**Functions of Parliament:**

Justices in the high court: There are 7 justices in the high court. And they must retire by 70.

The High court of Australia: The high court was modelled on the US Supreme Court, acting as both a constitutional court with jurisdiction over the Commonwealth Constitution and the final court of appeal for all matters. **These are established in Sections 73,75 & 76.**

Section 73 (appellate jurisdiction): The High Court determines appeals from any Australian Court – federal, state or territory. Decisions of the high court are final, and there is no guaranteed right to appeal to the high court of Australia, special leave to appeal must be granted.

Section 7 of the Constitution: Section 7 establishes and defines the senate. It establishes the states’ house. Senators are to be directly chosen by the people of each state. Each state is to be equally represented, senators are to serve a 6-year term.

Section 24: Creates and defines the House of Representatives establishes the people’s house. Members of the house of reps are to be directly chosen by the people. Members shall be in proportion to their population. Senate to be approximately ½ the size of the house of reps. Original states are to have a minimum of 5 representatives.

Section 51: The longest section of the Commonwealth Constitution with 40 subsections. This section outlines the legislative powers of the Parliament. These are the concurrent powers shared with the states. This is not a complete list of the Parliament’s powers.

Section 53: Creates equality in our bicameral parliament except for the creation of money bills – these must originate in the House of Representatives.

Quick review: Parliament is a representative body that has responsibilities that include the initiation & passage of legislation. The Australian CW parliament consists of the Queen, the Senate & the house of representatives. In Australia we expect parliament to represent the people, to debate the issues of public matter, to make the laws, and to both make and break the government. These expectations can be used to assess the effectiveness of federal parliament.

Legislative power: The power to make statues. A statute is a law made by a legislature. Section 1 of the Australian Constitution creates a bicameral Commonwealth Parliament composed of a House of Representatives, a Senate and the Queen (or her heirs and successors). The inclusion of the Queen is a result of Australia by having been a British colony. The monarchy and its representatives in Australia, the Governor General, play a minimal role in the legislative process. In Australia, the monarch is represented by the governor general, and is the head of state. The two houses have almost identical powers except that the Senate cannot initiate or amend money bills. Section 53 of the constitution imposes this limitation.

Statutes are universal and powerful laws. They are the primary tool of power because they control social, economic, and other aspects of society. In a democracy, statutes must reflect the will of the people. Sections 7 and 24 of the constitution make Australia a representative democracy by requiring both houses of parliament to be “directly chosen by the people”. These two sections help achieve political representation and popular participation in lawmaking.

The constitution creates a federal nation, one in which there is a division of government powers between one national and six state governments. Federalism divides sovereignty geographically and results in limited sovereignty for the national parliament. The commonwealth parliament can only make statutes in area of national concern specified and enumerated in the constitution. Specific powers are written in the constitution and are called heads of power. For example, section 51(ii) is a financial head of power for taxation, while Section 51(xxix) external affairs is a legislative power.

The commonwealth parliament makes laws authorised by a head of power. Laws that are seen to be beyond the power (ultra vires) allowed by the Constitution may be challenged in the High Court. In this respect, the Commonwealth Parliament is similar to the US congress because both operate within a federal system. By contrast, the parliament is similar to the US congress because both operate within a federal system. By contrast, the Parliament of the UK operates as a unitary system without a written constitution defining its powers and thus enjoys a wide-ranging parliamentary sovereignty.

The Australian Constitution only specifies the institutions and powers of the legislative branch. It is silent about lawmaking and other processes and procedures. Instead, it grants parliament power to make its own rules, called standing orders.

Executive power: Executive power is the power to carry out or execute laws by developing polices and implementing statutes. Executing statutes is done by a wide range of elected officials (called politicians), agencies and government employees. All the people and institutions involved in executing statutes make up ‘the government’.

The executive branch includes the Queen as represented by the governor general, the Prime Minister, the Cabinet (senior ministers) and the ministry (which includes junior and assistant ministers). It includes the tens of thousands of public servants working in government departments and other agencies tasked with the day-today implementation of statutes.

Section 61 vests the executive power of the Commonwealth in the Queen and her appointed representative in Australia, the Governor-General. A constitutional or formal executive is therefore created by section 61. However, the Crown’s specific constitutional powers are almost completely limited by unwritten Westminster conventions. The most important of these is that the Crown exercises its power on the advice of elected officials. Note that this convention makes the monarchy a constitutional monarchy.

The Governor-General fulfils the Queens role in executing statutes by using constitutional powers only when advised by members of the cabinet – the elected officials comprising the political executive.

The Queen – as represented by the governor general is the head of state. The head of government is the prime minister. Westminster systems separate these roles.

The constitution makes almost no mention of the political executive, which wields real power. The political executive, commonly known as the government is comprised of:

* A cabinet made up of the Prime Minister and Senior ministers.
* An outer ministry made up of junior ministers and assistant ministers.

The political or real executive is formed according to unwritten Westminster conventions. The most important of these conventions is that the government is formed by the party which has the majority of seats in the lower house, The house of Representatives. The PM is the leader of that party and chooses Cabinet ministers from amongst elected members of parliament.

Australia’s founding Fathers chose this system to entrench the parliamentary executive characteristic of the Westminster system.

Section 64 of the Constitution entrenches a parliamentary form of executive by ensuring that ministers must be members of parliament. Constitutional conventions require that as a collective group, they must command the support (or confidence) of the lower house of parliament.

Westminster conventions of responsible government and Section 64 of the Constitution create a structural fusion of the legislative and executive. This fusion is a point of significance difference between the Australian and the US systems of government.

