INTRODUCTION TO THE AUSTRALIAN GOVERNMENT

Fundamental concepts and institutions of the Australian Government

Public Law
Public Law is the law that governs the vertical relationship between individuals and the state. Public Law is primarily concerned with laws that regulate the Government, such as Administrative Law and Constitutional Law, in addition to Governmental responsibilities, namely, statutory construction.

The Rule of Law
The Rule of Law refers to the restriction of the arbitrary exercise of power by subordinating it to well-defined and established laws. It is the responsibility of the courts to preserve the Rule of Law.

In essence, the Rule of Law has two main facets that provide the basis for our legal system:

1. No man or woman is above the law
2. Equality before the law means that the Government cannot exercise power unless it is authorised to do so.

Parliament
Parliament is the law making body, or the legislative arm (legislature), of the Government. Parliament is derived from the history of sovereign authority in the United Kingdom. The Parliament of the Commonwealth of Australia is based on the UK model of parliament, known as the Westminster System.

In Australia, parliament consists of the Queen (represented by the Governor-General), the Senate (the Upper House) and the House of Representatives (the Lower House).

Parliamentary Sovereignty
Of the three arms of government, parliament is considered the most democratically responsive. Therefore, parliamentary sovereignty has three main tenets in its application to Australian politics.

1. Parliament is supreme – However, unlike the UK, Australia has a written constitution, which constrains the law making powers of the federal government to certain matters. As such, the High Court can invalidate ultra vires laws.
2. No parliament can bind future parliaments – In Australia, it is virtually impossible to bind future parliaments. That is, laws can be changed or reversed in the future
3. Legislation always prevails over case law
The Executive
The executive branch of the Australian Government is the Crown. The Governor-General represents the Queen in Australia. However, the Governor-General typically does not exercise political power, and instead, acts on the advice of the Prime Minister and the Cabinet (the Australian Constitution does not provide for a Prime Minister or for the Cabinet).

Therefore, the executive arm of the Australian Government consists of the Cabinet and Ministry. It is the executive’s role to carry out the laws passed by the legislative branch – Parliament. The Doctrine of Separation of Powers dictates that the three branches of government do not mix functions. However, due to the concept of Responsible Government, the executive is drawn from ministers in the House of Representatives, the lower house of Parliament (the Prime Minister chooses senior ministers to form the Cabinet).

The Government
Australia is a constitutional monarchy that is a representative democracy. Thus, the federal government includes elements of both the UK and US models of government, making it known as a hybrid ‘Washminster System’. The structure of the government can therefore be described as emphasising two distinct concepts; the separation of powers and federalism.

Federalism
The essence of federalism is the division of powers between the Federal and State Governments in the political hierarchy.

The Commonwealth Government’s exclusive powers are referred to in s 51 of the Constitution. The Federal Government can only enact laws in relation to these matters, otherwise the High Court may declare the laws as being invalid, or ultra vires, if a case is presented. Alternatively, the state governments are competent to enact laws on any matter they see fit. However, if an inconsistency arises between federal and state laws, federal laws prevail, as per s 109 of the Constitution. Similarly, federal and state courts are responsible for different matters.

Representative Government
The Government is drawn from the party that dominates the House of Representatives. Members of the Lower House are elected, representing electorates on a populace basis. Conversely, the Senate is deliberately based on location, with twelve senators representing each of the six states, and two senators for both the territories.

The major advantage of a representative democracy is that it allows citizens of large countries to choose who represents their interests. However, a criticism of this concept is that individual members will follow the interests of their respective parties.

Responsible Government
Responsible Government is the term used to describe a political system where the executive government, the Cabinet and Ministry, is drawn from, and accountable to, the legislative branch. Due to this, there is a fusion of the executive and legislative arms of government. Ministers are responsible back to the Lower House, whereas in non-Westminster structures, ministers are from the ‘outside’. In practice, the dominant party remains in power if it can maintain the confidence of the Lower House.
**Popular Sovereignty**

Popular sovereignty is the principle that the authority of the government is created and sustained by the consent of its people (voters), through their elected representatives. In reality, the people have limited opportunities to exercise power.

Another example of popular sovereignty is amending the Constitution. The constitution may be amended through a referendum. However, there is a double referendum requirement in that it must receive an overall majority, and a majority in four out of six of the states. Additionally, both houses of Parliament must approve the proposal.

**The Judiciary and Judicial Independence**

The judiciary is the branch of government that maintains the rule of law by undertaking judicial reviews of the legislative and executive arms.

- The High Court acts as the guardian of the Constitution. The Commonwealth Parliament can only make laws on certain topics dictated by the Constitution. The High Court reviews laws when a case on the specific matter is brought before it, if they are *ultra vires* or outside the Parliaments scope of power, the laws will be invalidated. Some *ultra vires* laws may not have been invalidated because there has been no litigation.
- The judiciary also ensures that the executive exercises power in accordance to proper legal limits.

