

# Ch 9.

# Federalism.

Unitary system: nation governed by a single central gov't with undivided sovereignty eg. UK, New Zealand

Federalism: a system of gov't in which sovereignty is geographically divided between one central gov't and 2 or more regional gov'ts, each sovereign within their own sphere.

↳ can be classified along a federal continuum: the relative power of one level compared to another.

- **coercive federalism**: a federal system in which central gov't possesses + exercises significantly more power than regional gov'ts. eg. Australia in recent years.
- **coordinate/dual federalism**: a federal system in which the 2 levels of gov't work independently in their own power spheres. Requires only weak institutions of federalism where levels come together to coordinate fairly autonomous action.
- **cooperative federalism**: a federal system in which the 2 levels of gov't work together to achieve outcomes. Requires strong institutions of federalism where levels come together to cooperate.
- **confederation**: a very loose federation in which central gov't is weak and regional gov'ts are strong eg. European Union

## Australian federalism

- Intended to be coordinate/cooperative - has become coercive over time.
- **Central gov't: The Commonwealth**
  - ↳ sovereign over all Australian territory + all Australians.
  - ↳ a federal parliament, executive, and courts.
  - ↳ created by Ch 1, 2 and 3
- **Regional gov't: the States**
  - ↳ sovereign over state lands + population
  - ↳ a state parliament, executive, and courts
  - ↳ powers + constitutions preserved by Ch 5
- **Non-sovereign governments of Australia:**
  - ↳ self-governing territories with power delegated to them by Commonwealth parliament
  - ↳ local gov't with power delegated to them by the states through Local Government Acts

Federalism: geographically-divided power, central/regional gov't, sovereign	Coercive	Coordinate	Cooperative	Confederation
- central exercises much more power than state/regional eg. Australia recently	- work independently in own spheres	- weak federal institutions	- work together to achieve outcomes	- loose federation
			- strong federal institutions	- regional gov't more powerful. eg. EU.

## Australia.

### regional

- State gov'ts: Ch 5
- own parliament/courts/executive

### Non-sovereign gov'ts

- ~~state gov'ts~~
- Local gov'ts
- Territories

- Central
- Ch 1 gov't
- main parliament, executive



## Dividing Powers

- **Exclusive powers**: powers granted by the Constitution to the Commonwealth Parliament alone.
  - ↳ specified (written) and enumerated (numbered) in Constitution
  - ↳ few in number
  - ↳ found throughout Constitution
  - ↳ eg. s52: power over Cwth public service and the ACT
  - ↳ eg. s115: prohibits states from coining money
- **Concurrent powers**: powers granted by the Constitution to the Cwth + State parliaments.
  - ↳ s109 invalidates any state laws that conflict with Cwth laws, to the extent of the inconsistency
  - ↳ all found in s51 → 40 subsections
  - eg. taxation.
  - ↳ some are 'exclusive by nature' in their execution
  - eg. defence and naval power in s51
  - ↳ states are otherwise entitled to exercise s51 powers bc Constitution doesn't state they are exclusive
- **Residual powers**: all govt powers not specified or enumerated in the Constitution, which belong to states.
  - ↳ many are services + public goods provided to citizens
  - eg. health, education, roads + traffic, public transport
  - ↳ states are closer to the people + their unique needs ∴ are in a better position to legislate these areas
  - ↳ not specified/enumerated to prevent having to change Constitution every time govt steps into new area of lawmaking.



