**Chapter 1 – Structure and Power**

1. **Legislative, executive, jucidial powers**

**(w/ reference to Constitution and comparison with another system)**

1: Legislative Power

* Section 1 – Legislative Power

Legislative power of the Commonwealth consists of the Queen, the House of Representatives and the Senate in the Federal Parliament

* Section 2 - The Queen
* Represented by The Governor General, who may exercise the powers and functions of the Queen (as assigned to them)
* Section 7 - The Senate
* Composed of Senators for each state, directly chosen by the people of the state
* used with S. 24 to justify rights to representative government: Right to vote/speech/association,
* 6 senators for each state (until the parliament otherwise provides)
* Equal representation of the Original States shall be maintained
* Terms of 6 years
* Section 15 - Casual vacancies
* If a Senate seat (representing a state) becomes vacant, a joint sitting of the respective state's parliament chooses a replacement
* If not in sitting, the Governor of the state (on the advice of the state executive council) may make the appointment
* Section 24 - Constitution of House of Representatives
* Composed of members directly chosen by the people
* Used with S. 24 to justify rights to representative government: Right to vote/speech/association
* Section 28 - Duration of House of Representatives
* Terms shall continue for no longer than 3 years from the first meeting of the House
* May be dissolved by the Governor General
* Section 32 - Writs for general election
* Governor-General (in Council) may cause writs to be issued for elections of members of the HoR
* Within 10 days from the expiry of a House or from the proclamation of a dissolution
* Section 51 - Legislative powers of the Parliament
* Power to make laws for the peace, order and good government of the Commonwealth with respect to:
* Concurrent: Both federal and state levels and legislate, but federal law prevails when inconsistent (Section 109) examples include, education, health
* Section 52 - Exclusive powers of the Parliament
* Exclusive powers to make laws with respect to:
* States cannot legislate on these subjects, eg. Defence, foreign affairs, overseas tradeChapter II: Executive Government

2: Executive Power

* Section 61: Executive power
* Executive power is vested in the Queen, exercisable by the Governor-General
* Extends to the execution and maintenance of the Constitution and of the laws of the Commonwealth
* Section 62: Federal Executive Council
* Federal Executive Council shall advise the Governor-General in the government
* Members shall be chosen and sworn in by the GG
* They shall hold office during the GG's pleasure

3: Judicial Power

* Section 71 - Judicial power and Courts
* Judicial power shall be vested in the High Court of Australia and in other federal courts that the parliament creates
* Shall consist of a Chief Justice and at least 2 other Justices, and any more as the parliament prescribes
* Section 72 - Judges' appointment, tenures and remuneration
* Justices of the HC and courts created by Parliament:
* Shall be appointed by the GG in Council
* Shall not be removed except by the GG after a joint session of Parliament, voting for a removal on the grounds of proved misbehaviour or incapacity
* Remuneration shall not be diminished during their term in office
* Maximum age for Justices is 70 years
* Section 73 - Appellate jurisdiction of the High Court
* Parliament can legislate conditions under which the HC may hear appeals
* Question of law which is raised that is of public importance
* Conflict between courts
* In the interests of the administration of justice
* Extends to: justices exercising the original jurisdiction of the High Court, any other federal or State court under the Queen, or questions of law concerning cases heard by the Inter-state Commission
* Section 74 - Appeal to Queen in Council
* No appeal is permitted to be heard by the Queen in Council from a decision of the High Court concerning the Constitutional powers of the Commonwealth or states
* Section 75 - Original jurisdiction of High Court
* In all matters that the High Court shall have original jurisdiction in:
* Arising under any treaty, affecting representatives of other countries or consuls, in which the Commonwealth or a person being sued on behalf of the Commonwealth is a party, between states and between residents of different states.

Compared with the USA:

1. Legislative Power

* Vested in the US congress, the legislative body
* It is a bicameral legislature with a House of Representatives and Senate
* Both are directly elected by the people
* Both have relatively similar lawmaking powers except Senate cannot initiate money bills
* Lawmaking powers limited by constitution
* Especially as it shares sovereignty with 50 states in the federation
* Key similarity is that both have strong bicameralism meaning both houses have almost the same lawmaking process, as well as both countries House of Representatives represent people in electoral divisions

1. Executive Power

* Biggest distinction between the Australian and US system
* The US executive system has a head of state AND head of government as the president of the United States, a single office directly elected by the people
* This system is completely separate from the other two arms of government, with people electing the executive government every four years using a complex electoral system
* The president and vice president are elected together and appoint a cabinet of secretaries who each head departments and agencies in the US administration
* They are appointed by and accountable to the president, as they are not members of the congress…

1. Judicial Power

* Judicial power is vested in a supreme court and other informal courts made by congress
* The US judiciary is entirely separate and independent from the other two arms
* The supreme court has the power to interpret the constitution and strike down laws that it judges to be unconstitutional
* It may also adjudicate on matters arising from the presidents power, as the supreme court is a powerful check on the powers of congress and the president
* It is also the final court of appeal for all matters

**Functions of the Commonwealth Parliament in theory/in practice**

**(including section 7, 24, 51, 53 and the decline of parliament thesis)**

1. Representative (represent the people of the nation)

* In Theory:
* Traditionally elected representatives acted in the interest of their constituents according to these theoretical models:
* Delegate Representation – where a MP is the mouthpiece of the people who elected them and represents their concerns to the parliament with little thought for their own values or opinions. Delegates were to relay the interests of their constituents and ensure their voice was heard in the legislation.
* Trustee Representation – where a MP is entrusted by those who elect them to make representation, MPs do not engage with their constituents regularly to gauge their views, rather use their own judgement what is best for their electorate. They are held accountable at the next election.
* In Practice:
* Political Parties – are dominant players involved in representing the people of Australia, and voters vote for parties whose ideologies and policies best reflect their personal views and preferences. However, often people vote for a party based on their leader, as seen on the 2007 election of the Labor government with Kevin Rudd.
* Senate – is the house for the states but has always been a partisan house. Since federation, there has been a shift from first past the post voting to preferential, until 1949 “Single Transferable Vote”. This is a complex proportional voting system that converts % of the votes a party received into roughly the same % of seats in the senate. This has resulted in more diversity in the senate, including more migrants, women, and minor parties such as One Nation, as well as independents such as Nick Xenophon.
* Partisan Representation and Mirror Representation – Partisan refers to when members of parliament are members of a party that commands their loyalty and imposes party discipline. Therefore they represent their party’s policy positions rather than acting as delegates or trustees, although may do on occasion. Mirror representation is present too as the senates method of proportional voting called the Single Transferable Vote allows the election of more diverse candidates which tends to more accurately mirror the demographic diversity of society. The inclusion of more minor parties in the senate also achieves greater political diversity.

1. Legislative (make statute laws, both money and non money)

* In Theory:
* Parliament is a legislature, a bicameral statute law making institution. It makes laws that are in theory, SCRUTINISED by the statutory process, have DIVERSE input and reflect the Australian electorates, can be INITIATED BY ANY member of parliament including those serving in the executive and private members (MP’s not in the executive), and FOLLOWS the statutory process involving multiple readings, analysis from committees and review from the senate.
* The statutory process is designed to ensure statutes are well crafted, diverse input and do not infringe upon rights without sound justification and limits.
* In Practice:
* The westminster system sets up a dominant system of government in the HOR in which the legislature function is dominated by the government which may use various tactics to force through it’s legislation, such as gags, guillotines, floodgating bills.
* Gagging the 2nd Debate – during the second reading, the government may use one of it’s members (a minister or backbencher) to move a motion that a bill be put to vote. As the government has a majority of seats in the lower house, gag motions will always pass, with few exceptions. The effect is to prevent any further debates, with members listed to speak on a bill lose the ability to do so.
* Guillotining the Debate – before debate commences, the government may move a motion that the time allocated to debate be set to a certain limit. Once the time limit expires, debate ceases. Again the government controls this because they have the controlling vote.
* Floodgating Bills – the government may introduce a lot of bills simultaneously into the HOR. This has the effect of overwhelming the procedures of the statutory process. It is also often used with gags and guillotines to push legislation through the HOR quickly, but also at the expense of scrutiny and diversity of input.
* Senate – all bills passed through the house and given to the senate go through the Senate Standing Committee for the Selection of Bills, which as the role of deciding whether bills will be referred to legislative committees for detailed scrutiny or if they can pass through the senate more quickly, ensuring both efficiency and scrutiny. The executive is less dominant in the senate, rarely does the government achieve a majority, if anybody, in the senate. This means that the senate committees have much greater scope to debate and scrutinize bills, as there aren’t many gags, guillotines or flood gates. This diverse composition adds to the democratic diversity of input which is theoretically important of legislating in a democracy as minorities should be protected and heard.

