**Legislative, executive and judicial powers with reference to the Commonwealth Constitution (Australia) and with comparison to one non-Westminster political and legal system**

* America

|  |  |  |  |
| --- | --- | --- | --- |
|  | Consists of: | Roles: | Differences to Australia: |
| Executive: the White house | POTUS VPOTUS Secretaries (up to 15, chosen by POTUS, not in congress) | POTUS can veto laws (article 1, section 7)  E.g. Obama vetoing S2040 – justice against sponsors of terrorist attacks (2016)  POTUS can nominate public officials |  |
| Legislative: Congress | The House: 436 representatives of electorates allocated per population (article 1, section 2)  The Senate: 2 senators per state (article 1, section 2) | Can pass laws  Must approve appointment of public officials (article 2, section 2)  E.g. Secretary of Treasury, Steven Mnuchin  Can impeach POTUS, VPOTUS, and gov officials  E.g. Bill Clinton (failure to convict)  Can exercise power over the executive funds, and manipulate it to manipulate the gov  E.g. in 2013, a disagreement by the congress regarding Obamacare caused them to restrict spending, and shut down the gov for 2 weeks |  |
| Judicial: supreme court | Judges | Can review laws passed by congress  E.g. Trump’s immigration ban | Permanent tenure for judges |

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

Decline of parliament thesis: WHAT DOES THIS MEAN?

**The legislative role:**

|  |  |
| --- | --- |
| **Theory** | **Practice** |
| All of parliament should be involved in the creation of bills | Cabinet initiates most bills based on party policy and expert advice |
| Bills originate from a variety of sources | Private members’ bills are rarely successful |
| Thorough scrutiny and amendment ensures bills are of a high quality | Cabinet controls of standing orders (schedule) & use of gag (stopping debate on a topic), guillotine (Sets time limits on the passage of a bill or motion), and flood-gating |

**The representative role (MPs should be):**

|  |  |
| --- | --- |
| **Theory** | **Practice** |
| Delegates who act to express the will of the electorate | Party solidarity |
| Trustees who act in the best interest of the electorate | Standing orders provide limited time (petitions, grievances etc) for members to act as delegates or trustees |
| Partisans who act to support party policy | Members are strongly representative of the male middle class from farming, legal & educational backgrounds. Few blue collar, small business, indigenous |
| Mirrors of society – groups in society are reflected in the make up of the parliament | However more women are gaining seats (about 23%) |

**Responsibility role**

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| --- | --- |
| **Theory** | **Practical** |
| Gov must hold the confidence of the house | Party discipline and the majority electoral |
| Collective ministerial responsibility and motions of no-confidence | Motions of no-confidence rarely pass |
| Individual ministerial responsibility, and censure motions | Censure motions rarely pass. Individual ministers only resign when they become a political liability to the gov |

**Debate role**

|  |  |
| --- | --- |
| **Theory** | **Practice** |
| Standing orders provide the following…   * Question time * Address in reply   + If a person is accused in parliament, they can go to a committee and tell their side   + Ministers can argue against legislation * Matters of public importance * Urgency motion * Adjournment debates * Private member business   All provide opportunities for debate | Executive dominance and the gov control of standing orders limit opportunity for debate  Recent analysis show the following time allocations…   * Gov business = 51.9% * Opposition = 18.2% * Private members = 15% * Other = 8.85% |

Things that go against the decline of parliament thesis:

* Conscience votes
* Crossing the floor
* Semi-independence of the speaker
* Roles of the opposition and opposition tactics
* Senate and proportional voting

Analysis of the governments:

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
| **Gov** | **PM** | **Date** | **Features** | **Extent** |
| 41st | John Howard | 2004 - 2007 | (Bad)  Double mandate  E.g. unpopular WorkChoice and unconstitutional Anti-terror act  Biased speaker  Floodgating  Lack of ministerial responsibility  2005 immigrations minister Amanda Vanstone didn’t resign after deporting an Aus citizen, and granting citizenship to a mafia  Accountability of the PM  E.g. Howard lost his seat in Bennelong in 2007 | Strong decline |
| 42nd | Kevin Rudd/ Julia Gillard | 2007 – 2010 | (Good)  Senate succeeded in debate function  E.g. rejected emissions 2009, renegotiated  (Bad)  Executive won clear majority  ‘Kitchen cabinet’  Lack of ministerial responsibility  E.g. Peter Garret 2009 insulation scheme incident – didn’t resign  Lack of confidence in gov (swap) | Some decline |
| 43rd | Julia Gillard | 2010 – 2013 | (Good)  Hung parliament | No decline |
| 44th | Tony Abbott | 2013 - 2015 | (Good)  Senate blocked several bills  (Bad)  Lack of ministerial responsibility  E.g. Bronwyn Bishop 2015, money usage criticism  Biased speaker  E.g. 2014 Bronwyn Bishop, removed 18 labour members in an hour | Some decline |
| 45th | Malcom Turnbull | 2016 – now | (Bad)  DD in 2016  Ministerial responsibility issues | Some decline |

**The senate is weird**

* Reasons not to have a senate:
  + Not proper representation
  + They veto the will of the majority when blocking bills (the majority represented by the HOR)
  + Or they pass a bill and they might as well not be there
  + A senate can be hostile, friendly, or unfriendly
* Reason we do have a senate:
  + When federation occurred, the states insisted on equal representation in the senate, to preserve the sovereignty of the states
  + Also, the proportional voting system (used since 1950) gives more minor party representation
* Functions
  + Senate representative function
    - Strengths
      * Allows minority views
      * Better mirror representation (more indigenous and ethnic members)
    - Weaknesses
      * Malapportionment
      * Senators don’t have a direct electorate. The people don’t really have a representative in the senate that they can go to
  + Senate debate function
    - Strengths
      * No restrictions on speech or debate – no gag, guillotine, etc
      * Major parties still have strong party solidarity, but minor parties don’t as much
      * Independents are free agents
      * Question time is more effective than in the HOR and debate is serious, not just a formality
      * Provides parliament’s best investigative and deliberative venue
        + All policy areas have a ‘legislative committee’ and a ‘reference committee’
        + Legislative committees: review and scrutinise legislation
        + Reference committees: more in depth investigations
    - Weaknesses
      * Can’t introduce money bills

**Roles and powers of the Governor-General, including Sections 61, 62, 63, 64, 68, 28, 57, 72, and ‘the 1975 crisis’**

Express powers: Constitutional powers of the GG that are, by convention, exercised on behalf of the parliament. Can either be fictional (likely never to be used) or formal (power that are often used on the advice of the PM).

* Section 28
  + HOR elections every 3 years
  + Can be dissolved by GG
* Section 68
  + GG controls navy and military
* Section 72
  + Justices must be appointed by GG
  + GG removes justices, after being instructed by both houses
  + Justice can resign by writing a letter to the GG

Reserve powers: Constitutional powers of the GG that can be exercised by him at any time

* Definitely includes:
  + Appointing a PM if an election results in a hung parliament
  + Dismissing a PM when he/she loses the confidence of the parliament
  + Dismissing a PM or minister when he/she acts unlawfully
  + Refusing to dissolve the HOR
* Debatedly includes:
  + Refusing a DD
  + Withholding assent to a passed legislation (section 59)
  + Appointing and dismissing ministers

Other sections:

* Section 2
  + Queen appoints GG as representative
  + Queen assigns GG as much power as she sees fit (within constitution)
* Section 5
  + The GG decides sitting times
  + The GG may dissolve the HOR or prorogue parliament
* Section 57
  + GG can call a DD if:
    - 2 times
    - A legislation passes the HOR
    - Blocked by the Senate
    - In a period of 3 months
* Section 61
  + Executive power is vested in the Queen, and hence the GG
* Section 62
  + The GG has a federal executive council
  + GG is formal or constitutional head of government
* Section 63
  + GG in council means GG acting with advice from the federal executive council
* Section 64
  + GG appoints ministers
  + Must be members of the federal executive council

The Gough Whitlam dismissal (1975)

