observance
 - prohibits free exercise of any religion (preventing people from practising their religion), though this is limited because of national security or to ensure that people follow the laws of the country.
 - requires a religious test as a requirement for holding any Commonwealth office

DOGS (Defence of Government Schools) 1981 Case:

The plaintiffs claimed that the legislation by which the Commonwealth had provided financial assistance to non-government schools via state grants was invalid due to this funding being directed to religious schools, and therefore contravened s.116.

The High **Court reinforced the right to freedom of religion and confirmed that the Commonwealth cannot establish a religion**. A majority of the Full Bench of the High Court held that the legislation allowing the Commonwealth to give grants to the states used to provide assistance to non-government schools was **valid as there was no religious inequality**. The **grants did not differentiate between different schools based on religion**. Hence through this case, the practice of assisting religions by continuing to fund religious schools was allowed.

- ✚ **S.92- Trade within the Commonwealth must be free**
This right prevents parliament from treating interstate trade differently from trade within a state. **S.92 holds that on the imposition of uniform duties of customs, trade, commerce and intercourse among states, whether by means of internal carriage or ocean navigation, shall be absolutely free.**
- ✚ **S.117-** It is unlawful for state and Commonwealth governments to **discriminate against someone on the basis of the state in which that person resides**. This means that, for example, a resident of NSW in Victoria cannot be subject to a Victorian law that would make them in a worse position than if they were from Victoria. However, HC has said that states can favour their own residents in **limited circumstances, such as the right for only residents of a state to vote in elections for that state.**

UNIT 3 AOS 2- THE CONSTITUTION (50 Marks)

- ✚ **S.51 (xxxi)- Acquisition of Property on Just Terms- Commonwealth must pay fair and reasonable compensation for property that is compulsorily acquired.** However, the Commonwealth is only able to acquire property for a purpose or area for which it has the power to make laws; for example airports and national parks.
- ✚ **S.80- Trial by Jury-** There must be **trial by jury for indictable Commonwealth offences**. LIMITATION: **Most indictable offences are crimes under state law**, where s.80 only applies to Commonwealth offences. Furthermore, HC has ruled that indictable means 'crimes tried on indictment'. Hence the **government can avoid s.80**, and thus avoid a jury trial for even the most serious offences, by **declaring that the offence is a summary offence**.

Implied Rights in the Commonwealth Constitution

Implied rights are rights which **are not expressly written in the Constitution**, but have been read into or **implied in the Constitution by its structure and text (ie. Through the wording of the Constitution)**. In Australia there is only one implied right- the right to freedom of political communication.

Key Dot Point #9: The significance of one High Court case relating to the constitutional protection of rights in Australia

Lange v Australian Broadcasting Corporation (1997) CASE

Established in **Australian Capital Television v The Commonwealth (1992)** where the High Court held that there was an implied freedom of political communication prior to elections. This right was later confirmed and extended in Lange v Australian Broadcasting Corporation (1997). In 1996, David Lange (previous NZ PM) brought defamation proceedings against the ABC for comments about him on the program Four Corners. In this case the **High Court found that there was an implied right to freedom of political communication**, but went further stating that the **right exists at all times, not just prior to an election**. This right is not a general right to free speech, but only a right to free communication on matters relating to political issues. **Hence the significance of the Lange case was that it confirmed and extended the right to freedom of political communication.**

Enforcement of Rights in Australia

The **High Court's role** is to **hear cases** brought before it and **interpret the words** in the Constitution. Constitutional rights are fully enforceable by the HC, which can declare legislation invalid if it violates any of these rights. **Commonwealth and state governments cannot override decisions of the HC.**

If HC declares a legislation invalid, the parliament's options are:

- **amend the legislation** so that the unconstitutional provisions are removed
- try and **remove the right** in the Constitution by amending the Constitution in accordance to **s.128**

This is a **COMPLAINTS-BASED APPROACH** to the enforcement of rights since people who believe their rights have been infringed can **bring a case to the HC**. The HC's focus is on declaring that a law passed by parliament is valid/invalid. They do not provide a remedy such as damages. The HC gives **meaning to words in the Constitution by interpreting the words** narrowly/broadly. In its role as final arbiter on the interpretation of words in the Constitution can **ensure that laws passed by the Commonwealth Parliament are not outside its law-making power.**

UNIT 3 AOS 2- THE CONSTITUTION (50 Marks)

WATCHDOG APPROACH

Rights protected through **Acts of Parliament or common law can be enforced through the courts**. In Australia, there are human right bodies that investigate laws that may contravene human rights. The **Commission and others can recommend to parliament that a law needs to be changed because it contravenes human rights**.