The executive branch also includes the public service, comprised of government departments, agencies and statutory authorities. The public service can be thought of as the administrative executive because it administers statutes and regulations.

Australia’s written constitution is minimalist with reference to creating and defining these executive institutions. Most of the constitutional rules which govern the operation of the executive branch are not written in the Constitution, but found in unwritten constitutional conventions inherited from the British Westminster system. The British Westminster system evolved over many generations, and with it, a set of conventions and traditions developed.

Judicial power: Judicial power is the power to adjudicate and to make legally binding decisions. It is the power to make decisions about rights and obligations by interpreting and applying statutes and common law. Courts decide disputes. Their decisions are legally binding on the parties concerned and may create new law.

Cases are disputes between parties where courts use judicial power to interpret and apply laws to a particular case. There are other forms of dispute resolution, but adjudication by a court is final – its decision is legally binding on the parties involved in the case.

Jurisdiction means ‘where the law speaks’. The types of cases heard by courts depend on a court’s jurisdiction. Australian jurisdiction is arranged both geographically and by areas of law. State and federal court hierarchies are made up of inferior, intermediate, and superior courts.

Courts interpret various types of law, including statutes (Acts of parliament), common law and in the case of the high court, the constitution.

Section 71 vests the judicial power of the Commonwealth (federal jurisdictions) in the High Court and “in such other federal courts as the parliament creates”. The High Court is the nations highest court. Section 71 also grants the parliament an executive power to make other federal courts. Newer federal courts created under section 71 include the family court (created 1976) and the federal court of Australia (1986).

The constitution creates a strict separation of judicial power, which follows the US system rather than the UK. Because Australia is a federation, the high court is modelled closely off the Supreme Court of the USA. For example, both courts have jurisdiction over the constitution and the division of powers. They are also both the last court of appeal, or to hear disputes.

The constitution only deals with federal and not state courts. This feature reflects that Australia is a federal nation, in which it judicial power is divided geographically.

Functions of parliament:

**Representative function** – It represents the people of the nation.

**Legislative function** – Makes statute law, both money and non-money acts.

**Responsibility function** – Holds the executive government to account.

**Debate function** – It’s the nation’s premier forum for the discussion of issues.

These functions are not discrete and separate, but overlap as the Parliament goes about its business. The exercise of these powers is either specified and enumerated (numbered) in the Constitution or governed by the conventions of the Constitution.

The Washminster hybrid system is: A blend of the Westminster system of responsible parliamentary government and the American system of federalism.

Commonwealth parliament: The Commonwealth Parliament consists of three parts.

1. A lower house, or House of Representatives, modelled on the British House of Commons.
2. An upper house, or Senate, based on the US Senate.
3. The crown, with constitutionally limited powers adopted from Britain.

Commonwealth parliament: Combining constitutional ideas from Britain and the US has consequences for the functions of the Commonwealth Parliament e.g. The crown is part of both parliament and the executive creating a fusion between the two branches. This is not a factor in the US. This means that in Australia both forms the executive and holds it to account.

Text

Description automatically generatedThe federalism part of Washminster:

The Westminster part of Washminster:

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Washminster issues: The blending of these two systems has led to many commentators to argue that there has been a decline of parliament thesis. This looks at the theoretical views on how the Australian Parliament should carry out its functions based on historical practices vs the reality of the actual practice of these functions in parliament today. Westminster theory stems from the British ‘Golden Age of parliaments’, which has developed over centuries.

In contrast, Australia’s Commonwealth Parliament has evolved and adapted to its national context since 1901. It practices its functions in ways that reflect its origins, purpose and context.

Representing electorates in theory: Parliament is supposed to be the elected assembly of the representatives of the people members of the house of reps represent smaller electorates. Members of the Senate represent a larger area. Representatives should put forward the interest of their constituents (delegate representative) and make judgements about their constituents best interest for which they will be held to account at the next election (trustee representation).

Delegate – A member of parliament is the mouthpiece of the people who elected them. They simply represent their constituents’ values and concerns in parliament. Delegates ensure their constituents voices are heard in the legislature.

Trustee representation – Members of parliament make judgements about their constituents best interests. Members of parliament do not communicate continuously with their constituents to gauge their views. Instead they use their judgement to decide the best interest of their electorate.

State representation – The Senate represents the six sovereign states at the national level. Each state – regardless of population – is equally represented in the Senate and has a voice in national government. The NT and the ACT are also represented in the senate, but with less seats than the states.

Representing electorates (in practice): Political parties- most electors identify with a party rather than an individual member- called party allegiance. There are leader-centric politics rather than policy-centric- Australian politics has become more presidential- eg Morrison v Shorten. Independent members can overcome leader-centric politics and function as trustees and delegates- eg Chaney. Examples of MPs acting as trustees/delegates: Zali Steggal, Helen Haines, Nationals MP George Christensen. The Senate is supposed to be a ‘states house’ but Senators rarely act based upon their states wishes and usually act as ‘partisans’ or party representatives. However, it is better able to provide mirror representation than the HoR. In theory the Senate is a house of the states but in practice it has always been a partisan houseFederation-1918- First past the post- in both houses caused a 2 party system. Preferential voting- creates a 2 party system- eliminates most minor parties and independents. Senate- Proportional representation- better mirror representation in Senate than in the HoR- reduced threshold of winning a seat. Proportional- greater cooperation and can select less conventional candidates. Preference deals- put the power back into the electors hands. 6 year terms can increase their resistance to party discipline – can risk breaking with their party on important issues. Party rooms- George Christensen example- banking Royal Commission.