1. Responsibility (holds the executive to account)

* In Theory:
* In Westminster systems, the executive is drawn from the parliament and is responsible to it. The mechanisms of parliamentary accountability have a deep history in the development of responsible government including:
* Government only exists as long as it maintains the support of the lower house, otherwise face collective or individual ministerial responsibility, through censure motions or vote of no confidence.
* Individual ministers may be dismissed by censure motions
* Ministers must answer questions asked in Question Time either immediately, or respond to take the question “on notice”, misleading parliament usually leads to censure motion.
* Scrutinizing government spending, as the executive can only spend money in accordance to the law, which requires the passage of the budget or other money bills. These bills pass the statutory process, thus Parliament scrutinizes executive action and activities through approval of government spending.
* In Practice:
* The party that wins a majority of House of Representatives seats forms the executive government and its leader becomes the prime minister.
* Dominance of disciplined political parties means that the party with majority seats in the house will almost never lose the support of the lower house as it already controls the votes of the members within it. This is referred to as executive dominance and it’s the main reason the responsibility function doesn’t work well.
* Motions of no confidence and censure motions moved by the opposition or non-governing party will always be defeated “on party lines” in the HOR, as partisan members simply vote to support their party.
* The points above mean that the conventions of individual/collective ministerial responsibility are not effective in practice. So long as a government can enforce party discipline on its members, it will never lose a critical vote in the HOR.

1. Debate (it is the nations premier forum for the discussion of issues)

* In Theory:
* Parliament is the house of debate and is the way many factors above are carried out.
* Effective legislation needs wide-ranging discussion about bills so that laws reflect the community’s values and wishes.
* Debate helps keep the government accountable and is critical when members of parliament are representing their constituents.
* Many opportunities exist, such as question time, matters of public importance and second reading debate, as well as urgency motions.
* Parliamentary privelage protects debate and creates the ultimate freedom of speech, where there is protection from the normal restrictions on speech, such as defamation.
* This is regulated through the privelages committee, and may sanction an MP if they abuse privelage.
* In Practice:
* The debate function suffers from the same executive dominance that undermines the theoretical operation of the other functions described above:
* Government can restrict opportunities for debate by allocating time for the sitting day. Government business is usually the longest item on a sitting day agenda, and can be extended by a vote by the house, which will always pass.
* Grievances, urgency motions, matters of public importance and other opportunities for debate are diminished when the government extended government business.
* Gags and guillotines limit debate during the legislative process, as discussed.
* The floor of the house is highly adversarial as the government and opposition compete with eachother for political advantage. Some debate especially in QT is truly influenced by this need of the parties to score political points in front of the media and public which can reduce the quality of the debate.
* Debate is also more effective in the senate due to the lack of executive dominance in that chamber, frequently the senate will engage in longer debates with more non-government senators able to speak. Debate also occurs in senate committees.
* This said, majority of good debate occurs in the senate and committees in each house.

**Roles and Powers of the Governor General**

**(including sections 61, 62, 64, 64, 68, 28, 57, 72 and the 1975 Crisis)**

The Governer General is the representative of the monarch in Australia and in Section 61 of the Constitution, exclusive power is vested in the Queen but exercised by the GG.

**Functions:**

* Appointing ministers
* Giving royal assent to legislation
* Issue writs for elections
* Bestow Australian honours

**The 1975 Crisis:**

John Kerr, Governer General of 1975 dismissed Gough Whitlam’s government (labor). Due to 2 casual vacancies in the Senate, 2 non-Labour senators were appointed, changing the balance of power to favour the opposition, who blocked the passage of the budget twice, in order to call a double dissolution. Whitlam refused to resign and instead asked the GG to consider a half senate election. He got word that Whitlam might contact the queen to dismiss him, and upon High Court judge’s advice, asked leader of the opposition Malcolm Fraser to form a caretaker government. A double dissolution was recommended and passed. Whitlam was dismissed and Liberal government won a majority in both houses.

**Roles:**

**Constitutional:**

* Legislative
* Proclamation of parliamentary sessions
* Dissolving HOR after election
* Dissolving both houses in double dissolution
* Executive
* Role to appoint federal executive council
* Dismissal of ministers

**Ceremonial:**

* Chief of armed forces
* Representing on ANZAC and Rememberance Day
* Receiving/entertaining Heads of State
* Opening new sessions in parliament

**Non-Ceremonial:**

* Represent what it is to be Australian
* Travelling to meet with people
* Attending services, speaking and opening conferences
* Presenting awards to public figures

**Express Powers**

* GG acts on advice of PM, as express powers are exercised by the government

Eg. Approving foreign treaties, appointing federal judges

**Reserve Powers**

* Only GG may use without ministerial advice, used as last resort
* Eg. Appointing a prime minister if there is a hung parliament, dismiss a PM if lost confidence of the lower house…

**Roles and Powers of the Prime Minister, Cabinet and Ministry:**

**PM:**

The Prime Minister is the head of government and leader of the executive government. He or she is the person who leads the party or parties that command majority support in the House of Representatives. The PM is the chief advisor to the GG.

**Conventions and Practices:**

* PM’s position has evolved so that the PM is the GG’s chief advisor. In practice, the GG acts upon the advice of the PM, except in rare instances eg. Whitlam dismissal
* The Prime Minister is the leader of the party or parties that retain that support of the HOR
* The Pm has responsibility for advising the GG of ministerial appointments

**Power:**

* Allocates ministerial roles, in the Labor Party the ministry is elected by the Caucus, although PMs Gillard and Rudd chose their ministries, in Liberal Party the leader is free to choose ministers from within their parliamentary party.
* PM chairs the cabinet, determines the cabinet agenda and oversees the work of the government
* Public face and spokeperson for the government, domestically and internationally
* Assumes power and prestige because media mainly focuses on the PM, meaning the Pm is able to go over the head of his colleagues and party and communicate directly with the electorate.

**Restraints:**

Party room – PM must maintain support of their parliamentary colleagues – Gillard, Rudd, Hawke all fell foul of their colleagues and were deposed as PM, consultation is key to maintain support in the party-room

Cabinet – PMs work with ministries and Cabinet of strong political personalities and ambitions, the management of their ministers is an important skill

The House of Reps – party discipline ensures that the Pm have relatively few difficulties In the lower house, however the parliaments role in scruitinising the executive means that the PM and other ministers must attend question time and submit to inquiries from the Opposition

Senate – can block prime minister objectives due to government usually not having majority support in the upper house, eg. John Howard had to broker with the Australian Democrats in 1999 to pass his Goods and Services Tax legislation

High Court – role as constitutional interpreter means that PM goals can be thwarted eg. Robert Menzies in 1951 when court invalidated the Communist Party Dissolution legislation, and Julia Gillards 2011 Malaysian solution policy on asylum seekers ruled invalid in the High Court

The Governor General – the constitution contains reserve powers which may be used against a prime minister. In the first decade of the Commonwealth, there were a number of occasions when requests for elections were denied, GG has the ability to dismiss Pm eg. Whitlam

**Cabinet:**

The Cabinet is the council of senior ministers drawn from and accountable to the parliament, who meet regularly and in secret to discuss policy, plan strategy and coordinate the functioning of government.