Rights Protected through Acts of Parliament/Common Law

🚩 **Parliament legislating to incorporate rights into an Act of Parliament**

All states have anti-discrimination laws making it unlawful to discriminate against people on various grounds. Furthermore, the Commonwealth Parliament has legislation to make sex, race and disability discrimination unlawful.

🚩 **Common law establishing rights through precedent**

A case is brought to court and a decision is reached. The ratio decidendi creates a precedent that is followed in the future. Eg. The right to silence when arrested or on a trial for a criminal offence is a right that has existed under the common law. But a right can be removed if parliament legislates to overrule the common law, eg. Giving police the right to demand the name and address of a suspect in certain circumstances.

VIC and ACT have their own bill of rights, ie. Victorian Charter of Human Rights and Responsibilities. These can be changed by an Act of the parliament that passed them.

Key Dot Point #10: Australia's constitutional approach to the protection of rights and the approach adopted in...South Africa

🚩 **Constitution of the Republic of South Africa Act 1996**

🚩 Contain a **Bill of Rights in Chapter 2** of the Constitution. This is an express rights entrenched in a constitution approach.

Structural Protection of Rights

🚩 **Representative Government**

Is expressly provided for by **the general right to free speech** according to s.16(1) of the bill of rights, and **the right to vote for all its citizens in s.19(3)**, with elections every five years of parliament. Thus if the government fails to act in a manner acceptable to the majority of the people, it can be **voted out of office at the next election**.

🚩 **Separation of Powers**

Is expressly provided for in the South African Constitution. Democracy is protected by separating three areas of power. The **legislature makes laws and monitors the executive** (president, deputy president and ministers). The **executive makes policy, proposes laws and implements laws passed by the legislature**. The **judiciary hears disputes and administers justice**.

The **Constitutional Court** (like HC of Australia) is able to keep a **check on the legislature** and **ensure that it does not abuse its power**. The parliament **cannot overrule decision of the CC** relating to the interpretation of the Constitution. **Some rights can be limited by parliament in extreme situations such as a state of emergency**.

UNIT 3 AOS 2- THE CONSTITUTION (50 Marks)

Express Rights

- ✚ Unlike Australia, the South African Bill of Rights contains **an extensive list of protected human rights** noted under various headings such as **equality, human dignity and security of the person**. The rights under the South African Bill of Rights are **entrenched and can only be altered through constitutional amendment**. In South Africa, this does not require a referendum, but the amendment must be **passed by two-thirds of the National Assembly members and then be supported by at least six of the nine provinces in the National Council of Provinces**.
- ✚ Bill of Rights applies to all law, binds the legislature, the executive, judiciary and all organs of state. It also applies between one citizen and another.

Enforcement of Rights

- ✚ **Interpretive Approach**
Rights under the Bill of Rights are **fully enforceable (like Australia)**. Legislation that violates these express rights can be **declared invalid by the Constitutional Court** and hence has no effect. This declaration of invalidity **cannot be overridden by parliament**. **Similarly in Australia, the HC of Australia can declare that a section of an Act contravenes an express right in the Constitution and therefore that section of the Act will be invalid**. However in South Africa, any individual/group can bring an action alleging that a right under the Bill of Rights has been infringed. This differs from Australia because in Australia the person bringing the action must be directly affected by the infringement of rights, ie. **Have standing. This is the complaints-based approach**.
- ✚ **Statutory Interpretation and Common Law**
When interpreting any legislation and developing the common/customary law, every court, tribunal or forum must **promote the spirit and purpose of the Bill of Rights and interpret legislation in accordance with the Bill of Rights**.
- ✚ **REMEDIES**- Legislation that infringes Bill of Rights can be declared invalid by courts. They can also make other appropriate remedies, such as an **award of damages**.
- ✚ **Civil, political, economic, cultural and social rights are protected, unlike Australia**. These include right to healthcare, food, water, education etc.
- ✚ **LIMITATION OF RIGHTS**- South African Bill of Rights contains a **general limitation** which provides that rights may be limited where **'reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom'**. There are also some **specific limitations**. Some rights may be **limited during a state or emergency** (the court can decide if it is a valid state of emergency). Other rights are **considered non-derogable, meaning they cannot be restricted/limited**. These include equality, human dignity, life and rights of children.