* What had happened to cause this?
  + Economy was in a recession, suffering from stagflation.
  + The senate blocked the money bills that would fund gov
  + Loans affair
    - Rex Connor
      * Connor was minister for minerals and energy
      * Sought out overseas loans to fund his energy resources plan
      * In 1974, the executive council approved the loan
      * 6 months later, the executive council revoked Connor’s approval
      * Connor continued to seek the loan
      * Was forced to resign several months later
    - Jim Cairns
      * Treasurer and deputy PM
      * Made matters worse by offering the middle man in the exchange a 2.5% commission
      * Also forced to resign
    - Embarrassed the Whitlam government and exposed it to claims of improper practise
* What happened on 11 Nov. 1975?
  + Whitlam threatens to call a half-senate election if the opposition does not pass the money bills
  + The HOR debates a motion of no confidence in the gov
  + Malcom Fraser is instructed to go to gov house
  + Whitlam goes to gov house and requests GG Sir John Kerr call a half-senate election
  + Kerr refuses and dismisses Whitlam
  + Kerr makes Fraser PM
  + The senate passes the money bills
  + Fraser announces that he is PM to the HOR
  + The HOR passes a motion of no confidence in Fraser
  + Parliament is dissolved
* What followed?
  + At the next election, the ALP is defeated and the Fraser Gov receives the largest majority in Australian federal political history
* Why is all this important?
  + Raised the importance of conventions, and how easily they can be ignored or overturned
  + Raised questions about the GG’s reserve powers. Express powers are only based on conventions, and the GG can constitutionally legally make any express power into a reserve power.
* Arguments in support of the decision of the GG
  + The government were guilty of mismanagement in the loans affair
  + The senate was constitutionally entitled to defer the money bill
  + The GG has the reserve power to dismiss ministers and call elections, to protect the constitution and the country
  + The labor party was defeated in the next election
  + The actions of the GG were never challenged in court
* Arguments against the decision of the GG
  + No public money was spent during the loan affair, and ministers who had misled parliament were aptly dismissed
  + An elected gov should be allowed to govern and complete its term
  + The gov had a clear majority
  + The senate shouldn’t have delayed the money bills. This is outside their constitutional powers. They can reject them, but not delay them
  + The gov still had 2-3 weeks of money left – the dismissal of the PM was pre-emptive
  + The GG should have given the PM warning
* Conventions that were broken
  + ‘Homegrown’ conventions
    - A vacated seat should be filled with a member of the same party (became a constitutional law 2 years later)
  + Westminster conventions
    - The party that has majority in the lower house forms the executive
    - The executive is responsible to the lower house, and must resign on a vote of no confidence of the lower house
    - The GG acts on the advice of the PM and cabinet

Hollingworth Affair (2003)

* What happened to cause this?
  + It is found that Hollingworth allowed a Bishop to continue preaching despite under-age rape allegations
  + And appointed a choirmaster to a church sexual abuse committee, despite abuse allegations
  + And he may have ignored warnings regarding choir master
  + A formal inquiry report finds he did act inappropriately and allowed at least one priest to continue working despite knowledge that he had assaulted children
  + A woman accuses Hollingworth of rape himself, but drops allegations
  + A letter emerges written by Hollingworth in which he writes that a 14-year-old ‘started’ the relationship with her abuser (the last straw)
* What happened to the GG?
  + Although the opposition demanded he be sacked, the PM claimed no grounds for dismissal
  + A poll finds that 76% of Australians want Hollingworth gone
  + The Queen granted permission for Howard to make the decision to fire Hollingworth or not
  + The PM will not fire him
  + The senate passes a motion to sack Hollingworth
  + Hollingworth finally resigns
* Why is this important?
  + There is no codified method of keeping the GG accountable
  + The only way to remove a GG officially is for the Queen to do it
  + There is a fixed term of 5 years (but still)
* Solution to these issues
  + A private member bill suggested that the GG should be removed by senate and HOR combined vote, but it failed to pass
  + No resolution so far

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

Prime Minister:

* Roles:
  + Coordinates policy
  + Controls cabinet proceedings
  + Cabinet admin:
    - Distribution of cabinet papers
    - Recording and keeping minutes
    - Advising departments
  + Charing meetings in the party
  + Getting along with the media
* Powers:
  + ‘First among equals’ in the cabinet
  + Distributes portfolios
  + Fires portfolio holders
  + Appoints and fires ministers
  + (Some parties have restrictions according to agreements, E.g. Liberals have to have a national Deputy pm)
  + Can minimalize debate in the party meetings
  + Chooses dates for HOR elections (and DD elections)
* Limits to power
  + Cabinet
  + Potential rivals (e.g. Gillard and Rudd)
  + Their party
  + Parliament
  + GG (e.g. 1975)
  + HC
  + Public opinion

Cabinet:

* Roles:
  + Controlling admin
  + Taking initiative in gov
  + Backing up the PM (cabinet solidarity)

Ministry:

**Roles and powers of the opposition and the shadow ministry at the Commonwealth level**

Opposition:

* Now:
  + 63 people
  + Labor
* Roles:
  + Keeping the gov responsible
  + Question time
    - With notice
    - Without notice
  + Blocking legislation
  + Media (e.g. giving speeches)
  + Amendments and voting on legislation
  + Censure motions
  + Providing an alternative gov
  + Represent their electorate
* Restrictions on roles
  + Question time
    - Gags
    - Guillotines
    - Dorothy Dixor
    - Standing orders (section 94a)
  + Reply speeches are controlled by the executive
  + Votes of no confidence/censure motions can’t really be performed because executive majority
* Impact:
  + Join forces with other minor parties in the senate
  + Opposition effects the committee stage in legislative process
  + Block bills in the senate
  + Number 1 impact is during question time

Opposition leader:

* Now:
  + Bill Shorten
* Roles:
  + To provide an alternative PM
  + To choose a shadow ministry
  + Chair weekly policy meetings
  + Alternative policies
  + To lead the party in election process
  + Must represent electorate

**Political mandates in theory and in practice, including competing mandates**

Mandates: Authority to pursue policies in parliament.

* Types of mandates
  + Majoritarian: a mandate provided by winning the majority of seats in the HOR
  + Balance of power: a mandate provided by being the members of the senate (usually – sometimes HOR) who swing the vote
  + Electoral mandate: a mandate provided by winning the majority of seats on a particular principle
* Tony Abbot example: Abbot said that he had an electoral mandate to implement carbon tax repeal legislation, as he had openly campaigned on those grounds. However, the opposition didn’t support it, and kept blocking it in the senate – this was because of their balance of power mandate.

**Lawmaking process in parliament and the courts, with reference to the influence of**

* **individuals**
* **political parties**
* **pressure groups**
* Legislative process:
  + Preparation of a bill
  + Giving notice
  + Presenting a bill to the house – first reading
  + Second reading debate
  + Consideration in detail
  + Third reading
  + Proceedings after leaving the house – tramsmission to senate
  + Senate proceedings
  + Assent
  + Disagreement between two houses - DD (s.57)
* Law making power and micro-parties
  + The balance of power in the senate is held by micro-parties
  + E.g. Palmer united party, greens, and independents like Nick Xenophon
* How the senate voting reform effected micro-party power in law making
  + Reforms went through in 2016
  + Reforms were to number above the line
  + The reforms allowed minor parties to get more representation??
* Power minor parties had in the ABCC legislation
  + David Leyonhjelm: got them to remove the “reverse onus of proof” on union officials
  + Derryn Hinch: negotiated 2 years before the bill comes into effect
  + Nick Xenophon team: rules to force companies to contribute to local economy
  + One nation: apprenticeships for WA school-leavers

**Roles and powers of the High Court of Australia, including Sections 71, 72, 73, 75 and 76 with reference to at least one common law decision and at least one constitutional decision**

* Roles:
  + Section 71: High court has judicial power. High court consists of chief justice, and at least 2 other justices
  + Section 72: appointed by GG, removed by GG on advice of parliament, constant payment, retirement age of 70
* Powers:
  + Section 73: appellate jurisdiction of the High Court.
  + Section 74: no appeal to queen in council
  + Section 75: original jurisdiction includes cases involving -
    - i) treaties
    - ii) other countries
    - iii) the Commonwealth
    - iv) state governments or members of multiple states
    - v) officers of the commonwealth
  + Section 76: other original jurisdictions include cases involving:
    - i) the constitution
    - ii) laws made by parliament
    - iii) admiralty or maritime laws
    - iv) differing laws between states
* Constitutional decision: Citizenship 7 case (2017)
  + People involved:

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
| **Parliamentarian** | **Party** | **Citizenship** | **Source** | **Ruled Eligibile?** |
| Senator Scott Ludlam | Greens | NZ | Birth | No |
| Senator Larissa Waters | Greens | Canada | Birth | No |
| Senator Matt Canavan | LNP | Italy | Descent | Yes |
| Senator Malcolm Roberts | One Nation | UK | Birth | No |
| Deputy PM Barnaby Joyce MP | Nationals | NZ | Descent | No |
| Senator Fiona Nash | Nationals | UK | Descent | No |
| Senator Nick Xenophon | Nick Xenephon Team | UK | Descent | Yes |

* + Causes:
    - Sykes vs Cleary (1992): Bill Kardamitis and John Delacartez were dual citizens of Greece and Switzerland respectively, and hence found ineligible to be in parliament under section 44(i)
    - Perth Barrister John Cameron investigated Scott Ludlam’s NZ citizenship, which caused everyone to start checking their own citizenship
    - August 8th 2017 – all of the people who found they have dual citizenship are referred by the senate to the HC
  + What was the decision and why?
    - Most MPs and Senators were unanimously ruled ineligible, because the HC read section 44(i) of the Constitution literally, to mean that any kind of foreign citizenship held, with or without knowledge or approval, counted as having foreign allegiances. Also, the HC based the ruling off of Sykes v Cleary, which set precedent for dual citizenship to be considered a breach in section 44(i) of the Constitution.
    - However, Canavan was considered to be eligible as the Italians did not consider him a citizen, and Xenophon was considered to be eligible because his status as a British Overseas citizen did not allow him benefits in the UK
  + Significance:
    - The case set up precedent to interpret section 44(i) as meaning that dual citizenship makes you definitively ineligible to sit in Parliament, whether or not you were aware or had given your consent in receiving the citizenship.
    - The decision that some parliamentarians were invalid raised questions about the validity of legislation these people voted on. Particularly in the HoR, where the executive only held a slight majority, the vote of a person who was there in violation of the constitution could have been a deciding vote on legislation.
    - The case caused a by-election to fill the seats of parliamentarians ruled invalid.
    - The case is also a prime example of how the High Court holds parliament accountable for their actions, and how the judiciary in our system of government is entirely separate from our legislative.
* Common Law decision: Norrie v the NSWRBDM (2013)
  + Causes:
    - Norrie transitioned from biological male to a woman, then adopted a non-binary identity
    - In 2010 Norrie applied to the NSWRBDM to be registered as “sex not specified”, and was accepted
    - 4 months later, a letter from NSWRBDM said this had been an error
    - Norrie appealed to the NSW court of appeals, which ruled in Norrie’s favour
    - The NSWRBDM appealed to the High Court to re-hear the case
  + What was the decision and why?
    - The judges decided Norrie could not be recorded as “male” or “female”, but rejected the idea zie should be in a special category. Rather, they accepted the category “sex not specified”
    - Importance: “For the most part, the sex of the individuals concerned is irrelevant to legal relations,” except for the Commonwealth Marriage Act
    - The Births, Deaths and Marriages Registration Act 1995(NSW): Although the judges decided “male” and “female” were, in fact, the only recordable genders, they decided the Act does not imply anyone should be wrongly registered as “male” or “female”, especially as the applicant specifies their own sex. Also, section 32DC of the Act empowers individuals to legally change their gender
  + What is the significance of the case?
    - Provides precedent for a similar decision to be made in other states
    - Legally affirms the existence of people who are neither male nor female
    - Displays the High Court’s power to make final binding decisions on disputed cases.

