

- **Common law method and citations**
- **English and American influences on the Australian Constitution**
- **Some basics**
  - Representative democracy
  - The importance of conventions
- **Dismissal or forced dissolution**
- **Rights and immunities**
- **Protection from abuse of power**

# Common Law case method and citations

- Precedent, stare decisis, ratio decidendi, obiter dictum/dicta
- *John Doe v Richard Roe*, (1957) 26 F.L.R. 267 or H.C.A. or A.C.
- *R. v Jones* (R. stands for Regina)
- The Honourable Justice Kirby, Kirby J.
- Internet citation- paragraph numbers: AustLII, CanLII, PacLII etc

# A Constitution is

- the rules of engagement between the people and the government
- Weber: the Nation State “is a human community that (successfully) claims the *monopoly of the legitimate use of physical force* within a given territory.”
- Baron von Savigny: "Law is the product of *Volksgeist*, embodying the whole history of each nation's culture, responding to organic processes of growth in society itself and reflecting inner convictions that are rooted in common experience."

# **USA: Declaration of Independence 4/7/1776**

**“We hold these truths to be self evident; that all men are created equal; that they are endowed by their creator with certain inalienable rights; that among these are life, liberty and the pursuit of happiness; that to secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed; that whenever any form of government becomes destructive to these ends, it is the right of the people to alter or to abolish it; and to institute a new government, laying its foundation on such principles, and organising its powers in such form, as to them shall seem most likely to effect their safety and happiness.”**

# **American and English influences**

- **English notions of the division of the Monarch's power**
- **Conventions, Cabinet**
- **US ideas of power of the people**
- **Written Constitution- judiciary can declare legislation and executive acts beyond power**
- **Federal system**
- **An adversarial culture**

## ***USA arrangement***

**Executive Power**  
**Elected President**

**Legislative Power**  
**Elected Congress**  
**and Senate**

**Judicial power**  
**tenure**

## ***UK/AUST arrangement***

**Queen/Governor-General**

**Parliament** (House of  
Representatives and the Senate)

**Judicial Power**  
**tenure**

**Executive Power**  
**Cabinet**

**Legislative Power**

# Basics

- **A compact between the States**
- **Bicameral Parliament- House of Representatives and Senate**
- **Supply/budget: the unresolved problem**
- **Powers listed in s. 51 (section 51)**
- **Reserve powers lie with the States**
- **Senate is to protect the States**
- **In conflict Federal law prevails**

**51. The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to: ...**

- (xiii) banking, other than State banking; also State banking extending beyond the limits of the State concerned, the incorporation of banks, and the issue of paper money; ...**
- (xx) foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth; ...**
- (xxvii) immigration and emigration; ...**
- (xxix) external affairs; ...**
- (xxx) the acquisition of property on just terms from any State or person for any purpose in respect of which the Parliament has power to make laws; ...**
- (xxxviii) the exercise within the Commonwealth, at the request or with the concurrence of the Parliaments of all the States directly concerned, of any power which can at the establishment of this Constitution be exercised only by the Parliament of the United Kingdom or by the Federal Council of Australasia; ...**



# **Representative democracy: the House of Representatives**

- **Universal suffrage**
- **Compulsory voting**
- **Equal electorates**
- **Preferential voting**
- **Parliament must sit every year**
- **Election every 3 years**

# Preferential voting

# Executive power

- **63 *Provisions referring to Governor General***      The provisions of this Constitution referring to the Governor- General in Council shall be construed as referring to the Governor- General acting with the advice of the Federal Executive Council.
- **62 *Federal Executive Council***      There shall be a Federal Executive Council to advise the Governor- General in the government of the Commonwealth, and the members of the Council shall be chosen and summoned by the Governor- General and sworn as Executive Councillors, and shall hold office during his pleasure.
- **61 *Executive power***      The executive power of the Commonwealth is vested in the Queen and is exercisable by the Governor- General as the Queen's representative, and extends to the execution and maintenance of this Constitution, and of the laws of the Commonwealth.
- **64 *Ministers of State***      The Governor- General may appoint officers to administer such departments of State of the Commonwealth as the Governor General in Council may establish.