UNIT 3 AOS 2- THE CONSTITUTION (50 Marks)

COMPARING SOUTH AFRICA AND AUSTRALIA

Both South Africa and Australia **have fully enforceable rights**. In South Africa, these are the rights under the South African Bill of Rights. Legislation that violates these express rights can be declared invalid by the Constitutional Court (equivalent of HC of Aus) and hence has no effect. The declaration of invalidity cannot be overridden by parliament. Similarly in Australia, the HC of Australia can declare that a section of an Act contravenes an express right in the Australian Constitution and therefore that section of the Act will be invalid. Though both countries have enforceable rights, the **methods used to enforce these rights differs significantly**. For example, South Africa utilises the **interpretive approach** to enforce their rights. Any individual/group can bring an action to a competent court alleging that a right under the Bill of Rights has been infringed, ie. A person does not need to have standing. This differs from Australia's **complaints-based approach** because in Australia, the person bringing the action must have standing- be directly affected by the infringement of rights. Furthermore, an individual can be awarded remedies if their rights have been infringed in South Africa, whereas this does not occur in Australia.

Both countries make use of **express rights, which are entrenched in the Commonwealth of Australia Constitution Act 1900 (UK) and the Bill of Rights contained in the Constitution in South Africa**. Both countries have entrenched rights that can only be **changed through the mechanism set out in the rights document**. However, these differ between Australia and South Africa. In Australia, this is underpinned by **s.128** of the Commonwealth Constitution, and outlines the process of a **referendum** to change the wording of the Constitution. Conversely in South Africa, **the constitutional amendment must be passed by two-thirds of the National Assembly members and then be supported by at least six of the nine provinces in the National Council of Provinces**. In addition, the **size and scope of its application differs significantly**. In Australia, there are only five express rights, all of which are limited in their impact. For example, **s.80** of the Commonwealth Constitution outlines the right to trial by jury. However, this right is limited as it only applies to indictable offences. Furthermore, crime is a residual power, whereas s.80 only guarantees this right for criminal offences under the Commonwealth legislation. South Africa's Bill of Rights, on the other hand, contains an **extensive list of protected human rights** under headings such as equality, human dignity and freedom and security of the person. It also includes civil, political and social protection of rights such as the right to water, food and education.

South Africa and Australia both have **structural protection**- the structure and text of the Constitution which provide mechanisms for indirect protection of rights in their dealings with the Commonwealth. Both countries have the **principle of representative government**. For example, in South Africa, according to s.16(1) of the Bill of Rights everyone has the general right to free speech. **S.19(2)** of the Bill of Rights guarantees the right to vote for all its citizens. Similarly in Australia, the principle of representative government refers to a government **that represents the view of majority of the people**. This is underpinned by **s.7 and s.24** of the Constitution, which states that senators of each state and members of the House of Representatives shall be directly chosen by the people. In both countries, if government does not meet the needs of majority of people, it is likely to be voted out at the next election. Furthermore, **both countries have the principle of separation of powers**, and are both divided into the legislative, executive and judicial branches. However, there is **no clear responsible government** outlined in South Africa, whereas this principle is expressly stated in the Australian Constitution. In addition, South Africa's rights are **protected by their Bill of Rights**, whereas **Australia does not have a Bill of Rights**- its rights are protected mostly by legislations and common law. There are also limitations of rights enforceable by parliament in states of emergency in South Africa, whereas the parliament cannot override the High Court's decision in any circumstance.