**Federalism in Australia with reference to**

* **constitutional powers of State and Commonwealth parliaments, including exclusive, concurrent and residual powers, Sections 51, 52, 90, 107 and 109**
* **financial powers of the Commonwealth Parliament, including taxation power, tied or special purpose grants, including Sections 51(ii), 87, 90, 92 and 96**
* **change in the balance of power since federation, with reference to**
* **financial powers, including vertical fiscal imbalance and horizontal fiscal equalisation, the Grants Commission**
* **referral of powers Section 51(xxxvii)**
* **the Council of Australian Governments (COAG)**
* **co-operative federalism as opposed to coercive federalism**
* **High Court of Australia constitutional interpretation, including external affairs power Section 51(xxix), corporations power Section 51(xx), and taxation powers**
* Exclusive powers: commonwealth
  + Section 90 – customs, bounties, and excise tax
    - Caused a VFI
    - Fixed by section 86: control of customs, bounties, and excise, and section 87: states money has to be payed to the states for 10 years after federation (but kept goin)
  + Section 52: power to legislate over various stuff
* Concurrent powers: commonwealth and states
  + Section 51: concurrent powers
* Residual powers: state only
  + Section 106: constitutions still apply
  + Section 108: Laws still apply
  + Section 109: but commonwealth wins
* Link between exclusive and residual powers
  + Section 96: tied grants
  + Section 92: free trade between states
  + Section 205a: state debts
* Co-operative federalism vs coercive federalism
  + Co-operative federalism
    - When the two branches of gov work together to legislate
    - COAG works to make legislation more uniform between states and commonwealth, as this increases efficiency
    - States get equal say in these legislation to the commonwealth
    - E.g. Company law, transport regulations
  + Coercive federalism
    - When the commonwealth manipulates the state gov to their benefit
    - E.g. in 2015, the Abbott government reduced funding for the states’ schools and hospitals to force them to agree to higher GST and a medicare levy. This was within COAG, so clearly COAG doesn’t work perfectly

**Formal and informal methods of constitutional change and their impact**

* **referendums, including Section 128**
* **High Court of Australia decisions**
* **referral of powers**
* **unchallenged legislation**
* Referendums to change federal balance
  + Section 128: how to change the constitution formally (referendum)
    - Both houses have to agree on question
    - National vote is held
    - Needs more than half of the original states to vote yes overall, plus an overall yes by all voters
    - GG needs to sign off
  + Referendums that made an impact
    - State debts (1910)
      * Altered section 105
      * Allowed commonwealth to take over state debts whenever they incurred
    - State debts (1928)
      * Disallowed states to borrow money, except through a commonwealth-controlled loan council
    - Social services (1946)
      * Altered section 51
      * Allowed the commonwealth to legislate easily on social services, not just monetarily, but for any benefits
    - Aboriginals (1967)
      * idk
    - Republican (1977)
      * Idk
* Other ways federal balance is changed
  + Section 51 (xxxvii): allows states to transfer areas of responsibility to the commonwealth – not the other way round
    - E.g. Murray Darling Basin Water policy (QLD, NSW, VIC, SA), non-metropolitan railways (SA, TAS)
    - Not major though
  + Unchallenged legislation
    - The commonwealth gov makes legislation in areas they shouldn’t according to the constitution, but since the state gov doesn’t challenge it, it becomes law
    - E.g. CSIRO
    - Not major
  + HC decisions
    - Section 76: The HC can interpret the constitution
  + The VFI, the HFE, and tied grants
    - Section 96 says tied grants are okay
    - First used in 1923. Taken to the HC by VIC, but passed. Whitlam used tied grants in particular
    - 45% of grants are tied
    - Major
  + External affairs
    - Section 51 defines external affairs
    - E.g. Tasmanian River was going to be dammed, but World Heritage said no, and the HC said that fell under external affairs

**The ABCC legislation (2016) and the DD**

* The ABCC
  + The Australian Building and Construction Commissions
  + It investigates ‘registered organisations’ such as trade unions
  + Aims to monitor and maintain appropriate standards of conduct in the building and construction industry
  + It would impose the same disclosure and transparency obligations on union officials as company directors
* The legislation
  + Aimed to replace the ABCC after it was closed down ages ago
* Double Dissolution