Party room: Members of parliament debate issues within their party room. A party room is a meeting of MPs and Senators belonging to a political party. Parties make decisions, either by consensus among members or by the leadership team imposing its will. Once made, party members are expected to support the decision. They vote in support of their party on motions and votes in parliament. When members find their party’s policy conflicts with the interests of their constituents, they may break ranks and act as a delegate or trustee in defiance of party discipline.

An example party member breaking party discipline: Nationals MP, George Christiansen, who acted in the interests of his constituents by supporting the 2017 Hayne Royal Commission into Misconduct in the banking, Superannuation and Financial Services Industry. The coalition parties (Liberal and Nationals) opposed the Royal Commission, which had of been promoted by the ALP opposition. Christensen represented farmers and others in the Queensland electorate of Dawson. Many of his constituents had suffered repossession of their farms and properties allegedly due to corrupt banking practices. Christensen forced the Coalition parties to change their policy and support the Royal Commission by threatening to cross the floor and vote with Labour Opposition. In this case, Christensen acted as a delegate/trustee rather than a partisan representative. However, this is quite exceptional in contemporary politics.

Legislative function (in theory): The commonwealth Parliament is the national legislature. Therefore, elected representatives are also legislatures. Their role includes creating statutes authorised by legislative and financial heads of power in the Constitution.

Statutes in theory:

1. Are well scrutinised through speeches, debates and in-depth analysis by parliamentary committees.
2. Have diverse input from the people’s elected representatives.
3. Can be initiated from any member of parliament, including those serving in the executive, as well as private members. Private members are all members of parliament whp are not part of the executive. There are government bills and private members bills.
4. Follow the statutory process derviced from British practice. There are many stages to this process, but the following, in particular, involve in-depth scruitiny of a bull and an opportunity for the representation of diversity. The key steps include:
   1. The second reading:
      1. Second reading speech informs parliament of a bills purpose and necessity. The member introducing the bill makes a speech recorded in Hansard.
      2. Second reading debate provides members of parliament with the opportunity to represent their electorates when making laws. All members have the opportunity to ‘speak to the bill’. Hansard records these debates.
   2. The committee stage provides opportunities for expert advice and detailed non-partisan work on bills. During this stage, called consideration in detail in the House of Representatives and committee of the whole in the Senate, bills are scruitinised line by line. Committees may consult professional or expert advice and the community. Committee members may travel to assess the impact of a proposed law on specific communities.

The senate is a house of review. The senate repeats the entire statutory process, emphasising the impact of a proposed law and how it may affect peoples rights. In theory, the statutory process is deliberative. The exhaustive process ensures that statutes are technically well crafted, representative and do not infringe rights.

Legislative function (in practice): The parliament is a very efficient legislative machine. The 45th parliament sat for a total of 105 days between 2016 and June 2018. In that time, 265 bills passed the Senate. By these statistics, the 45th parliament passed an average of 2.5 bills per sitting day.

Parliamentary – as opposed to presidential – executives can dominate votes I n the lower house of a Westminster style parliament, especially if they are majority governments. Consequently, the executive can dominate the legislative function in the Australian house of representatives. Governments often use their power over the House of Reps to force through government bills. The following tactics can speed up the passage of a bill in order to pass legislation quickly.

* Gags.
* Guillotine.
* Flood gating bills.

**Gagging the second reading debate –** During a bills second reading debate, the government may instruct one of its party members – either a minister or a private member – to move a motion putting the bill to a vote. The government then uses its majority then uses its majority to pass the motion, ending further debate. Members who were listed to speak lose the opportunity to do so. An example of a gagged bill is the Morrison governments fair work Amendment 2019. The coalition Government policy of cracking down on unions required new laws to be implemented. The ensuring integrity bill of 2019 passed in the house of reps, but unfortunately was unexpectedly rejected by the Senate in late 2019. Following the Senate’s rejection, the government reintroduced the bill into the House, this time including amendments demanded by senator Jaqui Lambi. Rather than allow debate on the amendment bill, the government used its majority in the House of Representatives to gag debate. It then voted the bill through the House. The Albanese Opposition was furious but being denied the opportunity to scrutinise the bill.

**Guillotining the debate –** Before a debate commences, the government may move a motion limiting the time allocated for debate. Debate ends when the time limit expires, that is the guillotine falls. Again, the government can manipulate debate because it has the controlling vote in the house.

**Floodgating bills –** The government may introduce many bills simultaneously into the House of Reps, which can overwhelm the deliberative stages if the statutory process, which need time to allow members to consider bills in detail. Floodgating is used with gags and guillotines to push legislation in lawmaking. A consequence of so-called ‘executive dominance’ of the lower house is the dominance of one view in lawmaking – the governments view. The government introduces an overwhelming number of bills. They originate from Cabinet as ministers propose new laws to implement government policy, such as the Ensuring Integrity bill 2019. As the government carries out the law, it may discover issues with the operation of particular laws. T address that issue, they create new bulls which aim to fix existing statutes. Very few private members’ bills get past the second reading stage. The government can use its numbers to end debate indefinitely, stalling the bill in the house of reps. The House Selection Committee examines all bills introduced into the house. The government can control the selection committee, as it can all House of Reps committees. The selection committee usually rejects bills the government opposes.

**Dealing with bills in the House of Reps:**

There are two pathways for a bill. The House Selection Committee will decide which of these two pathways it will follow through the lower house.

1. The controversial or complex bills – Usually orginating from government attempting to legislate for its policies. They pass through the House in the usual way. They follow the full statutory process, but are subject to gags and guillotines that may both speed them up and reduce effective scrutiny as well as democratic input.