UNIT 3 AOS 2- THE CONSTITUTION (50 Marks)

EVALUATION OF METHODS TO CHANGE THE DIVISION OF LAW-MAKING POWERS- REFERENDUM | HIGH COURT | REFERRAL OF POWERS

Method	Strength v Weakness
Referendum	<p>A successful referendum would be representative of the support of an overwhelming majority of people since the Constitution can only be changed with the double majority provision. Only when there is a majority of electors in Australia and a majority of electors in a majority of states can a change of the wording of the Constitution be made. It would also protect smaller states from being dominated by more populated states due to needing the support of people in at least 4/6 states. HOWEVER, the success rate of referendums is very low. Only 8 out of 44 referendums held have been successful, and of these 8, only 4 have changed the division of law-making powers. Hence, it cannot be very effective if it is extremely difficult to do. Furthermore, as proposals must be passed through Commonwealth Parliament, the process is largely controlled by the Commonwealth, which often results in an increase in its power. Other factors such as people do not understand referendums, are unlikely to want change and voting on party lines also have an accumulative effect on the rare success of referendums.</p> <p>The lengthy process of preparing a referendum means that proposals are considered completely and thoroughly, thereby protecting the Constitution from changes without merit. For example, the process of passing the Alteration Bill across both houses or one house twice after three months, as well as the process of putting the referendum proposal to the people no less than 2 months and no more than six months after giving notice both demonstrate the timely procedure that results from holding referendums. HOWEVER, no matter how considered the proposals are, referendums are a very costly process due to the information and publications provided to the public and cost of the election process. The government is frequently reluctant to put matters to the public vote unless there is a great deal of demonstrated support for them. Hence, this process has had very little impact on the division of law-making powers in comparison to the other methods of changing the division of law-making powers.</p> <p>The views of the community as a whole are more likely to be represented in a referendum because voting is compulsory. HOWEVER, people may see a referendum as giving politicians more power and will therefore tend to vote NO. People may also find referendum proposals difficult to understand and therefore vote NO. Furthermore, a referendum that does not have bipartisan support is very unlikely to succeed. Voters generally vote according to their political preferences and the advice of their political party.</p>
High Court Interpretation	<p>High Court judges are experts on constitutional law and its application, so are best placed to interpret its meaning. Hence, a matter can be dealt with when a case is brought before the court and an injustice can be rectified. HOWEVER, the High Court must wait for a relevant case to be brought before the courts before it can interpret the words in the Constitution. Furthermore, the party bringing the case must have standing- they must be directly affected. Henceforth, these cases are very rare.</p> <p>The High Court is also the guardian of the Constitution and can act to ensure that parliaments do not abuse their law-making powers. It can act as a check and</p>

UNIT 3 AOS 2- THE CONSTITUTION (50 Marks)

	<p>balance against abuse of power by the states or the Commonwealth Parliament. HOWEVER, the decision in a case brought before the High Court may depend on the composition of the High Court. Some justices are more conservative in their approach to interpreting the Constitution. This means that some judges may be reluctant to change law-making powers, ultimately reducing the High Court's impact on the division of law-making powers.</p> <p>The High Court interpretation of the Constitution has had the most success in changing the law-making powers, and updating them for modern use. It has also been shown that this method is the easiest to achieve and therefore the most powerful and effective. HOWEVER, similar to the other two methods, the Commonwealth generally increases its powers after a High Court interpretation. Furthermore, the justices in the High Court are unelected, and their decisions cannot be overridden by the elected parliament. This is undemocratic and therefore may not represent the views of majority of the people. Hence, the way in which the High Court will change the division of powers, or whether it will at all, is unpredictable. Once a case is brought before the Court the parties lose a lot of control over what the final change will be. Nonetheless, it has had far greater impact on the division of law-making powers than that of referendums. This is demonstrated through the Franklin Dam Case.</p>
Referral of Powers	<p>The Commonwealth Parliament is able to make laws that are consistent across Australia, for the benefit of all Australians. The states can also discuss the issue thoroughly and decide which law-making powers are to be referred to the Commonwealth. HOWEVER, the Commonwealth may refuse to accept the powers referred to it by a state, thereby reducing the benefit of having consistent laws. The states are often reluctant to hand power over to the Commonwealth as their residual powers are already limited in comparison to the Commonwealth. Nonetheless, the states can still agree to pass uniform laws without losing their law-making powers by referring it to the Commonwealth. In this way, the states can uniformly maintain some consistent laws whilst still upholding their residual power.</p> <p>It is difficult to get states to pass uniform laws on a particular issue. There are likely to be small differences between each state. However, if the power has been referred to the Commonwealth, then the Commonwealth Parliament is able to pass one law that affects the whole country. In addition, there may be a belief that a matter belongs more appropriately to the Commonwealth, or is a logical extension of a power the Commonwealth already has, but that a referendum to change the wording of the Constitution would be too difficult to pass. HOWEVER, it is another way of centralising law-making and reducing the law-making powers of the states. The states could also be induced to refer powers by the use of tied grants. This would make it not truly a free decision to voluntarily give up its law-making powers.</p>