**Roles:**

* Develop and communicate the vision of the government
* Develop policies that enact this vision
* To coordinate the apparatus of the government (public service’s departments)
* Act as a clearing house for information and issues
* To respond to crises such as natural disasters

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**Ministry:**

Composed of all the ministers, junior and senior. Only senior ministers hold cabinet rank.

**Roles:**

* Manage a “portfolio” (responsible for a department of the public service)
* Participate in cabinet meetings regarding their portfolio area to plan strategy
* Publically support cabinet decisions, even if disagreeing
* Answer to the parliament about their portfolio, personal decisions or integrity

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**Opposition:**

Formed by the party with the second largest number of seats in the House of Reps. The opposition is loyal to the system of government but in adversarial competition with the government.

**Roles:**

* Hold the government to account (through question time and debate)
* Moving censure motions and motions of no-confidence (to draw attention to incompetence)
* Debate (to speak against and highlight matters embarrassing to the government)
* Be a viable alternative government (to be ready to assume government anytime)
* Must have its own policies established
* Present a unified vision to the nation
* Present as competent and ready to govern

**Shadow Ministry:**

The shadow ministry is composed of senior members of the opposition party who directly oppose a corresponding minister of the government. A shadow minister is a private member.

**Political Mandates in theory/in practice (including competing mandates)**

Mandate – is an authority to do something. A “political mandate” is a claim to have the authority granted by the people at an election for a government, Senate minor parties or independents to enact their policies. They aren’t legally enforceable, only persuasive.

**Theory:**

Political mandates can be traced to “social contract theory”. The people’s consent is given by victory at an election. This allows the winner to claim a “democratic mandate: and thus be endorsed by the people. They are effectively claiming an authority to govern because they are democratically legitimate.

**Practice:**

* Government claims a democratic mandate, based on the fact that they won an election

This can be claimed in two ways:

* A “general” mandate, is the authority to enact all of the government’s policies over the term of the parliament. Eg. Abbott claims a mandate for it’s 2014 budget, because it claims to “fix the economy: even though the specific measure was not in the electoral compaign
* A “specific” mandate, claimed over the main policies which the government took to the election and which formed part of the electoral campaign. Eg. Abbot repeal carbon tax
* NOTE: general mandates are weaker than specific mandates, although neither guarantee that the opposition or senate will allow the government to legislate these polices uncontested…
* Minor parties in the senate and independent senators claim a “balance of power” mandate. The senate is usually a “hung house” due to the proportional representation electoral system used to elect senators. This makes it hard for either of the two major parties to win outright majorities, and easier for minor parties or independants to get elected.
* Due to this, minor parties and independants hold the balance of power in the senate, and means that they will decide whether a bill will pass or fail.
* In order to justify this, they claim the fact that voters “directly elect them” and thus have the power to wield power over legislation, and also the fact that some voters are “dual voters” who vote for a major party in the HOR and a minor party/independent senator for the senate, in order to hold the major one accountable, strengthening their mandate.

**Competing mandates:**

**Theory**

* Between 'majoritarian'/'policy' (HoR) and 'balance of power' (Senate) mandates'
* Between 'leader's mandate' and 'majoritarian mandate'
* Between the mandates of Opposition and Government

**Practice**

* Legally unenforceable
* Used as an argument to attempt to dissuade a side from defeating legislation/actions
* Whether a certain mandate holds true when competing is never clear
* Without a referendum or plebiscite or direct elections for a leader

**Lawmaking Process in Parliament and the Courts**

**(with reference to individuals, political parties, pressure groups)**

There are two principal lawmaking institutions within Australia:

1. **Parliament**

* *A democratic institution*, directly elected
* *Is sovereign and superior to other lawmaking institutions* including courts and executive agency
* *Is flexible, responsive and proactive*, as it can legislate new acts and amend existing ones, can change law quickly.
* *They make statute laws*

1. **Courts**

* *Is authoritative,* rely on deeply entrenched maxims and norms evolved over centuries
* *Being conservative,* tends to respect the separation of powers and interpret statute and common law literally and logistically.
* *Is inferior, common law does not have democratic legitimacy and is overruled if it crosses statute laws made in parliament*
* *Creates common law from cases*

**Influence of Individuals:**

* Usually not influential in law making because they lack resources, access to key decision makers, and lack organizational support
* Examples of success include:

1. Ron Williams, whose challenge saw the High Court rule that s61 (establishing the executive) did not permit the government to fund the chaplaincy program without legislation. The Rudd government legislated under 51 (social services power), which Ron challenged again, as it was money used to pay for chaplains, and these payments aren’t benefits to students, found ultra vires. The government will most likely use tied grants to continue the legislation.
2. Clive Palmer has used his coal mining fortune to establish a political party, campaign during 2013 elections and win seats in both houses of parliament. In 2014, forced Abbot’s government to back away from it’s Direct Action policy on climate change and reverse plans to abolish various climate and energy agencies.

* Individuals may be successful in influencing law-making in the courts and parliament if:
* They have resources eg. Clive Palmer
* They have persistence eg. Eddie Mabo, Ron Williams
* They have skills/backing from a pressure group
* Have a public profile eg. Lead singer for Midnight Oil Peter Garrett, was CEO of Australian Connservation Foundation….

**Influence of Political Parties:**

They are grousp of individuals who share a broadly similar ideological view and which seek to win seats in parliament with the purpose of influencing legislation by:

* Winning government (major parties)
* Forming coalitions with a major party
* Exercising influence over passage of legislation (holding balance of power)

**Very strong if:**

* They are a major party and they succeed in winning an election and forming government!
* Will deliver complete control of the HOR guaranteeing passage of all the party’s bills
* Provide them with a democratic mandate to persuade the opposition and balance of power parties in the senate to support their bills in the upper house
* Some 90% of bills originate from cabinet and are intended to enact into law

**Strong if:**

* They are a minor party whose support is necessary to maintain government’s majority in HP
* Very rare, but happened when the Greens teamed with several independants to join with Gillard’s Labor party, in return forcing them to introduce a Carbon tax despite an explicit pre-election promise not to do so
* The party is a minor party in coalition government with a major party
* Nationals are able to gain some ministerial posts in Cabinet and participate with the Liberal Party, and had success in blocking the sale of Grain Corp in 2014

**Reasonable if:**

* If the party is a balance of power party in the senate and the opposition opposes a bill
* In this situation, the minor party will determine whether the bill passes or is rejected, therefore giving them significant power to negotiate with the government for amendments
* If the party is the opposition and able to ally itself with balance of power parties to block bills

**Limited if:**

* The party is the opposition and is unable to convince balance of power parties to support its attempts to block or amend government legislation in the senate

**Influence of Pressure Groups:**

These are groups of individuals who share similar views and aim to influence lawmakers in the parliament and decisions made by courts with the purpose of influencing lawmaking either by:

* Direct lobbying – directly meeting/communicating with law makers (MPs, ministers)
* Direct action – taking action, often public… such as marches, sit ins, mobs
* Court action – legal action to challenge the interpretation of statutes / new precedents
* Advertising – using media to spread message to public and apply pressure to lawmakers
* Online campaigns – using social media to get public support and pressure lawmakers

Pressure groups will target MPs and ministers on issues of concern to them in hope of influencing statute law-making. Parliament is both equipped and more inclined to respond to “popular” appeals.