# **Cabinet conventions**

- **The G-G must appoint as Prime Minister the leader of the party with confidence of the House of Representatives**
- **The G-G must appoint the Ministers nominated by the Prime Minister**
- **Ministers form Cabinet which speaks with one voice**
- **Confidentiality- 30 years**
- **G-G must follow advice of Executive Council, i.e. the inner Cabinet**
- **The Queen must appoint and dismiss the G-G as the Prime Minister advises**

# **Conventions on forming government**

- **Defeat at election = resign**
- **G-G asks majority leader in House of Representatives to form a government**
- **Defeat in vote of confidence or loss of supply = must resign**
- **Note that ministers must be MPs**

# **Dismissal by the G-G**

- **Lang government 1932**
  - **Sydney Harbor Bridge**
  - **Defaulted on loan agreements**
  - **Lost confidence of the lower house**
- **Whitlam:**
  - **Supply blocked in Senate**
  - **Still had the confidence of the House of Representatives**
  - **“Fraser is Kerr’s cur” 1975**
- **Constitutional problem, especially for a Republic**

# Expressed Rights and Immunities

- The common law tradition of protecting human rights: Magna Carta and habeus corpus
- Some rights are expressed: Deane J in *Street v QLD Bar Association* [1989] 168 CLR 461 at pp 521-2
- Trial by jury, freedom of religion, right to vote, fair acquisition

# How effective a freedom is depends on the judges

**“S. 116: The Commonwealth shall not make any law for establishing any religion, or for imposing any religions observance, or for prohibiting the free exercise of any religion ...”**

- ***Krygger v Williams* [1912] 15 CLR 336**
- ***Adelaide Company of Jehovah’s Witnesses v the Commonwealth* [1943] 67 CLR 116**
- ***A-G Victoria, ex parte Black v The Commonwealth* [1981] CLR 559**



# But then the judges can make up their own freedoms

- An implied freedom of political communication
- *Nationwide News Pty Ltd v Wills* [1992] 177 CLR 44-
  - “a vast bureaucracy in the Ministry of Labour and enforced by a corrupt and compliant ‘judiciary’ in the official Soviet style Arbitration Commission.”
  - “To sustain a representative democracy embodying the principles prescribed by Constitution, freedom of public discussion of political and economic matters is essential: it would be a parody of democracy to confer on the people power to choose their Parliament but to deny the freedom of public discussion from which the people derive their political judgments.”
- *Australian Capital Television Pty Ltd v Commonwealth* [1992] 177 CLR 106

# Freedom of speech in political discussion

- ***Theophanous v Herald and Weekly Times Ltd* [1994] 182 CLR 104**
- ***Lange v Australian Broadcasting Commission* [1997] 189 CLR 520**
  - If the law is a burden on discussion in political matters and is beyond what is needed for a legitimate end then it is beyond power (*Lange*)

***Bass v Roberts* HCA  
2002 (AustLII.edu.au)**

- **Defamatory?-yes**
- **Defence of qualified privilege?- yes**
- **But malice defeats defence**

**But then see:  
Monis v The Queen  
[2013] HCA 4, 27  
February 2013**

# ***Monis v R* [2013] HCA 4**

- **Letters to the parents of soldiers killed in Afghanistan**
- **Charged with using the postal service in a way that a reasonable person would regard as offensive**
- **3 judges- the breadth of the prohibition is incompatible with maintaining freedom of political communication**
- **Crennan, Kiefel and Bell JJ: the section is not directed at political discussion and the degree of restriction on political communication is proportionate.**
- **3 v 3 = lower court decision stands**

# **Legal restraints on the abuse of executive power**

- **High Court has original jurisdiction in Mandamus, Prohibition and Certiorari, but it is expensive (and in *Al-Kateb v Godwin* (2004) 219 CLR 562 they accepted indefinite immigration detention)**
- **Administrative Appeal Tribunals, but independence problems**
- **Ombudsmen and Independent Commission Against Corruption (NSW)**
- **The Press and the electoral process**

# Australia: one size for oil and gas and another for refugees!



# **Exposing the abuse of Executive power**

- **“The Pacific Solution”**
  - 120,000 legal migrants per annum- sympathetic to legal refugees
  - Most illegals arrive by air
  - The boat people- Indonesia
  - Christmas Island not part of Australia
  - Camps in New Guinea and Nauru
- **Investigation by Parliament**
  - The select committee system
  - Playing to the Press

# “Throwing children overboard”

“We don’t want people like that in Australia!”

The *Tampa*



# Children overboard (continued)

- **A perfect political storm:**
  - Refugees demonised
  - Elements of racism and national security
  - Send in the army- act tough
  - Opposition supported it
  - High Court refused to intervene
- **In the end many were *not* genuine refugees (UN assessment)**
- **All exposed by a Senate select committee-  
Der Untersuchungsausschuss**
- **This then formed the basis of a TV documentary**
- **“Stop the boats”**