Most votes are decided ‘on the voices’, but formal votes require division. In a division, members of parliament vote by moving to the left or right side of the speaker.

1. Uncontested bills pass through the federation chamber. All MPs are members of the Federation Chamber. Bills progressing through this chamber receive less debate and scrutiny and pass quickly. The federation chamber operates by agreement, there can be no formal divisions. Bills which require debate or have a division return to the house.

Having two legislative pathways means the House of Reps can deal with bills very quickly. Bills that both the government and opposition support, such as small amendments to administrative law, can pass without slowing down House deliberations on complex or contested legislation.

**Dealing with bills in The Senate:** All bills transmitted from the HOR to the Senate pass through to the Senate Standing Committee for the Selection of Bills which determines whether they should go to legislative committees for detailed examination or if they can pass the Senate quickly. Classifying bills in this way ensures both efficiency and scrutiny. The executive is usually less dominant in the Senate. Only rarely does the government achieve a majority in the Senate. Gags, guillotines, and flood gating are less common here than in the house of reps. Opportunities for legislative scrutiny and debate are less often cut short. The government does not dominate and control Senate committees either. They are composed of Senators drawn from the various parties in proportion to their representation in the Senate. Consequently, Senate committees have greater scope to debate and scrutinise bills. The varied composition of the Senate contributes to the democratic diversity of representation in legislation, which is an essential aspect of legislating in a democracy. The government can rely on its majority in the House of Reps to pass its bills with ease. In the Senate, it must negotiate to bring about a majority for every piece of contested legislation. Creating Senate majorities involves consensus and compromise. Agreeing to amendments can accommodate non-government Senators, win their support and often improve government bills.

Standing orders: Permanent rules covering the conduct of the business of parliament e.g. debate, the ways the Presiding Officer can maintain order & voting procedures in the chamber. The constitution gives power to each house to make its own rules. Enforced by the presiding officer of each house- Speaker HoR and President of the Senate.

Minority government: A government formed by a party which controls less than 76 seats in the House of Representatives & must rely on the support of non-party MHRs on motions of confidence & supply.

Ministerial statements: Used to inform parliament of policy or other issues/decisions relating to a Minister’s portfolio.

Question time:  A daily period of time set aside during parliamentary debate for backbenchers to ask Ministers questions without notice. (approx 1 hr each sitting day).

Vote of no confidence: The House of reps withdraws its support for the government. By convention, the government must resign upon a successful no confidence vote.

Censure motion: A parliamentary motion that is highly critical of a minister. Can be used to call for a minister’s resignation.

Committee: A small cross-party group of members of parliament that inquires into specified matters & reports back to the parliament.

Role of Committees:

* Scrutiny of legislation
* Scrutiny of govt expenditures
* Investigating policy issues or community issues
* Maintaining the procedures & operation of parliament

NOTE: A committee has only the powers assigned to it by parliament!

Types of Committees: There are 3 types of committees:

**1. Select committee =** carry out specific short-term tasks.

**2. Standing committee =** permanent with specific areas of expertise.

**3. Joint committee =** members from both houses of parliament.

Responsibility function (in theory): Australian governments are drawn from, and responsible to the parliament. Westminster government is called responsible government because the executive is responsible to the lower house of parliament. Other names for this type of government are:

* A parliamentary executive because the government is formed of ministers who must be members of parliament.
* Cabinet government, because ministers belong to an executive committee called Cabinet, led by a first or prime minister.

Responsible government relies on unwritten conventions. In short, parliament makes and breaks the government according to Westminster conventions. The major conventions of responsible government are:

1. A government must maintain the confidence of the lower house. In practice this means a vote of no confidence by House of Representatives will dismiss a government
   1. This relevant convention is collective ministerial responsibility, which holds a government responsible to the lower house.
2. The individual ministers may be dismissed by parliament through a censure motion.
   1. This relevant convention is individual ministerial responsibility, which holds ministers to account for the lower house for their conduct and competence, and the performance of their department.
3. Cabinet operates in secret and speaks as one.
   1. The convention of cabinet secrecy binds ministers and cabinet staff. The cabinet room itself is a highly secure room, windowless with sound insulation. Security services regularly check it for listening devices.
   2. The convention of cabinet solidarity permits ministers to debate government policy in cabinet and allows different views to be voiced. However, once cabinet decides, it binds all ministers. Ministers must publicly support cabinet decisions even if they disagree with them. If they cannot, they must resign from Cabinet.

Ministers must answer questions put to them by any member during question time. They must not mislead parliament while answering questions. Question time is a significant accountability procedure. Members of parliament may ask questions without a notice, to which a minister will respond verbally there and then. Alternatively, a minister may take a question on notice if the answer is complicated and requires advice from the minister’s department. Answers to questions on notice are provided to the house later, usually in writing. According to Westminster conventions, misleading parliament will lead to the censure of the minister.

Another way for it to hold a government accountable is for parliament to scrutinise government spending. A government can only spend money authorised by parliament. The annual budget and other appropriations (money) bills are the means by which parliament monitors government spending. Money bills follow the same statutory as all other bills, including debates and scrutiny by parliamentary committees. Money bills allow parliament to examine executive activity through the approval of government spending. Parliament has many standing and select committees. Members of parliament form parliamentary committees. Even though they are parliamentarians, ministers cannot belong to the committees – this is an example of the separation of powers. Parliamentary committees have a strong investigative power and may inquire into matters relating the government.

Note that ministers may belong to executive committees, not parliamentary committees. Cabinet is the main executive committee.