The courts are unlikely to respond to lobbying, direct action, advertising or other such strategies. They are motivated by authority and respect for process and not by “popular appeals”. Court action is the only avenue open to pressure groups in attempting to influence judge made law.

**Types of Pressure Groups:**

1. **Sectional**

* Represent the interest of sections of the community (eg. Mining, business, sports…)
* Often have direct access to those in power
* Closed membership
* Seek selective benefits (only for section of society represented)
* Resource rich (via membership fees)

1. **Promotional**

* Motivated by what they perceive to benefit the whole of society
* Lack access to those in power
* Seek benefit for the broad community
* Resource poor, rely on donations and government grantd

1. **Hybrid**

* Combine features of both sectional and promotional pressure groups
* Advocate for the interests of a segment of society but for related policies which believe are in the wider interest of society

**Example:**

Roe 8

* Extension of Roe Hwy, from Kwinana Fwy to Stock Rd
* Meant to take trucks off roads, but went through Beeliar Wetlands
* “Save Beeliar Wetlands” were a cause pressure group designed to halt the project and used signs, social media, compaigns and funding
* Group lost case to the High Court and construction started
* Labour Party won not long after however, and the extension was cancelled.

**Federalism in Australia**

**Powers of state and commonwealth parliaments:**

Federalism is divided sovereignty in which the powers of government are divided between one central and two or more regional governments, each sovereign within their own spheres. In Australia this operates through the division of powers between the commonwealth and the six states, each having it’s own parliament and government.

**Exclusive:**

* Specified and enumerated within the constitution, allocated to the Commonwealth parliament
* Include defence, foreign affairs, overseas trade
* Power over the Commonwealth public service (s52)
* Prohibits the states from collecting excise, customs, taxes (s90)
* Some are exclusive by nature, for example, national defence

**Concurrent:**

* These are powers allocated to the commonwealth but the term “exclusive” is absent, thus the powers are shared by the commonwealth parliament and state parliaments.
* S51 contains a range of powers, many being concurrent
* Examples include, both governments can raise taxes, education, health
* If state and commonwealth laws conflict, according to s109, commonwealth law will override the state law, but only to the extent of the inconsistency.

**Residual:**

* These are powers unspecified, and are nt enumerated
* These belong to the states
* Include roads, local government, public transport, mental health

**Change in the Balance of Power since Federation**

Commonwealth power has significantly increased since federation due to the following:

* Financial powers including vertical fiscal imbalance and horizontal fiscal equalization
* The Grants Comission
* Referral of Powers (s51)
* COAG
* Nature of the federal relationship (co-operative vs co-ercive)
* High Court Decisions

**Vertical Fiscal Imbalance**

The Commonwealth collects more revenue from all its sources than it must spend to meet it’s obligations, this results in a large surplus which is paid into trust funds. T

The states hwoever have the burden of heavily service oriented and expensive responsibilities such as educating and health, collect too little revenue to meet their expenditure needs.

This is referred to as VFI, the transfer of surplus revenues from the commonwealth via a number of mechanisms redresses the imbalance. The commonwealth grants commission administers the payments, and may occur thus:

* As **specific purpose payments** or **general purpose payments**
* As the **GST**, collected wholly by the commonwealth but transferred entirely to the states

The VFI is one of the principal causes of the growing power of the commonwealth within the federation. The growing financial power of the commonwealth has been a major cause of changes to the balance of power within the federation.

**Referral of Powers s51**

States may hand their powers to the commonwealth if they choose to do so. If they do so, the decision affects only that states, all the other ones retain their power. The referral of a power changes the balance of powers within a federation. It is very rare (states are jealous of powers)

Examples include:

* State powers over the custody and maintenance of the children of divorced parents were referred by all states except WA by 1990.
* Terrorism, the defence power does not extend to internal security, the nature of the war on terrorism caused the commonwealth to persuade the states to refer limited powers so that terrorism could be dealt with as a federal offence and not a state offence.

**COAG – Council of Australian Governments**

COAG is the peak “ministerial council” of the federation, meaning a intergovernmental of the commonwealth, state and territory ministers of the same portfolio area. There are many ministerial councils (eg. Education, health) and they are important coordinating institutions within the federation.

COAG is made up of the heads of government – the PM, 6 state premiers, 2 territory ministers and the president of local government authority. It is the most important of the coordinating institutions within the federation. It regularly meets to debate, plan and monitor reforms and programs that are jointly run by the commonwealth and the states, such as the National Disability Insurance Scheme and Infrastructure.

It has attempted to encourage the development of a more co-operative federalism, which means when each level of government is more or less autonomous within it’s own sphere of sovereignty, especially under Rudd and Howard’s governments. This was seen by Rudd seeking better cooperation in health through COAG.

However it has also been the vehicle of more coercive federalism too, such as the National Competition Policy in which the Commonwealth set objectives for the states to meet and provided inventive payments to the states when the objective was met. This included states selling off their government owned businesses to the private sectors with the aim of increasing competition within these markets.

**Coercive vs Co-operative**

**Coercive –** where the central government is very powerful and the regional government lack autonomy within their sphere of sovereignty.

**Coordinate –** when each level of government is more or less autonomous within it’s own sphere of sovereignty.

**Cooperative –** where there is a relatively even balance of power between central and regional governments, rather than pursuing its own policies relatively independently of the other, there is substantial cooperation between the levels.

**High Court Decisions**

The High Court has been the single most important agent in constitutional change in Australia since federation. It’s decisions in various landmark constitutional cases have fundamentally altered the way the constitution operates. As noted, the constitution divides the powers within the federation by allocating exclusive and concurrent powers to the commonwealth and states.

When the high court interprets a case in which any of the exclusive or concurrent powers are in dispute, the outcome can redefine the powers and so change the balance of powers between the levels of government.

**High Court Decisions affecting the Balance of Power:**

**Uniform Tax Case**

**1942:**

During WW2, the CW passed 4 acts under section 51 for taking control of income tax for the duration of the war, state income tax wasn’t outlawed but the CW decided that if the state collected income tax then the CW grants would be reduced by that much.

States challenged the four acts in the high court, the court found it constitutional especially during wartime emergency. This marks when VFI began to tip towards the commonwealth, the now strong financial position of the commonwealth and powers it has to influence the states in the exercise of their residual powers.

**1957:**

Upheld the 1942 decision.

**Hammond Case 1997:**

High Court disallowed the franchise fees of the state as they were considered excise, reducing the state tax base further, and increasing financial power to the commonwealth.

**WorkChoices 2006:**

Took control of the state’s power over industrial relations. The industrial relations power in the constitution was insufficient for the CW to use, so the legislation was passed with the corporations power instead as 85% of Australians are employed in corporations, as a backdoor into industrial relations. States challenged in 2006 in regards to using corporations power to make industrial relations law – pushing it too far? HC ruled this constitutional, the states lost its power.

**Methods of Constitutional Change**

The Constitution is “superior law”, meaning that the ordinary lawmaking institutions (parliament and the courts) which it creates and defines, cannot change it.

**Referendums:**

Constitutions contain special mechanisms for the own alteration. It sets out a procedure for alteration in s128, the last section of the constitution. This process is as follows:

* Proposal to change the constitution must pass as a bill through both house of the parliament (or the same house twice) and be given royal assent by the GG
* The proposal must be put to the people (as a yes or no vote) no less than two months and no later than six months after it passes the parliament
* To succeed the proposal must get a so called double majority (majority of voters in australia, and majority of voters in a majority of states)

Only eight referendums have passed. The ones that did had in common – small technical changes, not seen as “power grabs”, are not opposed by the states and do not generate pressure groups sponsored “NO” campaigns.

**High Court Decisions:**

Seen through changing balance of power.

**Referral of Powers:**

Same as above.