## Commonwealth Financial Powers.

- s51(ii): taxation power
  - ↳ used to raise revenue
  - ↳ concurrent power
  - ↳ since WWII, income tax was Cwth-only (not states) which is major source of Cwth revenue.
  - ↳ Cwth taxing powers have increased at expense of state taxing powers - change in federal balance.
- s90: customs, duties and excise power
  - ↳ abolishing interstate customs/tax on trade was one reason for federation
  - ↳ power over customs/excises made exclusive to prevent states from re-introducing taxes on trade.
  - ↳ created Vertical Fiscal Imbalance
  - ↳ not clearly defined → means that 'excise' in particular has been interpreted by HC to enrich Cwth and deplete states over time.
- s96: grants power
  - ↳ Cwth may pass laws to grant states money
  - ↳ may be untied i.e. state can spend in any way they choose → general purpose payments.
  - ↳ may be tied i.e. conditions attached as to how states spend the money → special purpose payments.
  - ↳ Cwth may interfere with residual powers. eg. Asset Recycling Scheme: states encouraged to sell govt infrastructure to private sector, then spend money on newer infrastructure. Cwth promises 'incentive payments' to states that meet asset sales targets.
- s87: 'Braddon Clause' or 'Braddon Blot'
  - ↳ method of transferring funds btw Cwth + states.
  - ↳ required Cwth to pay states 75% excess revenue from s90 revenues for 10 yrs after Federation
  - ↳ is now a spent section: once time limit ended, section ceased to function.
- s94: surplus revenue
  - ↳ required Cwth to distribute surplus revenue in any manner that the parliament deemed fair
  - ↳ soon after 1901, Cwth parliament decided to invest surplus revenue into trust funds for future spending i.e. no allocation to states - section is thus redundant
  - ↳ challenged in Surplus Revenue Case 1908 → HC found that Cwth's actions were constitutional

\* States wouldn't dare introduce new tax

s51(ii)

s90

s96

s87

s94

s92

s109

residual powers

s51 Taxation  
- concurrent  
- since WWII, Cwth → income tax  
- Cwth taxing powers ↑ at expense of state powers

s90 Customs/excises  
- abolish state restrictions on trade  
- exclusive  
- vague: open to HC interpretation

s96 grants  
- untied (GPP)  
- tied (SPP)  
- influence state powers  
eg. Asset Recycling Scheme.

s87 Braddon Blot  
- 75% excess s90 revenue to states for first 10 years  
- spent clause

s94: surplus  
- Cwth distribute surplus revenue to states  
- instead, puts in trust fund



\* All sections enabling granting of power/funds to states have evolved over time to favour Cwth.

↳ Constitutional design favours Cwth naturally eg. s99  
↳ Sections designed to protect state revenue are now spent or redundant

↳ HC favoured Cwth in constitutional cases eg. in regards to s94 surplus revenue.

\* Vertical Fiscal Imbalance: the imbalance in the taxing powers and spending obligations between the two levels of govt in a federation

↳ Cwth collects more revenue than it needs, and States spend more revenue than they collect.

↳ creates need for grants to States.

- s92: free trade between States.

↳ guarantees that no state can make laws that create trade advantages towards themselves, or a disadvantage towards other states.

↳ interstate trade is 'absolutely free': no customs/costs.

↳ most litigated section of the constitution.

eg. Cole v Whitfield 1988 defined 'absolutely free' in a broader economic sense of 'free trade', which limited State legislative power.

VFI:  
imbalance in taxing powers/spending obligations of 2 levels of government.

s92

- free trade btw states  
- most litigated section  
- eg. Cole v Whitfield 1988:  
broad interpretation of 'free trade' limits state legislative powers.

All sections granting funds power favour Cwth

- sections preserving state funds spent/redundant  
- design favours Cwth eg. s100  
- HC favoured Cwth over time.



Institutions of Australian Federalism: bind levels of govt together

### - Constitution

- ↳ creates Cwth, preserves states, defines their powers
- ↳ creates mechanisms for resolving disputes.
- ↳ financial sections provide for financial transfer e.g. s 96
- ↳ s 51 allows states to refer powers to Cwth
- ↳ prevents Cwth from favouring any single state (s 117)

### - Commonwealth Grants Commission. - est 1933.

- ↳ statutory authority (executive agency est. by statute) i.e. Cwth Grants Commission Act 1973.
- ↳ purpose is to distribute Cwth grants under s 96.
- ↳ aims to achieve Horizontal Fiscal Equalisation: the requirement that the Cwth parliament use its financial powers to equalise the standard of public service delivery in each state - i.e. that poorer states receive higher per capita grants from Cwth.
- ↳ distributed GST to the states (since 2000)
  - technically an excise → collected by Cwth, but all is granted to states as untied grants.