Responsibility function (in practice): The party that wins a majority of House of Reps seats forms the executive government, and its leader becomes the PM. In practice, the supremacy of disciplined political parties means the governing party will seldom lose a vote of no confidence or censure motion, rendering the ministerial conventions on accountability inoperable.

**Majority + party discipline = Executive dominance in the House of Representatives.**

Executive dominance of parliament explains why the responsibility function of parliament does not operate according to Westminster theory in the Australian parliamentary system. Motion of no confidence and censure motions have negative consequences for a government in the House of reps. However, a majority government can always defeat them by a bloc vote of its party. Censure motions have been successful at times in the Senate, where governments tend to be less dominant. However, they lack authority in the Senate and have little consequences.

The executive’s dominance of the House of Representatives means the conventions of individual and collective ministerial responsibility are ineffective in practice. So long as a government can enforce discipline on its party members, it will never lose a critical vote on the floor of the house. A minority government may not be able to exert dominance on occasion but majority government is the norm in Australia and so is dominance by the executive.

There are rare occasions where no party wins a clear majority of House of Reps seats. The preferential voting system tends to aplify a small majority of seats, which is a phenomenon known as the winners bonus. Historically, a hung parliament has been infrequent in Australia.

* A majority government is one where a single party, or a united coalition of parties wins a clear majority and can govern in their own right. In practice, this has been by far the most common form of government in Australia.
* A minority government may form in a hung parliament where no party wins a majority of House of Representative seats. After an inconclusive election, the larger parties may negotiate with other parties and independents. They will be hoping to secure their support to form a government. They need confidence and a money supply to do so. If they are successful in obtaining confidence and supply, then a minority government may be formed.

Example of minority government: The Gillard Government (2010-2013) and the Morrison Government (2018) are examples of minority governments that were subject to much greater scrutiny by parliament because they could not command a majority in the HoR

The case study of Medevac shows how losing the seat of Wenthworth to an Independent and the resignation of Julia Banks MP from the Liberal Party impacted the Morrison Government’s control of the house.

A minority government is uncommon in practice, but declining voter support for the major parties may deliver it more often in the future.

Censure motion in senate example: In 2015, the senate censured senator George Brandis. ALP Senator Penny Wong moved the censure motion against Brandis for his role in attempting to force the resignation of Human Rights Commissioner, Gillian Triggs. Though the censure was successful, it had little impact on Senator Brandis because the Westminster system has no convention for an upper house censure.

Medevac case study: Malcolm Turnbull resigned from parliament immediately after he lost the prime ministership in August 2018. His resignation created a vacancy in the Sydney electorate of Wentworth. A by-election was necessary to fill this vacancy, and its constituents were typically liberal voting. Indeed, the electorate had been held by Liberal party and its predecessors since federation. Many Wentworth electors were upset by how their pervious member, former PM Turnbull, had of been treated by his party. Additionally, they were concerned about the Coalition’s offshore detention policy for asylum seekers and refugees. There had been cases of self-harm and a string of severe physical and mental health issues amongst the detainees.

Professor Kerryn Phelps nominated as an independent candidate in the by-election. Phelps is a medical doctor, former head of the Australian Medical Association, and an advocate for better medical treatment for asylum seekers and refugees.

By electing Phelps in November 2018, the electors of Wentworth had chosen a representative and legislator who could use the balance of power in the House of Representatives to hold the parliament to account in its legislative role.

On the 27th of November, Julia Banks (liberal) announced she was resigning from the Liberal Party and would sit on the crossbench as an independent alongside Phelps and other Independents until the end of her term. Banks had of become dissolution by the conduct of her party colleagues during the Turnbull affair. Phelps’ victory and Banks’ resignation cost the Morrison Government its majority, forcing it to govern as a minority government, relying on the support of non-liberal MPs to stay in office and pass bills and motions. More importantly, the government could no longer count on winning gag and guillotine motions or defeating other motions moved on the floor of the HOR.

As the delegate/trustee of her Wentworth constituents, Phelps introduced a private member’s bill called the Migration Amendment (Urgent Medical Treatment) Bill 2018 on the 3rd December 2018. This is known as the medevac bill. Her private member’s bill would allow gravely ill asylum seekers and refugees held on Manus Island or Nauru to apply for medical evacuation to Australia if Papuan or Nauruan facilities could not provide adequate care. The proposed law would require two independent Australian doctors to approve an application for medical evacuation. A medical approval would compel the Home Affairs Minister to bring the sick person to Australia. The minority government opposed Phelps’ Medevac bill and was able to convince the other Independents to vote with the government in the House of Reps to prevent the bill proceeding beyond its second reading.

Meanwhile, in the final sitting week of 2018, the opposition and other senators used Phelps’ private member bill as the inspiration for amendments to the government’s Home Affairs Legislation Amendment Bill 2018, which replicated the Phelps bill and would enshrine Medevac in law. A bill passed by the House of Reps and amended in the Senate must be returned to the HOR for amendments to be agreed upon. When the Home Affairs Bill returned to the HOR, the government opposed it. However, since the bill first passed that house the balance of power in the lower house had of shifted against the government. An amended government bill passed in the House of Reps against the wishes of the executive. The passage of the Home Affairs Bill had made history. It was the first time in 80 years a government had lost a legislative vote in the House of Reps.

**How is the useful?** When the HOR approved the Senates amendments to the Home Affairs Legislation Amendment Bill 2018, the parliament was seen to respond to the concerns of electors in Wentworth – and all other electorates represented by MPs who supported the bill. In this way, when the electors in a by-election had held the parliament to account in its legislative role by bringing about a change in the balance of legislators willing to support a change in law. The case study illustrates how the parliament carries out its representative and legislative functions. The circumstances were unusual because the by-election had of created a minority government. Nevertheless, the example shows how an MP – as a delegate or trustee – represent their constituents’ concerns and translate that representation into legislation. The case study also demonstrates how parliament may function in the absence of a dominating executive.