**Unchallenged Legislation:**

The Commonwealth Parliament should have constitutional authority to pass legislation, meaning most legislation will make reference to at least one head of power. These are found in the exclusive and concurrent powers listed in the constitution. Laws passed without adequate support from a head of power risk being declared ultra vires (beyond the power) by the High Court IF challenged.

Key point being “if challenged”. A law passed without any support from a head of power will stand as an act of parliament and thus be a law until challenged and proven ultra vires.

They can only be deemed ultra vires:

* By the High Court under its s76 jurisdiction to interpret the constitution
* If a case is brought before the High Court, no court can make a judgement on a matter unless parties bring it to court, as courts are reactive, not proactive.
* If a party have “standing: - that is only certain parties can bring the case (states/parties directly affected by the law)

If none of the above, the law will remain unchallenged, and the law remains in force. Examples include:

* CSIRO – laws which established it have never been challenged despite being no head of power to support them at all

**One reform proposal – Aboriginal 1967**

This referendum was about including Aboriginals in the census, and to allow the Commonwealth government to make laws for aboriginal people.

It was supported by both parties, and unopposed by the states (despite surrendering their powers to make laws for the Aboriginal race).

It was in a time of “rights consciousness” as the US civil rights movement in full swing.

Had great support from various pressure groups supporting a yes vote, no opposing pressure groups. This achieved an over 90% of the national yes vote and passed in all 6 states – the highest YES vote in any referendum.

**High Court (roles and powers + one common law + one constitutional decision)**

The third chapter of the constitution creates the third arm, the judicature, which is vested in the High Court.

**Roles**

* Determining constitutional cases
* Disputes occasionally arise regarding the meaning of the constitution, and may centre on how particular words should be interpreted. The High court will either define legislative, define powers or discover implications (unspecified references) within the constitution. Its judgements in landmark cases may change the way the constitution operates by declaring the meaning of words or sections, despite not being able to alter words themselves.
* Hearing appeals, which may lead to new common law
* S73 grants the High Court the power to hear appeals from all federal, state and territory courts and bodies exercising judicial power, it is through the appeals process that the High Court most often makes common law. It may make new common law when it reverses a case on appeal, interprets statute laws in new ways or overrules existing precendant.

**Appelate Jurisdiction (s. 73)**

* Hear appeals on all civil and criminal matters arising from lower courts
* Special Leave to Appeal, which is designed to control the case load of the High Court by giving it power to decide, which is only granted when there appears to be a miscarriage of justice, question of law, conflict between courts
* Final court of appeal, but not a general court of appeal as SLTA is not always approved

**Original jurisdiction (S. 75)**

* Matters concerning treaties between other countries or organisations
* Cases between states (inter se)
* Parliament can grant additional original jurisdiction other than already given
* Interpreting the constitution

**Common Law case:**

**Norrie 2014**

Norrie is a person of “non specific” sex, born with male reproductive organs, Norrie underwent sex affirmation surgery to assist in becoming female. She did not believe that the surgery had resolved her sexual ambiguity and in 2009 sought to be registered under the Births, Deaths and Marriage’s Act as “non specific sex”. The Registrar originally approved the registration but later decided it was invalid, as the act only allowed sex to be defined as male or female, a strict binary classification.

Norrie appealed the decision to the NSW Administrative Decisions Tribunal, who rejected the appeal, ruling that the act must be used as written. Norrie appealed AGAIN to the Court of Appeal in NSW who found in favour of Norrie and declared that Norrie could be assigned to a category of sex other than male or female.

The NSW Registrar then appealed to the High Court, who decided that while the act does allow only for male and female sexes, binary classification shouldn’t apply to everyone, and it is the registrars job to record information as provided by the members of the public, not to decide moral or social judgements.

**Constitutional case:**

**Williams vs Commonwealth 2014**

Ronald Williams challenged the Commonwealth’s ability to amend financial acts in order to allow for funding of chaplains in schools. The High Court found that these laws were invalid and beyond the power of the government in section 51, as they didn’t constitute “benefit to the students”. The financial power to fund the chaplaincy program had to be found elsewhere, in section 96 (tied grants).

**Accountability of Parliament, Executive, Public Service and GG**

**Commonwealth Parliament**

1. **Through elections of HOR and Senate**

* Elections allow eligible citizens accountable for their previous term in office, and to delegate popular sovereignty (is the principle that the authority of a state and its government is created and sustained by the consent of its people, through their elected representatives (Rule by the People), who are the source of all political power) to elected officals for the next term in office.
* Electoral laws ensure that they are free from intimidation, allow a fair expression (will of majority and protected rights of minorities), as well as being regular and frequent.
* These are achieved through elected officials not running the elections (rather, the Australian Electoral Commission), the preferential voting method which expresses the will of the majority whilst acknowledging minorities, the compulsory voting ensures majority view is truly expressed, and there is a maximum 3 year term in the HOR (6 years in the upper house)…
* **IN THEORY**
* It is accountable for how well it performs it’s functions, such as statute laws, how it deals with issues in debates, for forming and holding the government to account, and how well it represents the people. House of Representatives is the house where government is formed, and Senate is the house of review, and both are held accountable for how well they perform their distinct roles.
* **IN PRACTICE**
* In practice, parliament is an arena where political parties contest with eachother. Voters tend to identify with one of the major parties. When they vote in elections, citizens may really be predominantly passing judgement on the performance of parties rather than that of parliamentarians. In today’s highly partisan landscape, its hard to tell whether voters are judging parliamentarians as legislators, debators and representatives, or if they are voting in judgement of the political parties. The latter is more likely to be the case.
* **EXAMPLE, CLIVE PALMER 2016**
* Clive Palmer won the Queensland seat of Fairfax in 2013 and by early 2016, was facing questions over how he managed his company Queensland Nickel, and it’s donations to the Palmer United. There was a significant fall in voter support for him as member, and he announced shortly before the election that he would not recontest his seat.
* Sophie Mirrabella was held to account by her electorate when she lost her seat in Victoria in the 2013 election, despite occupying a safe seat. This possibly occurred due to the view that she was no sufficiently representing the interests of her electorate, as she was prioritizing her role as Shadow Minister over electoral matters and questions regarding her conduct and persona.

1. **Through Privileges Committees**

* To prevent abuse of parliamentary privelage, there must be some accountability for what is said under privelage. MPs may be in contempt or breach of privelage, but the law and the courts cannot exert any restraint or impose a sanction on them for such a breach. Parliament itself needs its own internal mechanisms to hold its members accountable.
* Privelage committees act like courts within parliament and may sanction a member found to have breached privelage.
* **HoR**
* Committee of Privileges and Members' Interests inquiries into breaches of parliamentary privilege and immunity (including contempt of witnesses) by MPs and the public
* Craig Thompson was reprimanded in March after the recommendations of a two year investigation by the committee for misleading parliament
* **Senate**
* Senate Standing Committee of Privileges, inquires into and reports upon matters of privilege referred to it by the Senate.
* Has only imposed two reprimands on Senators found to be in contempt, although Arthur Sinodinos has been referred to the committee after refusing to attend an inquiry.

1. **Through Procedures and Processes**

* Standing Orders
* The rules governing the conduct of all the business of House of Representatives and Senate
* These govern conduct, orders of business, how motions are made and voted on, passage of bills, how to address the speaker of the house, and so on.
* If orders aren’t followed, the Speaker and President of the Senate enforce the standing orders, which can lead to a sanction
* Without rules, question time would turn into chaos and the responsibility function would fail, legislation wouldn’t be properly debated or receive proper scrutiny.
* They can be manipulated however, as the government may suspend or amend them by a majority vote, however this doesn’t occur in the Senate.
* Hansard
* All debates in both chambers are recorded and transcripts are published after they conclude
* This provides accurate records of the debate that has taken place
* These are posted online, and provide an element of accountability to parliament
* Matters of Public Importance
* This allows members to speak in parliament about current issues, if they have not been raised in other debates in the chamber
* Example, talking about allegations against members of parliament
* In terms of parliamentary accountability, this has limited effectiveness
* OVERALL, THE STANDING ORDERS ALLOW FOR THE ORDERLY CONDUCT OF THE BUSINESS OF EACH HOUSE ENSURING THAT THE LEGISLATIVE, DEBATE, REPRESENTATIVE AND ACCOUNTABILITY FUNCTIONS ARE CARRIED OUT IN PARLIAMENT PROPERLY.