### - COAG - Council of Australian Governments.

- ↳ a meeting of the heads of Australian governments - PM, State Premiers, Chief Ministers (Territories) and President of Local Government Association. The main forum for cooperative federalism to operate.
- ↳ purpose: to discuss + resolve major federal issues. eg. anti-terror laws, Closing the Gap.
- ↳ ministerial councils: forums where Cwth ministers meet with state counterparts to coordinate activity, especially in regards to funding/execution.

### - High Court

- ↳ resolves inter se cases - between governments, regarding the meaning of the constitution.
- ↳ interpretations have significant impact on meaning and application of constitution.
- ↳ decisions have been an important influence on the federal balance of power.

#### Constitution

- defines powers
- mechanisms of conflict resolution
- s 51 referral of powers
- financial transfer
- s 117: Cwth can't favour 1 state

#### Cwth Grants Comm.

- 1933
- distribution of grants s 96
- GST
- aim to achieve HFE

#### COAG

- heads of Australian govt meet/coordinate
- ministerial councils

#### HC

- inter se cases
- important in changing federal balance



## Changing the federal balance of power.

- **Formal changes:** changes to the words of the Constitution
  - ↳ via referendum - s128
- **Informal changes:** changes to the operation of the Constitution.
  - ↳ High Court interpretation
  - ↳ Referral of powers
  - ↳ Cooperation through COAG
  - ↳ unchallenged legislation
  - ↳ Coercion of states through Cwth financial power.

## Commonwealth Financial Powers

- **Vertical Fiscal Imbalance**
  - ↳ Commonwealth collects 80% revenue, performs 50% of all expenditure
  - ↳ States collect 20% revenue, perform 50% of all expenditure.
  - ↳ means Cwth must provide funds to states
- **Specific purpose payments**
  - ↳ grants with conditions attached for their spending
  - ↳ states don't have the financial resources to refuse Cwth SPPs
  - ↳ Cwth may use to interfere with residual powers
  - ↳ eg. after losing 2 Williams cases to continue NSCF, Cwth made SPPs to states, who had to spend the money on chaplaincy programs in schools.
  - ↳ states may interpret terms + conditions flexibly, would for Cwth to monitor → so Cwth introduced incentive payments.
- **Incentive payments**
  - ↳ used where Cwth lacks legislative power to perform a desired legislative action / carry out a policy
  - ↳ set aside funds that can be accessed only AFTER states have met all desired criteria.
  - eg. Asset Recycling Initiative - encouraged privatisation of govt infrastructure, and building of new infrastructure. In order to obtain grants, states had to submit infrastructure projects that would have net positive benefit, enhance long-term productive capacity, and enhance private sector financing of infrastructure. Encouraged states to follow Cwth policy

## Formal/informal constitutional change.

VFI → Cwth must provide funds to states

SPPs → grants with conditions attached. States lack financial resources to refuse them, may interpret terms loosely.  
eg. SPPs for NSCF after losing Williams Cases

Incentive payments → set aside funds for states to be accessed once a set of criteria have been fulfilled  
eg. Asset Recycling Initiative



### - National Reform Agenda

↳ agreed on by COAG to change financial relations under Intergovernmental Agreement on Federal Financial Relations - began 2009.

↳ enables greater authority for incentive payments and SPP to States.

↳ bring financial agreements under greater COAG control

### - Significance of VFI

↳ 30% Commonwealth surplus revenues → largest VFI in the world

↳ allows Cwth to take over residual powers in practice

↳ Australia dubbed a fiscal federalism

### - Fall in Use of SPPs in recent times

↳ creation of GST in 1999 and distribution of revenue to the states, has reduced states' revenue shortage

### Referral of Powers:

- s51 (xxxvii) enables states to refer powers to Cwth.

↳ only affects referring state, but other states may 'adopt' the referral as well

- eg. all states except WA have referred custody and maintenance of children of divorced parents to Cwth → Cwth thus created Federal Family Court, but WA still has own Family Court

- eg. anti-terror laws - criminalisation of terrorism

↳ s51 exclusive 'defence' power doesn't cover law in Australia - can't be used, criminal law is state power

↳ exclusive 'external affairs' power can only be used if an international agreement has been signed.