Breaking the government theory: The convention of collective ministerial responsibility – If the Government loses the confidence of the house a ‘motion of no confidence’ is put to the parliament. If it passes, the Government must resign or call an election. The convention of individual ministerial responsibility – If ministers are incompetent or act with impropriety a censure motion can be passed against them.

Breaking the government in practice: The Government almost never loses the confidence of the house because a ‘motion of no confidence’ is rarely passed in the lower house where it holds the majority. A hung parliament is the only time where this is likely because a minority government is formed. However, even when the Government loses control of the business of the House it does not necessarily resign. The Turnbull Government in the 45th parliament was defeated on several procedural motions and the Morrison government lost a vote on legislation in 2019. Neither Government resigned or lost a motion of no confidence because the crossbenchers continued to guarantee ‘supply’.

Censure of ministers: Censure motions are defeated in the lower house because the Government holds the majority. They may pass in the Senate if the Opposition holds the majority. In 2015, the Attorney General George Brandis made comments about the President of the Australian Human Rights Commission, Gillian Triggs, accusing her of bias against the government, which caused him to be censured by the Senate for ‘malicious’ attacks on the independence of a senior statutory office holder.

Responsibility function overall:

* Derives from the Westminster system of responsible parliamentary government.
* Operates by conventions.
* Theory- parliament makes and can break a government in the HoR.
* Uses parliamentary procedures to hold government to account- eg IMR and CMR, Question Time etc.
* Practice- executive usually dominates the HoR to the extent that it can defeat motions against ministers or the government.
* QT is dimished by Dorothy Dixers and the ability of ministers to avoid answering questions.
* Senate can hold government accountable through committee system.
* Senate crossbench usually holds the balance of power and can combine with Opposition to support motions against the government.
* Scrutiny of money bills is a key process in the responsibility role- s53 prohibits Senate from introducing supply bills but they can scrutinise their spending via Senate Estimate Committees.

Debate function of parliament (in theory): Parliament is a speaking chamber and is the nation’s highest forum for the debate of important issues. Debate is the vehicle that carries parliament’s other functions. Each of parliaments other functions depends on debates, as follows:

* Legislating depends on the discussion and analysis of bills to ensure they are well drafted and reflect community values.
* Representing constituents depends on d=members telling parliament about the needs of their electorates.
* Holding government responsible requires questioning ministers and discussing government activities in committees.

Parliament has procedures that facilitate debate. The types of debates include grievances, urgency motions, matters of public importance, private member’s business, ministerial statements, members’ 90 second statements, adjournment debates, second reading debates and question time.

**Parliamentary privilege –** Creates an ultimate form of freedom of speech. Laws such as the tort of defamation or limitations imposed by statute do not apply when a member is speaking in parliament. They may debate any issue without fear of legal consequence. Both houses of parliament have privileges committees, and their role is to ensure that parliamentarians do not misuse their enhanced freedom of speech. Privileges committees may sanction a member if they abuse parliamentary privilege.

Example (parliamentary privilege): Craig Thomson was an MP during the Rudd and Gillard Governments. He was a union official with the health Services Union before entering parliament in 2007. In 2012, the Fair Work Commission found Thompson had broken workplace laws on 156 occasions, including using his union credit card to spend $6000 on escort services. He made a statement to parliament in 2012 denying the allegations. In 2014, after he left parliament, a court found him guilty of dishonesty offences relating to his union role. The House of Reps referred his case to its privileges committee. The committee reported in 2016 that his statements to parliament was ‘at odds with the findings of the court’ and that there was a ‘reasonable presumption of Mr Thomson’s intention to mislead the house.’ Mr Thomson was no longer a parliamentarian, but the privileges committee could have recommended he was jailed or fined. Privileges committees are reluctant to jail or fine those who breach privilege. In modern Australia, imposing sanctions is accepted as strictly the role of courts. This upholds separation of powers, however it shows that privileges committees are ineffective at policing the use of parliamentary privilege.

Grievance debate: The grievance debate is regarded by private Members as a most useful opportunity to raise matters in which they have a particular interest or to ventilate complaints or concerns of constituents. The matter raised need not necessarily be an actual 'grievance'.

Urgency motion: An urgency motion (or matter of public importance) may be moved on any sitting day, and must have the support of four other senators before the matter can be debated. Notice is not required so that newly emerging matters can be considered by the Senate. The urgency motion is debated and at the conclusion of the debate a vote is taken as to whether the matter is considered urgent or not.

Private member business: The term 'private members' business' refers to business that is initiated by a member who is not a minister.

Adjournment debate: In the Westminster system, an adjournment debate is a debate on the motion, "That this House do now adjourn." In practice, this is a way of enabling the House to have a debate on a subject without considering a substantive motion.

Question time: Question time in a parliament occurs when members of the parliament ask questions of government ministers (including the prime minister), which they are obliged to answer. It usually occurs daily while parliament is sitting, though it can be cancelled in exceptional circumstances.

Examples of responsibility function:

* Aged Care Minister Richard Colbeck has also faced questioning in the Senate where Jacqui Lambie used QT to question why Colbeck attended the Ashes on the same day he had advised he was too busy to attend a Senate committee investigating the pandemic response to his portfolio area.
* In addition Barnaby Joyce was questioned by Deputy Leader of the Opposition over the leaked text messages where he called Scott Morrison a ‘hypocrite and a liar’ and was held to account for his conduct.