1. **Through Judicial Review**

* The High Court has the power to keep the parliament’s statutes consitutationally valid
* They can declare the parliaments statutes ultra vires
* A statute passed by the parliament may not be constitutional unless it is grounded in a constitutional head of power
* To be reviewed a statute must be challenged by a party with standing and brought before the high court, before it can adjudicate the constitutionality of the law, otherwise it will remain as unchallenged legislation…
* If challenged and proven ultra vires and beyond the constitutional powers of the commonwealth, the court will strike the law down. It ceases, in full or part, to be a valid law of the commonwealth.
* This is the ultimate accountability mechanism, as the high court is the most powerful check on the legislative power of the Parliament
* **Statutory Interpretation**
* Courts may apply interpretation to adapt and change the meaning of acts so that they remain current and deliver just outcomes. Parliament may actually intend this to be the case when it writes statutes in general. On occasions an act may be subject to frequent interpretations or the courts may have to resort to the rules of statutory interpretation more often to make it work justly. In these cases, the courts are signaling to the parliament that the act in question is in need of attention. Parliament may be encouraged to review its act, and amend it so that it works more reliably as intended.
* Courts provide feedback on statutes on the parliament, it is hoped that this will encourage parliament to write good statutes and to amend bad laws. They provide a very powerful check on the legislative role of the parliament.
* Examples is Williams Case.

**Executive and Public Servants:**

**Individual Ministerial Responsibility:**

Individual ministerial responsibility is the convention that makes it theoretically possible for Parliament to sack a minister for incompetence, corruption or for serious problems within their public service department.

* Parliament can censure a minister by passing a censure motion or a no confidence motion. These motions are usually moved by the leader of the opposition and often directed at the Prime Minister but they can be moved against a specific minister who is in political trouble due to corruption or portfolio problems.
* *Censure motions* are a motion to discipline a minister or the government. A successful censure motion in the HOR would, by the conventions of IMR/CMR, require a minister to resign.
* *Does the HOR effectively hold the ministers to account?* Nah, the HOR does not hold ministers to account as it is controlled by the government, and if the governments or a minister belonging to the government has a motion against them, the government can easily vote the motion out, not holding the minister to account.

**Collective Ministerial Responsibility:**

This convention theoretically empowers the House of Representatives to dismiss a ministry, thereby sacking a whole government.

* A motion of no-confidence against the government as a whole is the most important motion the House of Representatives can move. It will immediately take precedence over any other business and will be debated automatically.
* Standing Orders allow debate on it for up to 30 minutes by leader of the Opposition, 30 minutes by the Prime Minister and Ministers, and 20 minutes for any other member before a vote on the motion is taken.
* Opposition can use the motions as oppurtunities to frustrate the executive and because they trigger an automatic debate, speak at length against the government. The opposition might hope to highlight the problems and embarrass the government.

Only ever been one successful motion of no confidence, this passed after parliament had dissolved during the 1975 constitutional crisis. The government usually will win the vote, so like IMR, a vote of no confidence is never successful in causing a government to resign.

**Committees**

**Senate Estimates Committees**

A committee whose sole purpose is to scrutinize the government spending (ie. Budget), as expanded over time to scrutinize all activity involving money. They provide parliamentary oversight of the executive use of delegated legislative power. It may recommend to the senate that it disallow regulations made by the executive under statutes which grant to power to make regulations, ordinances and instruments.

Although estimate hearings cannot reverse government decisions, they can bring scrutiny to hear and force a government to defend and justify their decisions and actions, or make changes if deemed appropriate.

**Auditor General**

An independent officer of the parliament responsible for performance and financial reviews as well as assurate audits into the public service, other executive agencies and the government.

He conducts independent audits of government spending to ensure that those people in charge of spending government funds do so in accordance with the set legislation. He aims to improve the financial accountability of government departments who are spending public money, reduce bias and allow for effective administration.

The audiotor general is only somewhat effective in holding the executive to account. Whilst he can review the government spending habits by conducting audits (official inspection of an organization's accounts) he cannot make motions to remove ministers from their position if he finds them of mis-using tax payers. That is the job of the senate estimates committee.

**Administrative Appeals Tribunal**

The AAT is concerned with the accountability of the public service, the government departments and agencies that make up the administrative executive, as well as ministerial decisions. They are like courts, they adjudicate disputes, but they aren’t courts. They do not exercise judicial power, they review administrative decisions. In the case of the AAT, the government decisions are reviewed if parties dispute them. Tribunals emphasise fairness, informality, efficiency, timeliness. They check to see that administrative decisions are fair, taking into account the merits of the case. Areas the AAT can look into include, child support, migration, taxation, workers compensation.

This can be a powerful accountability mechanism, as its own website describes it as “the one stop shop for the independent review of a wide range of decisions made by the Australian government”. It helps members of the public test, in an independent body, administrative decisions affecting them to see that their public service has served them well.

**Judicial Review**

Courts exercise judicial power, make judgements based on the law and the evidence alone, and judgements are legally binding (they are the law). Courts check the power of both the public service and the “real executive” – the Pm and the cabinet.

Rule of Law is critically important in keeping government and executive power accountable. This requires everyone including government to be subject to law, an independent judiciary and due process be observed in law making, including government policy and regulations made under delegating.

This can all be done through:

* Writs of Mandamus
* If a court find that a government department or agency made a decision that was not accordance with the law it may issue a writ of mandamus to the official of the government. This is a court order requiring a government official to carry out (or not carry out) a specific act that the official is obliged to do by law.
* The court will interpret the relevant statute, decide its meaning and then issue the writ of mandamus to force the government to obey the law. Perceptive students will observe that this demonstrates the rule of law in action; the government is being held to account by a court for the lawlessness of its decisions.
* Injunctions
* Courts may also issue prohibitions/injunctions to government agencies or departments, these are writs which prevent certain actions.
* In 2016, High Court issued an injunction against the department of Immigrationbased on a case where an African refugee was raped while suffering a seizure in Nairu, she became pregnant and wished to have an abortion, but Nauru prohibited abortions. The government transferred her to PNG for her medical abortion, but she felt like she couldn’t be cared for in PNG for her epilepsy due to lack of medical care. She called lawyer George Newhouse saying she wanted to access a safe and legal medical abortion procedure in Australia. The government denied responsibility, arguing it was hers, as they would either arrange the abortion in PNG or transfer her back to Nauru. Newhouse went to the High Court seeking an injunction preventing an abortion in PNG and her transfer back to Nauru until the Federal Court would decide the final outcome. The case was referred to the federal court which decided that the minister for immigration had put her at serious risk of medical harm and that he had a duty of care to enable her access to a safe and legal abortion. She remained in PNG this whole process, as the High Courts injunction restrained the executive governments action, however she received treatment in Australia.
* ALSO WRITE ABOUT MALAYSIA SOLUTION

**Governer General**

**Through Appointment:**

* Under section of 2 of the constitution, the GG is appointed and holds their position at the pleasure of the queen. In reality by convention, the appointment of the GG occurs on the advice of the Prime Minister. By implication, the GG can also be dismissed on the recommendation of the prime minister.Under section 64, however, the GG is also responsible for the appointment of the PM, meaning the Pm is also accountable to the governer general.