↳ Howard govt wanted to develop strong set of national laws to prevent growing criminal threat of terrorism.

↳ successfully asked states to refer certain criminal law powers to Cwth so that Cwth had constitutional power to pass Security Legislation (Terrorism) Act 2002

- Largest VFI in world: 30% Cwth excess revenues

### National Reform Agenda - COAG

- increased state authority over incentive payments and SPPs to states

### Referral of powers s51 (xxxvii)

other states may adopt eg. criminalisation of terrorism Security Legislation (Terrorism) Act 2002



## COAG negotiations + agreements

- COAG peak ministerial council of federation
  - ↳ PM, state Premiers, Territory Chief Ministers, President of Local Government Authority
- Meets regularly to debate, plan + monitor reforms.  
eg. National Disability Insurance Scheme, Closing the Gap, Infrastructure, water, anti-terrorism, tax reform
- Has attempted to create a more cooperative federalism
  - eg. Murray Darling Basin Plan
    - ↳ needed to create a unified set of laws for a river flowing through 4 states
    - ↳ tried to convince states to refer power to Cwth
    - ↳ initial failure: vic refused conditions to receive federal grants
    - ↳ more successful in unifying laws through Water Act 2008 - cooperation of states + Cwth
- Intergovernmental/National Agreements have increased since Rudd govt. eg. NDIS
  - ↳ allowed large-scale coordination from Cwth in state reserved powers (eg NDIS - health) with state cooperation
- COAG has also been used for a more coercive federal style
  - ↳ eg. National Reform Agenda 2009
    - Federal Financial Relations Act 2009 allows Cwth to grant SPPs for state services, and allows treasurer to decide National Partnership Payments (incentive payments)
    - COAG Reform Fund Act (2008): created COAG Reform Fund, which is a pool of funds for SPPs to states

## High Court Interpretation

- Greatest impact on constitutional change since 1901
  - ↳ s71 establishes High Court
  - ↳ s76 grants it jurisdiction to interpret constitution.
  - ↳ has power to define govt powers when exclusive/concurrent powers are in dispute. → may change federal balance of power.



## History of landmark High Court cases and interpretation

### - Defending State power 1903-1920.

- ↳ Founding Fathers keen to protect state powers/sovereignty within a cooperative/co-ordinate federalism.
- ↳ Constitution designed to favour Cwth
- ↳ thus, HC judges had to create doctrines of interpretation (evidences/policies courts use when deciding the meaning of a law, to ensure coherency + consistency) to avoid centralising tendencies of Constitution.

- ↳ Doctrine of Reserved Powers → protected state concurrent powers.
  - instructs HC to interpret concurrent powers narrowly such that state power preserved when Cwth entered a concurrent legislative area.

- ↳ Doctrine of Implied Immunities of Instrumentalities → protected state residual powers.
  - interpretation that argues that Constitution implies that state powers should be preserved, and thus that Cwth should not intervene in residual powers
  - instrumentalities: state-owned business eg railway.

- ↳ Peterweld's case 1904
  - applied Doctrine of Reserved Powers to define 'excise' (Cwth power s90) very narrowly, such that a NSW tax on brewers was kept under state, not Cwth, control

- ↳ Railway Servants Case 1906.
  - applied Doctrine of Implied Immunities of Instrumentalities to rule that Cwth industrial laws (exclusive, s51 xxxv) couldn't apply to WA state govt railway employees, as railroads were a state instrumentality.

### - Increasing Commonwealth power 1920-1971.

- ↳ Constitution written to centralise power + erode state sovereignty over time, due to how state powers are unspecified and thus cannot be interpreted by the HC (ie. are non-justiciable).

- ↳ Engineers Case 1920 - eroded state legislative power.
  - national trade union engaged in dispute with WA sawmill. Cwth wanted to legislate under s51 (xxxv) industrial relations power.

- HC ruled that Cwth has power to legislate if a dispute crosses state borders
- reversed Railway Servants Case precedent
- Set a new precedent which is persuasive still in the modern day.