Debate function (in practice):

Debate within parliament. In practice, the executives dominance of parliament undermines its debate function in the same way it undermines the other functions. Governments can control debate through:

1. Restricting debate opportunities when it decides the schedule for the sitting day. Government business is usually the longest item on the day’s agenda. A simple vote of the house – which a government usually wins – can extend it.
2. Extending government business. This means that grievances, matters of public importance, adjournment debates etc lose their allotted time.
3. Using gags and guillotines to limit debate during the legislative process.
4. Taking advantage of parliaments adversarial nature. Parties can undermine the quality of debates in order to score points in the media.

Debates occur within parliamentary committees also. Committees are less adversarial than the floor of parliament because they operate away from the media- reduce incentive for political point scoring. Committee debate often more effective- more likely to work cooperatively together as a cross section of parties. Debate is often more effective in the Senate than the HoR. Senate lacks executive dominance + has more diversity. Debate is often freer and represents a wider range of views. The Senate frequently engages in lengthy debates with more non-government Senators able to speak. Quality debate occurs in senate committees also. Minor and micro parties and independents active participants in committees. Wide range of views on committees.

**Debate within political parties –** Debate in Australia’s modern parliamentary system occurs outside the traditional spaces of the House of Reps, the Senate and Parliamentary committees. Debate occurs within the parties themselves. Each party with representation in parliament has its ‘party room’. The party room is meeting of a political partiy’s MPs and Senators. Party room meetings occur within parliament House in meeting rooms designed for the purpose. The main party rooms in the contemporary political system are:

* The parliamentary Labour Party meets as the ‘ALP Caucus’.
* The parliamentary Nationals meets as ‘Nationals Party Room’.
* When the Liberal Party and Nationals form a Coalition Government, they meet as a ‘Joint Party Room’ as well as separately.

Party room meetings are private and have no media present. There is no need for political point-scoring and all members of a party have a chance to speak their minds. Party rooms provide an effective venue for the exercise of the debate function. Party members debate policy, represent community concerns, discuss national issues, devise plans for dealing with crises, develop political strategies and debate other issues of the moment.

A government’s backbenchers – that is, its non-executive members – may hold their government to account within their party room. In practice, a modern version of the responsibility function has developed within the party rooms of the major parties when they are in government.

Example (party rooms in the contemporary Commonwealth Parliament): Over 2017-2018, PM Malcom Turnbull and his senior Cabinet ministers devised a policy they hoped would reduce Australia’s carbon dioxide emissions, improve the reliability of electricity generation and reduce the price of electricity. The policy was called the National Energy Guarantee or NEG. The Cabinet developed the NEG, but the policy needed liberal Party Room approval before the government would introduce the NEG bills into parliament. When the party room met, there was disagreement between the progressive centre and the conservative right of the Liberal party. The conservative wing of the party refused to support any form of legislated emissions reduction.

Many conservative Liberals represent electorates with conservative voters and electorates in which coal mining is an essential economic activity. Queensland electorates were particularly affected. People in these electorates fear the consequences of emissions reduction on their livelihoods and communities.

Conservative opposition within his party forced Turnbull to abandon the emissions components of the NEG. Later, the NEG and other issues had led Home Affairs Minister Peter Dutton, a conservative Queensland Liberal, to launch a leadership challenge against Turnbull. Duttons challenge failed, but fatally weakened Turnbulls leadership. A second party room challenge soon afterwards saw Scott Morrison voted leader of the Liberal Party, and, therefore, the new PM.

The NEG provides a robust example of how a governments party room can debate issues, represent constituents and, ultimately, hold its government to account. Debating issues, representing constituents, and holding government to account are all traditional functions of parliament. Indeed, party rooms have become increasingly important since 2007 in holding PMs to account. Kevin Rudd, Julia Gillard, Tony Abbott and Malcom Turnbull were all deposed by their parties in party room leadership spills.

Case study (Speaker of the house of reps): Harrry Jenkins (speaker 2008- 2011) was first elected to the House of Reps in 1986 for the seat of Scullin (VIC). He was a much-respected speaker, occupying the chair from the time Rudd took office. In November 2011, he stunned parliament by resigning as Speaker on the grounds of wanting to engage more with policy process. Peter Slipper replaced him as speaker in 2011-12 but was controversial in the role. Slipper was first elected to parliament for the seat of Fisher (QLD) in 1986. He was a Liberal MP who had fallen out with his party. He was elected Speaker by the HOR – against the wishes of the Liberal opposition – and resigned from the Liberal Party the next day. The Gillard government was a minority government. Having Jenkins’ vote back on the floor strengthened the government, and the loss of Slipper’s vote weakened the Abbot opposition. Now an independent MP, Slipper was a genuinely independent Speaker. However, he was brought undone by harassment and fraud allegations resulting in court proceedings. He resigned the Speakership in October 2012.

Anna Burke was elected to the HOR in 2998 for the seat of Chisolm (VIC). She was Deputy Speaker under peter Slipper and assume the office until Slipper’s resignation. As a speaker during 2012-2013, Burke carried out her duties impartial, despite beung a partisan ALP MP.

Bronwyn Bishop was elected to the HOR for the seat of Mackellar (NSW) in 1994 and was elected by the House to the position of speaker on 12 of November 2013, replacing Anna Burke. In her time as speaker, Bishop set a record for the greatest number of MPs ejected in one day – 17 labour members and one liberal during question time in 2014. Over the course of her term, she ejected 400 MPs under standing order 94A. Of those 393 were Labour members and 7 were Coalition MPs. Bishop resigned as speaker on 10th of August 2015. She is noted for the expenses scandal that plagued the latter part of her parliamentary career after it was revealed that she charged taxpayers $5000 for a Helicopter charter from Melbourne to Geelong for a Liberal party fundraiser in November 2014.

