

Constitution: legislation outlining the structure, operation and power over the legal system

Division of powers: the way the Constitution allocates law-making powers to Commonwealth and state parliaments

- o Specific: clearly outlined in the Constitution
- o Exclusive: powers solely belonging to the Commonwealth
- o Concurrent: shared between Commonwealth and states
- o s109: if Commonwealth and states make conflicting legislation the Commonwealth legislation will prevail to the extent of the inconsistency
- o Residual: not mentioned in the Constitution. Solely belong to the states

Restrictions on law-making powers of states

- o Constitution makes some power exclusive and therefore restricts state power
- o Section 109

Restrictions on law-making powers of Commonwealth

- o Sections 51 (xxxi), 80, 92, 99, 116 & 117
- o Section 128 (referendum process) prohibits Commonwealth from altering the Constitution
- o Residual powers: restricted by omission

Referendum process

1. Proposal Bill drafted
2. Legislative process
3. Proposal put to the people
4. Tested for double majority
5. Royal Assent
6. Change in Constitution

Factors affecting success: double majority requirement, complex proposals, need for bipartisan support, suspicion of politicians' motives, voter ignorance/conservatism

Referenda affecting division of powers: state debts (1910, 1928), social services (1946), Aboriginal affairs (1967). All increased Commonwealth's power at expense of the states

High Court interpretation

High Court: sits atop federal and state court hierarchies. Roles: guards the Constitution, ensures parliaments do not go beyond their law-making powers, interprets legislation.

Interpretation: sole interpreter (meaning giver) of the Constitution. When relevant cases arise the court will consider intention of the founding fathers of the Constitution but will make it relevant to modern needs.

Effect on division of powers: Interpretation has had a greater affect on division of powers than referendum process. Relevant cases: Koowarta v Bjelke-Petersen (1988); Tasmanian Dam Case (1983); Roads Case (1926); First Uniform Taxation Case (1942); Brislan's case (1935)

Referral of power

Reasons for referral: consistency across Australia, common sense, efficiency

- o Example: Industrial relations power (referred in 2009)

Process: state passes a Bill referring the power, and Commonwealth passes a Bill accepting the power

Constitutional protection of rights

Express rights: s51xxxi (acquisition of property on just terms); s80 (trial by jury for CW indictable offences); s92 (freedom of trade (& movement) between states); s116 (freedom of religion); s117 (freedom from discrimination based on state)

Implied rights: freedom of communication on political matters (Political Advertising case)

Structural protections: separation of powers; representative government (guaranteed in Roach); responsible government

Effectiveness of Constitutional rights protection

Note: when comparing to another country, use the same three criteria

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| 1. How rights are protected | Positive: some rights are entrenched (e.g. express rights) Negative: no Bill of Rights |
| 2. Scope of rights protection | Positive: one fundamental right (s116) Negative: only five express rights and one implied Negative: narrow and obscure rights (e.g. s51xxxi; s117) |
| 3. Power of rights protection | Positive: fully enforceable and can override conflicting legislation |