Although there is a distinction between federal and state jurisdictions, there also exists a degree of interconnectedness between federal and state courts, resulting in an integrated national judiciary

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**Judicial independence** is the concept that the judiciary is free from the influence of the other branches of government or other improper interests. This is essential in to the Rule of Law.

- Federal judges are appointed by the Governor-General on recommendation of the Cabinet
- Judicial terms are fixed to preserve independence
- Judges cannot be dismissed or have their salaries reduced, to limit outside
- Federal judges can be removed under s 72 of the Constitution for proved misbehavior
- All federal judges have a forced retirement age
Fundamental developments

**Indigenous Peoples**
At the time of British settlement, there were several hundred Indigenous communities with unique languages, cultures, territories and laws. Colonisation had a devastating effect on these communities.

At the time, International Law recognised three methods of taking possession of a territory. Land could be conquered, ceded or settled.

1. **Conquered** land is taken by force, with the existing law remaining in place subject to modification by British Parliament
2. **Ceded** land is gained through treaty or agreement, legally this is considered the same as conquered land
3. The **settlement** of land implies there is no existing legal system, British law immediately fills the legal vacuum

Captain James Cook carried with him secret instructions aboard the Endeavour on its voyage to the southern continent:

*With the consent of the natives, take possession of convenient situations in the country, in the name of the King of Great Britain.*

*If you find the country uninhabited, take possession for his majesty by hoisting British colours and setting up proper inscriptions as first discoverers.*

Despite Cook’s awareness of the Indigenous people, the accepted rule amongst the expanding European empires was that a people could not be considered civilised if no legal system existed. In addition, due to the nomadic nature of the Aboriginal people, the British standards of property ownership were contradicted. Ownership, to the British, meant exploitation of the land for cultivation. The British simply could not recognise that the Indigenous people did in fact have a customary legal system and a connection with the land in place for millennia. Therefore, Australia was settled.

**Terra Nullius** alleged that Australia was an uninhabited land before English settlement, and thus created the moral and legal basis upon which English law could be implemented. The views of the Indigenous people of Australia were not sought, and the customary laws followed by the Aboriginal population were ignored. Common law did not recognise native title - the right over land that may be owned according to traditional laws.

After a decade of litigation in the *Mabo* case, the High Court rejected the doctrine of *terra nullius*. It did not question the radical title in that all land in Australia was vested to the Crown, however, acknowledged that in reality, native title exists.

**The Assertion of British Sovereignty and Reception of English Law**
On 26 January 1788, Governor Phillip established the first penal colony in Australia. According to William Blackstone’s formulation, all English law was transplanted in Australia on this date. However, there were restrictions, as the young colony could only receive as much of the English law as is reasonably applicable to its situation.
At international law, the effect of British settlement was twofold:

1. The English Crown acquired sovereignty over the land, giving the Crown radical title under the feudal system of land tenure (refers to the absolute ownership of all land by the Crown)
2. The laws of England, as far as they were applicable to local conditions, were introduced into the new colony

Colonial Structures

Australian Courts Act 1828
From reception until 1828, the importation of English law stemmed only from common law. To erase any doubt in relation to the applicability of English law in New South Wales, the Imperial Parliament (the British Parliament legislating for the empire) passed the *Australian Courts Act 1828*. This Act asserted in statute that all laws and statutes in force in England that were applicable to the conditions of New South Wales and Van Diemen’s Land were also in force there. The respective Supreme Courts were given authority to determine what laws were applicable to the conditions. As Victoria and Queensland were at the time considered part of New South Wales, the date of reception in those states is the same. It was still possible for the British Parliament to pass statute that applied to the colonies.

Colonial Laws Validity Act 1865
This Act reiterated the supremacy of British law, maintaining control of colonial legislature to protect British interests. However, s 3 stated that no colonial law was to be invalidated on the basis of repugnancy unless it was inconsistent with Imperial legislation. Additionally, s 1 expressed legislation was intended to apply to the colonies. The Victorian Parliament and courts were free to alter the received law of the United Kingdom but could not enact laws extending beyond the boundaries of Victoria or repeal British statutes of paramount force.

Australian Constitutional Instruments

Commonwealth of Australia Act 1900 (UK)
Formally created, by statute the Commonwealth of Australia. In 1901, the colonies of Victoria, New South Wales, Tasmania, Queensland, South Australia and Western Australia combined to form a Commonwealth. The Commonwealth government and courts obviously acquired law making functions, however, were also inhibited by the same restrictions as the State parliaments.

Statute of Westminster 1931 (UK)
The Commonwealth Parliament was granted full legislative independence from the United Kingdom, hence the restrictions on the Commonwealth were removed.

Constitution Act 1975 (Vic)
The Constitution provides the framework within which parliamentary democracy and responsible government operate in Victoria. It sets out the basic rules relating to the Crown (the Queen and the Governor), the Legislative Council, the Legislative Assembly, local government, the Supreme Court and the Executive (ministers and the public service).

The Constitution does not set out everything about democracy and government. It does not, for example, cover Cabinet, the Opposition or political parties. Instead such concepts have been based on the Parliament of the United Kingdom or have developed over time.