- ↳ **Uniform Tax Case 1942**: increased Cwth financial power
  - WWII, federal govt needed new sources of income, so used concurrent s51(ii) taxation power to pass 4 Acts:
    - Income Tax Act 1942: established federal income tax
    - States Grants Act 1942: grants to each state were equal to the income tax a state would raise itself.
    - Income Tax Assessment Act 1942: taxpayers had to pay federal before State income tax
    - Income Tax (War-time Arrangements) Act 1942: states had to transfer all income tax staff, records + offices to Cwth
  - States challenged in HC: 1st Uniform Tax Case 1942 ruled all acts were constitutional, because during war defence needs greater, Cwth had authority.
  - Challenged again 1957: upheld Acts as constitutional on basis of s51 (taxation concurrent), s96 (grants) and s109 (Cwth law shall prevail in inconsistency)
  - Meant states were essentially prevented from collecting income tax - had been major source of state revenue
    - ↳ more reliant on Cwth grants + small taxes
  - Since case, VFI began to strongly favour Cwth.
  - Income tax now collected by Cwth, biggest source of revenue → 57% of all tax collected in 2013-14.
- ↳ Doctrine of 'covering the field' s109
  - s109: if laws conflict, Commonwealth law will prevail to the extent of the inconsistency.
  - early days: HC interpreted 'inconsistency' as small as possible to maintain state power
  - later, interpreted s109 more broadly
  - allowed Cwth to specify in an Act made under s51, if the Act was intended to be the 'only law' covering that field - conflicts with + overrules all state law in the field.
- ↳ Broad interpretation of s96
  - Cwth can attach any conditions to grants to states, may interfere with residual powers but HC cannot intervene
  - Cwth has developed incentive payments to increase power i.e. states receive funds after conditions are met
- ↳ mid 1940s - 1970s: cases limiting Cwth power
  - State Banking Case 1947: ruled against Cwth laws that required states to bank with Cwth Bank - discriminatory to states
  - Bank Nationalisation Case 1948: struck down ALP's attempts to nationalise all banks. ALP had said it prevented free interstate trade



#### ↳ cases increasing Cwth power

- Concrete Pipes Case 1971: HC ruled that, under s51(xx) corporations power, Cwth had power to legislate for corporate activity within states. Ensured constitutionality of Trade Practices Act 1974 which regulated prices, consumer protection etc. nationally.
- Uniform Tax Case 1957: upheld 1942 precedent post-war

#### - Increasing Cwth power 1971 - present

##### ↳ s51(xxix) External Affairs power - exclusive

- has become more prominent due to globalisation, growth of Australia as a world + regional leader and increased presence of international bodies eg. UN
- allows Cwth to sign international treaties, then ratify them through a law in parliament
- s109 allows the law to overrule any conflicting state law
- allows Cwth to interfere in areas of state power eg. land + water management

##### • CASE STUDY: Tasmanian Dams 1983

Cwth signed Int. Convention for the Protection of the World's Cultural and National Heritage, then ratified it using external affairs power to ratify it in World Heritage Properties Conservation Act 1983. Listed Gordon-below-Franklin River as World Heritage Area, to prevent Tasmanian gov't from damming the river, thus, Tas lost power over land + river management

##### ↳ s90 customs + excise powers

- HC found that NSW gov't fees on tobacco and franchise sales were 'excises' and thus were exclusive Cwth powers - Ha/Hammond v NSW 1997
- undermined state financial independence, increased VFI

##### ↳ cases undermining state economic freedom - interstate trade

- Cole v Whitfield 1988: Tasmanian law limited size of crayfish that could be sold → meant a Tasmanian company couldn't import smaller SA crayfish. Law ruled unconstitutional as had a discriminatory protectionist effect on interstate trade. Meant states could not pass laws to protect its own industries because it impeded 'absolutely free' trade



↳ expanding Cwth power under corporations power s51(xx)

• corporations power includes companies, charities, non-for-profits, sporting clubs etc

• Work Choices 2006

↳ industrial relations law - Howard govt.

↳ sought to take over most state powers in IR.