NOTE: Generally, referendums have had little impact on law-making powers, with only four referendums changing those powers. High Court interpretation is more frequent and has had a greater impact than referendums on the law-making powers.

UNIT 3 AOS 2- THE CONSTITUTION (50 Marks)

EVALUATION OF THE CONSTITUTIONAL PROTECTION OF RIGHTS FOR AUSTRALIANS

While rights that are already contained within the Constitution are very well protected, it does not protect an extensive number of rights since the legal system relies heavily on legislation and common law to protect many of its rights.

The Commonwealth of Australia Constitution Act 1900 (UK) sets out five express rights, all of which are entrenched in the Constitution. This means they can only be removed by amending the wording of the Constitution using the referendum procedure established in s.128. As the referendum process is very thorough and is only successful if a proposal passes provisions such as the double majority provision, it ensures that only proposals that have widespread support within the voting community will be successful. Despite these rights being well protected, the scope of their operation is quite limited. For example, s.80 of the Commonwealth Constitution outlines the right to trial by jury. However, this right is limited as it only applies to indictable offences. Furthermore, crime is a residual power, whereas s.80 only guarantees this right for criminal offences under the Commonwealth legislation.

The referendum process underpinned by s.128 of the Constitution ensures that express rights cannot be changed. This is evident by the fact that only 8 out of 44 referendums held have been successful. Whilst this does demonstrate that already established rights are well protected, it can also be a hindrance in ensuring that protection of rights keeps up with contemporary attitudes. Rights may lag behind when attitudes of the community change and technology advances with time. This means that if Australia were to entrench more rights or expand on the existing ones, it would be extremely difficult and expensive to do so.

Already established rights can be well protected and expanded upon through the High Court interpretation. According to s.76 of the Constitution, the High Court has the power to interpret and imply rights into the Commonwealth Constitution. However, the High Court only has one implied right- the right to freedom of political communication. This suggests that the High Court is not a reliable method of adding new rights to the Constitution and expanding the protection of rights in Australia. The *Lange v Australian Broadcasting Corporation* case merely demonstrated the High Court's ability to expand the rights protection by the Constitution.

All the rights contained within the Constitution are fully enforceable by the High Court. This means that the High Court can declare any legislation that contravenes one of the express rights as invalid, thus protecting the operation of the right. However, the High Court is limited in its ability to do so. The High Court can only declare a piece of legislation invalid if a case is brought before it. This is called the complaints-based approach. Furthermore, the party bringing the action must have standing, so they must be directly affected. Since these cases are rare, the High Court is extremely restricted in its ability to protect rights contained within the Constitution.

The Constitution contains structural mechanisms and protections such as separation of powers, representative and responsible government and s.7 and s.24 to protect rights. The structural protection of representative government allows parliament to be democratically elected. This ensures that government represents the views of majority of the community. The separation of powers principle allows decisions of courts to remain free of influence by political pressures. However, these structural protections only protect individuals from the power of government. They do not consider protecting individuals from the power of other individuals and powerful companies. Furthermore, a reliance on representative government as a structural protection may be insufficient

UNIT 3 AOS 2- THE CONSTITUTION (50 Marks)

to protect the rights of some less popular minorities. Some majorities may actually support the violation of some individuals' rights, as is the issue with the rights of asylum seekers.

Rights are protected by legislation and common law. This ensures that they can be added to continually and amended to keep with changing values. These protected rights cannot be overridden by parliament.