**Through Removal:**

* The tenure of the GG is at the pleasure of the Queen.
* By convention, the Queen may choose to recall or dismiss a GG before their term is complete, only on advice of the PM.
* None has ever been removed, although came close in the 1975 crisis.
* **Peter Hollingworth:**
* Closest Australia has come to a GG being removed was Peter Hollingworth
* When allegations arose that while he held the position of archbishop, he had covered up allegations of child sexual abuse in the Anglican church, while he denied them
* The prime minister John Howard however didn’t withdraw his support from him
* However once allegations that he raped a women in the 60s came about, he withdrew from his position as governer general due to public pressure

**Accountability of the Judiciary**

1. **Appeals**

* Most direct check on the quality of a court’s judgement is the appeals process
* Judicial reveiew of judicial deicisons involves the assement of a court decision and the legal processes undertaken by a superior court
* The appeal court may uphold the appeal or grant an appeal in which may result in the quashing of a convinction.
* Both parties may appeal a decision
* Can be made on the basis of right (on the grounds of an error of law) or leave (claimed error affect on the sentence handed down)

1. **Parliamentary Scrutiny and Legislation**

* When parliamentary statutes and judge made law com into conflict, statutes always have precedence hence providing another means of keeping courts accountable – parliamentary sovereignty
* Legislation passed by the parliament only applies in future, therefore it doesn’t affect cases already determined by the courts
* The impact of any court judgements can be limited by parliament that can legislate to reinforce, modify or abrogate (repeal) the case law set by courts. In this sense, the courts are accountable to the parliament. Parliament can abrogate certain decisions of the HC.

1. **Transparent processes and public confidence**

* Public confidence, people thinking courts are impartial and fair in all hearings and that judges are competent and independent of outside influence. The appointment process for judges was updated in 2008, increasing public confidence.
* Chief justice annual reports provide info on the justices and their role
* Media seating, freedom of political communication

1. **Censure and Removal of judges**

* Judges of the high court shall not be removed except on proven misconduct or incompetence

**Human Rights Issues**

**Australia:**

**Constitutional Protection:**

The following rights are entrenched in the Australian constitution, often reffered to as express rights and can only be changed or altered through the processes of constitutional change (formally through s128’s referendum process or informally High Court decisions). Therefore these are strongly protected.

* *s51*, individuals to receive ‘just terms’ when property is acquired by the commonwealth
* *s80*, right to trial by jury for indictable criminal offences
* *s116*, limited protection regarding freedom of religion, government prevented from imposing an official national religion or using a religion test for public sector employment
* *s117*, citizens will not be discriminated against on the basis of what state you reside

**Statutory Protection:**

Federal governments have enacted statutes that protect Australians from having their human rights violated. Federal legislation such as:

* Racial Discrimintation Act (1975)

The RDA makes racial discrimination in certain contexts unlawful in Australia, and overrides States and Territory legislation to the extent of any inconsistency

* Sex Discrimination Act (1984)

This was an Act of the Parliament of Australia which prohibits discrimination on the basis of sex, marital or relationship status, actual or potential pregnancy, sexual orientation, gender identity, intersex status or breastfeeding in a range of areas of public life.

* Disability Discrimination Act (1992)

This act makes it against the law to treat people unfairly because of a disability

* Age Discrimination Act (2004)

Act of the Parliament of Australia that prohibits age discrimination in many areas including employment, education, accommodation and the provision of goods and services

**Common Law Protection**

Can be considered the ultimate constitutional foundation for human rights in Australia. The basic principle of common law is that every citizen enjoys basic rights unless these are removed by statutes. Rights and freedoms covered by common law include:

* Equality of religion
* Freedom from arbitrary arrest – reason for arrest must be given
* Right of access to courts – cannot be excluded
* Freedom of speech, movement and association eg. can hold a political rally and speak freely against the government…
* Right to be presumed innocent until proven guilty
* Right to a free trial
* Right to have or receive just compensation for deprivation of property
* Right to seek legal support/legal counsel when accused of a serious crime

Common law ensures all citizens receive fair trial procedures, eg. right to remain silent and the exclusion of hearsay or irrelevant evidence. These rights are entrenched in all legal procedures.

However the use of trial by jury is only for certain Commonwealth indictable offences (s80) but may not necessarily apply to serious cases. There may also be a reduction in rights due to increased fear of terrorism in Australian society.

Implied rights being contested in High Court Cases:

* *Australian Capital Television (1992) (freedom of political communication)*

Concerns the Political Broadcasts and Political Disclosures Act 1991, which regulated political advertising during election campaigns, and required broadcasters to broadcast political advertisements free of charge at other times. The High Court found the laws to be invalid, since they contravened an implied right to freedom of political communication in the Australian Constitution.

* *Roach (2007) (right to vote)*

This case was dealing with the validity of Commonwealth legislation that prevented prisoners from voting. The Court held that the 2006 amendments were inconsistent with the system of representative democracy established by the Constitution. Voting in elections lies at the heart of that system of representative government, and removal of a group of adult citizens without a substantial reason would not be consistent with it.

High Court has the power to make judgements on legislation deemed “ultra vires"

* Malaysia Solution (2011)

Migration Act amendment which was passed by Parliament was rejected by High Court. Malaysia had a luck of upholding human rights, the HC determined Australia cannot send asylum seekers to a country with no laws to protect refugees. Australia signed UNDHR, Malaysia hasn’t.

Overall, Australia has achieved a high standard in protecting human rights with some issues occurring.

**Charter of Human Rights and Responsibilities Act (2006) (Victoria)**

* 'Guides human rights' rather than enforces them
* Enumerates twenty human rights
* Establishes a standard by which public bodies are required to act consistently with the Charter
* New laws must be checked for compatibility against the Charter through a Statement of Compatibility, delivered to Parliament
* Courts cannot invalidate legislation
* Promotes public pressure on Parliament to follow the HRRA or have to justify its overruling

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**USA:**

**The Bill of Rights 1971**

* A constitutional bill of rights. It lists the fundamental rights that everyone is entitled to enjoy and serves to protect natural rights of liberty and property. The bill of rights directs the actions of government. The USA bill of rights strengthens the protection of rights of the individuals and reflects contemporary expectations within a democracy.
* It guarantees in amendments:
* *1st Amendment*, freedom of religion, speech, press, rights of assembly and petition
* *4th Amendment,* search and arrest warrants shall not be issued without probable cause
* *5th Amendment,* cant be held on a capital crime unless on indictment by the grand jury, cant be tried for the same crime twice, cant be made to incriminate themselves
* *6th Amendment,* right to a fair trial (speedy and public trial with an informed of charges, confront witnesses/accuser, guarantee for defence witnesses, right to legal council)
* *7th Amendment,* right to a jury trial in civil cases according to the rules of common law
* *14th Amendment,* all US citizens receive protection and the states cannot reduce rights
* *15th Amendment –* African American suffrage
* *19th Amendment –* *Womens suffrage.*

**Statutory Protection**

* *Age Discrimination Act (1975)*

Age Discrimination Act of 1975 is a law which prohibits discrimination based on age in programs or activities that receive federal financial assistance, for instance, financial assistance to schools and colleges, provided by U.S. Department of Education.

* *Civil Liberties Act (1988)*

The Act was passed by Congress to provide a Presidential apology and symbolic payment of $20,000 to the internees, evacuees, and persons of Japanese ancestry who lost liberty or property because of discriminatory action by the Federal government during World War II. It was decreed that no one of Japanese ancestry could be allowed to remain on the West coast of the U.S. during its war with Japan, Japanese Americans were forced to liquidate their assets.