↳ industrial relations s51(xxxv): power to resolve industrial disputes that cross state borders - insufficient power

↳ instead, Cwth used corporations power s51(xx)

↳ states + unions challenged Cwth in HC → ruled that Cwth was acting constitutionally under corporations power

↳ set a precedent for broad interpretation of corporations power.

eg. Howard govt wanted to control irrigation of water from Murray River, but failed to convince states to refer powers over the river to the Cwth. Instead, used corporations power to amend Water Act 2007 and regulate amount of irrigation water that came from rivers → because many of the businesses irrigating along the Murray River were corporations.



# Ch 10

# Changing the Constitution.

- Constitution - superior fundamental law.
  - ↳ defines + limits powers of govt → important to protect + limit who can change it.
  - ↳ constitutional change: any change to the actual words and/or effect of the words of the Constitution
  - ↳ 2 ways to change: formal and informal

+ GG



## Referenda requirements:

- Bill passed parliament
- Put to people 2-6 months later as YES/NO vote
- Double majority:
  - ↳ democratic maj. of all voters
  - ↳ federal majority: of a majority of states i.e. 4/6 (not NT/ACT)

- **Referenda:** Formal Constitutional Change.
  - s128 of Constitution enables it to be changed
  - **Referendum:** the only formal way to change the constitution, contained within s128. Requires a Bill to pass parliament, with the question then being put to the people between 2-6 months later. To succeed, must obtain a double majority: a democratic majority (a majority of Australian voters) and a federal majority (a majority of voters in a majority of states)
    - ↳ idea may come from govt, parliament, parliamentary committee, expert panel, pressure group, review by Royal Commission / Constitutional Convention / Constitutional Convention established by govt.
  - **Process:** example of direct democracy, as only the people can approve changes to fundamental law. Process also designed to protect smaller states
    - ↳ proposal to change must pass through both Houses of parliament (or the same House twice) and receive Royal Assent from GG.
    - ↳ must be put to the people as a YES/NO vote, not less than 2 months, or more than 6 months, after it passes the parliament
    - ↳ to succeed, must achieve a 'double majority':
      - **democratic majority:** a majority of all Australian voters
      - **federal majority:** a majority of voters in a majority of states (i.e. at least 4 of 6 states). NT and ACT votes do not count towards this majority

Constitution is superior law which defines, and limits govt - must control who can change it [s128]

- 1) Bill passed by parliament
- 2) Put to people 2-6 months later
- 3) Must obtain double majority:
  - ↳ federal majority: at least 4/6 states (no territories)
  - ↳ democratic majority: majority of all Australians
- 4) Royal Assent GG.

Direct democracy  
Protect smaller states.



8/44 passed

- Success of referenda

- ↳ have been 44 referenda, put to the people 19 times, but only 8 have passed.
- ↳ of 36 that failed, 5 had a democratic but not federal majority eg. 1977 simultaneous elections: 62.27% of Australians, but 3 smaller states (QLD, WA and Tas) voted against it.
- ↳ 8 successful referenda:
  - 1906 Senate Elections timing
  - 1910 State Debts: Cwth could take over state debts
  - 1928 State Debts: established Loan Council
  - 1946 Social Services: expanded Cwth welfare powers
  - 1967 Aborigines: counted in census, Cwth could legislate for
  - 1977 Casual Senate Vacancies
  - 1977 Territorial Voters: included NT + ACT in democratic majority
  - 1977 Retirement of Judges: past age 70.

Successful Referenda:

- minor technical change
- Not a Canberra power grab unless for good reason
- wide bipartisan support
- No 'NO' campaign

- Successful Referenda:

- ↳ propose only minor technical changes
- ↳ don't seem like a power grab by Canberra
- ↳ if they do increase Cwth power, it is for a good reason eg. social services 1946.
- ↳ have wide support
  - ie. bipartisan support from parliament, supported by States (states may open political points by championing their states or Canberra-bashing - support is critical)
- ↳ don't generate strong NO campaigns
  - if Bill opposed in parliament, then funding authorised for a NO campaign.
  - pressure groups + individuals may start their own NO campaigns to persuade uncertain voters. eg. Australians for a Constitutional Monarchy opposed republic referendum

Failure:

- cautious voters
- not willing to diverge from the prosperous norm
- apathy
- NO campaigns
- Distrust of politicians

- Reasons why referenda fail

- ↳ voters are inherently cautious
- ↳ Australia is stable and prosperous - citizens don't see a reason to change anything
- ↳ apathy - causes people to vote NO: compulsory voting
- ↳ distrust of politicians' motives

- CASE STUDY: Aborigines 1967 - allow Cwth to legislate for Aboriginal people include them in the census. Bipartisan and state support. Manifested in US civil rights movement around the same time. No public funds or NO campaign, strong YES campaign. Achieved 90.8% YES.