Tony Smith was elected to the House of Representatives for the seat of Casey (VIC) in 2001 and was elected by the House to the role of Speaker on 10 August 2015, a position that he continued to hold in late 2020. Tony Smith made history in 2019, when he was re-elected as Speaker unopposed by the House of Reps for the third time. He is only the second Speaker to have achieved this feat, the last being Sir Frederick William Holder – the first Speaker of the House – who sat in the Speakers chair from 1901 to 1909.

During the passing of the Home Affairs Legislation Amendment Act 2019 (Medevac Bill), Attorney-General Christian Porter shared legal advice with Speaker Smith on the Bill’s potential constitutional issues. Attached to this advice was a letter from the Attorney-General stating that it was provided on a confidential basis and that he would “appreciate you not circulating it further”. In a statement to the House on 12 of February 2019, the Speaker stated that he “have advised the Attorney General that, as speaker it is important to ensure in this instance all material available to me is also available to all members of the House. As a consequence, I’ve also decided to table the Solicitor General’s opinion.”

**How can we use this?** This study illustrates the significant power that the Speaker can wield over the floor of the House of Representatives. Parliament is Australia’s highest forum for the debate of issues, and it is the role of Speaker to ensure Standing Orders are upheld during these debates. However, it is also important that the Speaker always acts fairly and impartially, which will ensure that the ability of the HOR in upholding the 4 functions of parliaments is not hindered by partisan politics.

Scrutiny of Government in practice: Question time is often gagged by the Government. Questions may be ’dorothy dixers’ made by the government or ‘point scoring’ questions put by the opposition. Questions on notice do not have to be replied to within a set period of time and there is no penalty for delayed or vague answers. However, there are standing orders regarding relevance and the length of questions and answers that lead to better scrutiny. A Turnbull reform to Question Time meant Coalition backbenchers were able to ask ministers’ questions not pre-prepared by the minister, enabling them to ask questions of concern to their constituency. Committee members may not have the time or expertise to operate on them in a way that effectively scrutinizes the government. However, they provide Opposition major and minor parties more scope for effective participation in parliamentary processes. Senate estimates are considered a powerful method of scrutiny. The Constitutional and Legal Affairs Committee exposed Brandis’ attempt to remove Gillian Triggs from her position as Human Rights Commissioner during a Senate estimates hearing. Here too, however, questions can also be taken on notice.

Forum for debate in theory: Westminster parliaments are regarded as 'talking assemblies' where significant opportunities for debate occur. Debate is expected to be open and accessible. Members can speak freely because they have parliamentary privilege. Public issues of community concern are discussed. In Australian parliaments these opportunities include:

* Second Reading Debates.
* Matters of Public Importance
* Adjournment Debates and Grievance Debates
* Party room debates

Forum for debate in practice: Problems include:

* Government Business time dominates the sitting day agenda and can be extended by a vote of the House.
* Gags and guillotines limit the Second Reading debates. In 2017 Government successfully gagged debate on the Human Rights Commission's procedures bill which passed after less than half an hour of debate.
* Adjournment Debates and Grievance Debates do not happen frequently enough or go for long enough.

Examples of debate function- in practice:

* Government business takes the longest on sitting days- restrictive schedule
* Eg in 46th parliament 44% of business conducted was government business
* Eg a Private Members Bill proposed by IND Helen Haines was initiated into the HoR in Oct 2021 - the Federal Integrity Commission Bill 202. In Nov 2021 Haines attempted to interrupt gov business to move a motion to propose a debate on her PMB and start the 2nd reading debate of the bill however the Coalition blocked it, even with Lib MP Bridget Archer crossing the floor to back Haines’s motion – which was supported by ALP & the crossbenchers = the vote was 66 MPs for and 64 against BUT a COVID technicality meant that it did not pass. It needed an absolute majority — or 76 votes — to get through, but with a number of MPs not in parliament because of COVID restrictions, that was a larger task than usual. Gov business continued and debate blocked.

Forum for debate strengths: Strengths:

* Committees in both houses allow for less adversarial and more effective debate. They are away from the media spotlight and do not need to score political points.
* Lack of Executive dominance in the Senate allows for better debate there.
* Parliamentary privilege allows members to speak freely.
* Much debate occurs in the main party rooms – the Liberal party Room, the National Party Room and the ALP Caucus (see p24). Furious debate in the party room over the NEG (National Energy Guarantee) in 2018 saw the leadership spill that ultimately ousted Turnbull. The NEG was an energy policy proposed by the Turnbull government in late 2017 to deal with rising energy prices in Australia. It was almost over the line in 2018 when it was attacked by the right of the party room. Turnbull dumped it but the strained tension apparent in the debate led to a leadership challenge from Peter Dutton and ultimately Turnbull’s resignation, enabling Morrison to become PM.

Further examples: Legislative, representative and debate function:

* Gags, guillotines, floodgating
* Eg Foreign Intelligence Legislation Amendment Bill 2021 gagged after a few hours- Ind Helen Haines complained it wasn’t enough time for the crossbench to scrutinise for their constituents
* Eg In Sep 2020 the Environment Protection And Biodiversity Conservation Amendment (Streamlining Environmental Approvals) Bill 2020 was rushed through the HoR by the Morrison gov, prompting outrage from ALP, the GRN & the crossbench. The proposed changes passed the lower house after the gov used its numbers to gag debate on the bill and amendments proposed by Labor and the crossbench