* *Pregnancy Discrimination Act*

The Pregnancy Discrimination Act of 1978 is a United States federal statute which prohibits sex discrimination on the basis of pregnancy. The Act covers discrimination on the basis of pregnancy, childbirth, or related medical conditions. The pregnancy must be deemed as a normal, objectifiable condition, for that to be enacted. Employers with less than 15 employees are exempted from the Act. Employers are exempt from providing medical coverage for elective abortions, unless the mother's life is threatened, but are required to provide disability and sick leave for women who are recovering from an abortion

* *Voting Rights Act (1965)*

The Voting Rights Act, signed into law by President Lyndon Johnson (1908-73) on August 6, 1965, aimed to overcome legal barriers at the state and local levels that prevented African Americans from exercising their right to vote under the 15th Amendment (1870) to the Constitution of the United States. The act significantly widened the franchise and is considered among the most far-reaching pieces of civil rights legislation in U.S. history.

**Common Law Protection**

This is achieved largely through the Constitution and Supreme Court interpretation.

Cases:

* *Roe vs Wade (1973)*

Case: The case is filed by Norma McCorvey, known in court documents as Jane ROE against Henry WADE, the district attorney of Dallas County from 1951 to 1987, who enforced a Texas law that prohibited abortion, except to save a woman's life. Question was: Does the Constitution embrace the right of a woman to obtain an abortion, nullifying the Texas prohibition? The ruling allows for legal abortions during the entire pregnancy, but set up conditions to allow states to regulate abortion during the second and third trimesters.

The Decision: The Court held that a woman's right to an abortion fell within the right to privacy (recognized in Griswold v. Connecticut) protected by the Fourteenth Amendment. The decision gave a woman a right to abortion during the entirety of the pregnancy and defined different levels of state interest for regulating abortion in the second and third trimesters.

Effect: The US Supreme Court, in a 7-2 decision, affirms the legality of a woman's right to have an abortion under the Fourteenth amendment to the Constitution.

* *Loving v Virginia (1967)*

Case: Followed an interracial couple – 17-year-old Mildred Jeter, who was black, and her childhood sweetheart, 23-year-old white construction worker, Richard Loving – against Virginia's 'miscegenation' laws banning marriage between blacks and whites. After marrying in Washington, D.C. and returning to their home state in 1958, the couple was charged with unlawful cohabitation and jailed.

The Decision: The couple was referred to the ACLU, which represented them in the landmark Supreme Court case, Loving v. Virginia (1967). The Court ruled that state bans on interracial marriage were unconstitutional. The Supreme Court's unanimous decision determined that this prohibition was unconstitutional, ending all race-based legal restrictions on marriage in the United States. The chief justice said “Marriage is one of the "basic civil rights of man," fundamental to our very existence and survival....”

* *Obergefell v Hodges*

Case: The two questions presented by the case—the constitutionality of same-sex marriage bans (the “marriage question”) and the constitutionality of bans on recognizing same-sex marriages (the “recognition” question).

The Decision: Obergefell v. Hodges, legal case in which the U.S. Supreme Court ruled (5–4) on June 26, 2015, that state bans on same-sex marriage and on recognizing same-sex marriages duly performed in other jurisdictions are unconstitutional under the due process and equal protection clauses of the Fourteenth Amendment to the U.S. Constitution.

**Assess the extent:**

* Strong democracy and good governance are the essential foundations for the building and maintaining of a human rights culture and therefore protecting rights.
* Australia and the US, therefore, have a strong record for protecting rights.
* Both the US and Australia have strong democracies where rights are highly supported in the political and legal system. Laws are made in accordance with rights which are also supported by the Constitution, statutes and common law. Both countries have open and accountable process.
* The US does have a bill of rights and Australia does not
* Rights are protected in Australia through a combination of statute and common law, the Constitution, and judicial process (the High Court).
* Rights are also protected in the US through the Supreme Court (has the power to render legislation as “unconstitutional”.

**Democratic Principles**

1. **Political representation**

* Australia has a very good electoral system
* Majority representation and majority rule are achieved through preferential voting for the House of Representatives while minorities can achieve representation in the powerful senate through a proportional representation electoral system
* There is a independent electoral commission administering centralized and consistent electoral laws
* There has been a willingness to undertake electoral reform to improve political representation
* In the USA
* A simple first past the post electoral system is used which delivers majority representation and rule in the senate and the presidency but at the expense of minority representation
* Gerrymandering reduces the fairness of political representation in the House of Representatives
* The lack of independent electoral administration allows the two parties to game the system for political advantage
* Decentralization of electoral procedures causes inconsisentency across the country. Partisanship prevent effective electoral reform
* Minorities do not achieve significant representation in the congress

1. **Popular participation**

* Australian participate through compulsory voting, political parties and pressure groups
* Government forces participation by all eligible voters at least every three years federally and every four years in most states. Low voter registration among the young and the increasing tendency to cast early votes is problematic
* Australian political parties offer a diverse range of ideologies and provide vehicles for active citizens to participate more fully. Rates of membership are declining for the established parties but there is increasing fragmentation of the vote leading to the rise in minor and micro parties which are capable of achieving representation in parliament
* Pressure groups are common and many Australians belong to them. They are good for representing the wide plurality of interests in society but can also distort representation if powerful corporatist groups are able to lobby decision makers without transparency or openness. A code of conduct and the registration of lobbyists help reduce the over-representation of powerful groups.
* USA has voluntary voting. Declining voter turnout indicates falling rates of participation.
* For active citizens there is a limited choice of political parties to join with only two parties capable of achieving representation in congress.
* Popular participation is high during the presidential primaries where members of each party campaign and vote for their preferred presidential candidate. Participation occurs within the debates of the two major parties, who both have broad ideological spectrums offering opportunities for a range of views to be represented within their organisations.
* Pressure groups are influential within powerful sectional groups. Corporatism is a feature of American pressure group activity since the removal of limits to political donations.

1. **Rule of Law**

* Both Australia and the USA score high on all the principles that together comprise the rule of law
* Both have a deep respect for their consitutions and the laws created by the legislatures and courts
* Both separate the powers of government. Both have independent judiciaries and clear and transparent processes for law making
* Both countries share similar concerns. Laws designed to counter particular threats such as terrorism or to crack down on crime with mandatory sentencing infringe on the independence of the courts and reverse the rights of accused persons.
* Retrospective legislation is a breach of the principles of the rule of law. Law should be known but cannot be if theyre backdated. The usa prohibits retrospective laws in its constitution, whereas Australia doesn’t, however Australian courts presume that parliament does not intend to act unjustly when they interpret back-dated laws

1. **Judicial Independence**

* Both countries have highly independent juidiciaries created by constitutions which separate them firmly from the other arms of government
* There are strong guarantees of independce in terms of appointment, dismissal and renumeration of judges. These guarantees protect judges from pressure that could be applied by governments or parties seeking favourable judgements.
* The supreme court is more powerful than the high court, as it has a highly specific constitution to interpret whereas the Australian constitution relies on unwritten conventions which cannot be adjudicated by the high court. The lack of an Australian bill or charter of rights to the high courts less influential role in society.
* The usa has some states that elect judges potentially compromising impartiality because of the intrusion of politics into judicial appointments. Elections expose judges to the popular will, which may not always be just.

1. **Natural Justice**

* Both countries dispute resolution systems exhibit strong natural justice with the adversarial trial being a shared key feature
* Rules and procedures of adversarial trials are designed along the principles of fairness
* Legal aid is available to those unable to afford legal representation but there are limits to how much the aids schemes in both countries can reduce the effects of wealth on outcomes
* Backlogs and delays reduce the achievement of justice outcomes in the courts of both countries
* Both countries have attempted to improve natural justice through the adoption of cheaper, quicker and more informal ADR processes which can resolve disputes on merit and not just on the law.