44 referenda, 19 occasions, 8 passed

Reasons for success:

- minor technical change
- bipartisan support + state support
- No strong NO campaign
- Not a power grab for federal govt - if are for a good reason eg. social services 1946.

Why fail

- Inherent cautiousness
- Mistrust of politicians
- Apathy
- It's stable - no need for change

Aboriginal Representation 1967

- no NO campaign, bipartisan/state support, Civil Rights USA

90.8% YES



## Informal Constitutional Change: High Court Decisions

- Constitutional cases - granted to HC in s76
  - ↳ cases arise when parties dispute Constitution's meaning
  - ↳ HC decisions on words' meanings can change their application and operation
  - ↳ HC judgements may be literalist or activist.
  - ↳ judgements can only be made if a case comes to court - HC cannot act proactively.
  - ↳ HC has been most important agent of constitutional change since Federation.

Court can't act proactively

## - The Australian Constitution and Rights.

- ↳ rights: freedoms or entitlements to which a citizen has a just claim.
- ↳ constitutions define relationship btw govt and citizens by:
  - preventing govts from limiting freedoms
  - obliging govts to provide certain entitlements.
- ↳ constitutional rights are most secure, as cannot be changed by exec/legis, only subject to court interpretation
- ↳ some constitutions are rights-based eg. US Constitution contains a number of amendments known as the 'Bill of Rights' - post-War of Independence protection from tyranny
- ↳ Australia gained independence through peaceful means, thus federation was the most important concern for writers of the Constitution eg. divvying powers for social services, infrastructure, immigration, trade etc. Also didn't want a rights-based constitution that would conflict with legal arrangements with Aboriginal people. ∴ Aus constitution not rights-based.

## - Specified Constitutional rights: rights or freedoms expressed explicitly in the Constitution, found ad hoc in text.

- ↳ s41: transitional right to vote
- ↳ s80: right to jury trial - federal indictable cases
- ↳ s116: no state religion re. freedom of religion.
  - Scientology Case (1983): religious organisations exempt from tax, Vic charged Church of Scientology for tax. Church took to HC which interpreted 'religion' widely such that Scientology was defined as a religion.
- ↳ s117: no discrimination based on state of residence
- ↳ s92: absolutely free trade
- ↳ s51 (xxxii): if Cwth takes property, must be on 'just terms'
  - Army v Datzel (1944): property = defined very broadly
  - Dorman v Rogers (1982): property = all valuable interests
  - Mutual Pools v Cwth (1994): distinguished 'acquisition' from 'deprivation'

Cole v Whitfield 1988

Australian Constitution → not rights based

- ① Not born from violent revolution
- ② Interfere with Indigenous legal relations

## Specified rights

- s41 - right to vote
- s80 - trial by jury federal indictable offenses
- s116 - freedom of religion, no state religion (Scientology Case 1983)
- s92 - absolutely free trade between states
- s117 - no discrimination btw states
- s51 (xxxii) - acquisition of property on 'just terms'



- Implied Constitutional rights: freedom or entitlement that is not expressed specifically, but can be inferred from the broader meaning of the Constitution.

↳ must be discovered in an activist HC interpretation

CASE STUDY: discovering freedom of political communication

- Australian Capital Television v Cwth (1992): Political Broadcasts and Political Disclosures Act 1991 limited political advertising, forcing TV stations such as the ACT to broadcast political advertising at certain times only. ACT (broadcast company) challenged in HC.

- s7 and s24 specify that parliament must be 'chosen by the people'. HC found that this establishes a representative democracy, which implies that voters must be able to hear the arguments of politicians & parties to make their democratic choice. Therefore, freedom of political communication must exist.

- HC ruled in favour of ACT - struck down section of Act that banned political advertising.

