**UNIT THREE**

**C o n s t i t u t i o n a l C h a n g e**

definitions

*constitutional change:* any change to the actual words and/or effect of the constitution

*formal constitutional change:* change to the actual words of the constitution (referendum)

*informal constitutional change:* change to the effect/interpretation of the constitution

*explicit/specified constitutional rights:* freedom/entitlement explicitly expressed in the constitution

*implied constitutional right:* freedom/entitlement inferred from the constitution’s meaning

formal constitutional change

* achieved through referenda, established in section 128
* example of direct democracy as citizens must approve the change to law
* protects smaller states from larger ones (federal characteristics)

*referenda process*

* must pass as a bill and receive royal assent
* must be put to the people not less than two months but no more than six months after it passes through parliament
* must receive a double majority (majority of voters and majority of states)

*referenda history*

* eight of forty four proposals have succeeded
* 1906 senate elections
* 1910 & 1928 state debts
* 1946 social services
* 1967 aborigines
* 1977 casual senate vacancies, territorial voters, & retirement of judges

*factors increasing the success of referenda*

* they only propose minor technical changes
* they are not seen as a grab for power from the government
* they are seen as morally correct or the right thing to do
* they have bipartisan support and support from the states
* they do not generate strong ‘no’ campaigns and therefore have limited funding

*factors decreasing the success of referenda*

* consequences may be unforeseeable
* voters may not see change as necessary
* apathetic voters
* distrust and hostility towards politicians

*case study of a successful referendum (1967 aborigines)*

* altered section 51(xxvi) to allow parliament to make laws for aboriginal people and removed section 127 so aboriginal people were counted in the census
* had bipartisan support and support from the states
* seen as morally correct, especially with the civil rights movement in america
* had support from various pressure groups and lacked an organised ‘no’ campaign
* democratically supported through street marches and direct action
* achieved 90% of the national vote and 6/6 states (highest ‘yes’ vote in history)

*referenda evaluation*

* the only formal way to alter the constitution
* historically, most referenda do not pass
* expensive process
* limited impact on the operation of the constitution

informal constitutional change

* changes the effective meaning of the constitution
* does not change the actual text of the constitution

high court interpretation

* power for the high court to interpret the constitution is established in section 76
* arises when meaning or words of the constitution are disputed and must be interpreted

*explicit constitutional rights*

* limited due to australia’s evolutionary history with no focus on rights protection
* most secure as they are immune to executive and legislative change

⤷ section 80 - right to trial by jury for federal indictable cases

⤷ section 116 - prevents australia from having an official religion (religious freedom)

⤷ section 117 - prevents discrimination on the basis of state residence

*implied constitutional rights*

* must be discovered through an activist interpretation
* discovered when a case comes before the high court, the meaning of the constitution is examined, the high court makes an activist decision, and the right is created and applied

*implied constitutional rights example (right to political communication)*

* established in australian capital television v commonwealth (1992) after a section of the political broadcasts and political disclosures act 1991 was struck down
* upheld in theophanous v herald & the weekly times ltd (1994)
* upheld in lange v australian broadcasting corporation (1997)

*high court evaluation*

* most significant factor in changes to the operation and effect of the constitution

referral of powers

* section 51(xxxvii) allows the states to refer their residual and concurrent powers to the commonwealth
* allows the constitution to keep up to date with a fast changing world

*examples*

family law - referred by all states except wa between 1986 and 1990 to encompass more diverse forms of family

consumer credit law - referred by all states in 2007 to regulate consumer credit at a national level in order for better coordination and state equality

criminal law - referred by all states in 2002 to quickly deal with respond to terrorism crises following 9/11

*referral of powers evaluation*

* limited impact but has allowed the constitution to adapt to contemporary needs

unchallenged legislation

* law that does not reference a head of power in the constitution but remains unchallenged in the high court
* must be judged by the high court only and decisions are ex post facto (cannot act proactively, disputes must be brought before the court)
* a party must have a special interest or connection to the law (standing/locus standi) in order to bring a case before the high court

*example (commonwealth scientific and industrial research organisation)*

* nation’s most important institution for the development and application of science and technology to real world issues
* established by the science and industry research act 1949 but has no constitutional head of power
* has never been challenged and therefore continues to operate

*example (snowy mountains scheme)*

* largest engineering project in australian history designed to achieve economic and population growth
* established by the snowy mountains hydro-electric power act 1949 under the defence power in section 51(vi)
* has never been challenged and therefore continues to operate

*unchallenged legislation evaluation*

* successful but minor way to keep the constitution up to date

quizlet

<https://quizlet.com/_7ha2w8>

example essay structure

introduction - discuss the constitution as superior law, introduce methods of constitutional change, strong thesis with argument

paragraph 1 - referenda and evaluation

paragraph 2 - high court and evaluation

paragraph 3 - referral of powers and evaluation

paragraph 4 - unchallenged legislation and evaluation

conclusion - restate points and examples, strong finish with evaluation

practice essay questions

“referendums are the only formal means of constitutional change and have therefore had the greatest impact.” evaluate the validity of this statement. {25 marks}

“all constitutional change results in a shift in the federal balance.” assess the validity of this claim. {25 marks}