- Precedent/Implied right applied to future cases

↳ Theophanous v Herald & Weekly Times Ltd (1994)  
MP Andrew Theophanous unsuccessfully sued a newspaper for defamation after it published an article questioning his capacity as an MP - formed a part of free political expression.

\*Also:

- Roach
- Alqudsi v The Queen
- Lange.

\* Laws made only apply in States that have referred their powers → known as State/Federal Laws

Informal Constitutional Change: Referral of Powers

- s51 (xxxvii) allows states to refer residual/concurrent powers to Cwth. Only affects referring state, but also allows other states to adopt the referral at a later date.  
- Has been used to modernise the Constitution to the 21st century - otherwise is relatively inflexible.

- Family Law:

↳ all states ex WA have referred family Law powers

↳ allows national laws

↳ Australians more mobile, higher divorce rates, families may have family members in different states.

↳ Cwth 'marriage' and 'divorce' s51 powers do not cover de facto marriages or children - referral of State family law powers has resolved many legislative issues

- Criminal Law

↳ states referred criminal law powers over terrorism, to allow for speedy creation of anti-terrorism laws on Cwth level in the aftermath of 9/11 attacks

Implied Constitutional Rights: eg. freedom of political communication

Australian Capital Television v Cwth (1992)  
Political Broadcasts and Political Disclosures Act 1991, s7/s24.  
applied as precedent: Theophanous v Herald & Weekly Times (1994)

Referral of powers s51 (xxxvii): only applies to adopted states, Cwth laws only apply within adopted states.  
Allowed modernisation of constitution eg. family law all states ex WA - families more mobile, more divorce → concurrent powers don't cover de facto marriage: resolve legislative issues.



## Informal Constitutional change: Unchallenged legislation

- To pass a law, legislation should:
  - ↳ reference a head of power i.e. an enumerated + specified power in the Constitution
  - ↳ if law doesn't reference a head of power, it must avoid being challenged in HC where it may be struck down as ultra vires (exceeding power).
  - ↳ If it remains unchallenged, increases Cwth power.
- Based on 2 principles
  - ↳ rule of law: independent HC is only court that can determine constitutional cases.
  - ↳ courts cannot act proactively, and judicial decisions can only be made ex post facto.
- Any party who has locus standi (standing) may challenge a law i.e. an interest or involvement greater than that of the general public - no companies, individual citizens ∴ easier to go unchallenged.
- Has been used to modernise the Constitution
- Snowy Mountains Hydroelectricity Scheme 1949-74.
  - ↳ threat of Japanese invasion WWII → Cwth desperate to stimulate growth post-war 'populate or perish'
  - ↳ Snowy Mountains Scheme: largest engineering project in Australian history, encourage economic + population growth
  - ↳ Cwth had no authority to pass Scheme - passed it using 'defence' head of power
  - ↳ States could have, but did not challenge. Instead, passed own supporting legislation, despite having constitutional power over land + rivers.
- Cross-vesting judicial powers
  - ↳ Cwth Jurisdiction of Courts (Cross-vesting) Act 1987
  - ↳ Reduces cost/barriers to legal system - no constitutional grounds
  - ↳ Has continued to be unchallenged legislation
  - ↳ State to Cwth cross-vesting was struck down by HC, In Re Wakim; Ex parte McNally (1999)
    - State had cross-vested company law
    - Federal court found 4 parties guilty of negligence under company law
    - Parties said Federal Court didn't have jurisdiction to rule them negligent and liable for damages.
    - High Court found the cross-vested power to have no constitutional standing
    - However Wakim didn't challenge Cwth → state vesting under Jurisdiction of Courts Act → remains operational

locus standi

## Unchallenged legislation

- Courts can only act ex post facto and if the party has locus standi
- Used to modernise
- eg. Snowy Mountains Hydroelectricity scheme 1949-74. 'defence' head of power

## eg. Cross-vesting

- Cwth Jurisdiction of Courts (Cross-vesting) Act 1987
- reduce cost + barriers to legal system, but has no constitutional grounds
- btw states - unchallenged
- state to federal cross-vesting struck down Re: Wakim; Ex parte McNally (1999).