



POLITICS & LAW

YEAR 11/12 | WACE | HUMANITIES & SOCIAL SCIENCES



What's included?

- Concise summaries of the year 12 (WACE) Politics & Law course
- Ready-to-use examples
- Notes completed by a student who achieved **96%**



KEY COURSE TERMS

Separation of powers	A political principle which provides for political power being split between the three arms of government (legislative, executive and judiciary.) It allows for checks and balances on government operations and facilitates the upholding of the rule of law.
Westminster conventions	Political traditions derived from England's Westminster system of government. The conventions aren't legally binding but are generally accepted as aspects of government function. For example, the Prime Minister is a Westminster Convention
Legislature	The arm of government responsible for representing the people, through debating public issues and proposing and passing legislation (enforceable law.) Australia's legislature is composed of the House of Representatives and Senate.
Judiciary	The body of government tasked with interpreting and applying laws passed by Parliament, while also creating common law through past judicial decisions.
Executive government	The branch of government composed of the leaders of government (the Prime Minister and their ministers.) The executive also includes the Governor-General.
Decline of Parliament thesis	A political theory that suggests Australia's modern Parliament fails to uphold its theoretical functions, namely, to represent the people and be a responsible legislative house.
Cabinet	A small group of the executive government which control the government's agenda and policies.
Federalism	The division of political power between at least two levels of government, typically a central, federal government and state governments.
Governor-General	The Constitutionally based political representative who theoretically heads the executive government, but in reality, is a figure head for the British Crown. Every law passed by Parliament requires the Governor-General's consent
Constitutionalism	A political principle that provides for checks on government power through the imposition of a body of rules which direct government functions. A 'constitution' is a legally binding document which facilitates transparency between government and the people and provides for basic civil and political rights.
High Court of Australia	The pinnacle of Australia's court system. The High Court is the final place for legal appeals to be heard and is where constitutional-based legal battles occur.
Human Rights	Basic liberties and freedoms afforded to and enjoyed by all citizens irrespective of any discriminating factors.
Mandate	'Political instruments' which governments' wield to justify political decisions.
Division of powers	The essence of federalism, where political power is allocated to differing levels of government (ranging from Federal → local govt).



THREE ARMS OF GOVERNMENT: EXECUTIVE, JUDICIARY & LEGISLATURE

	EXECUTIVE	JUDICIARY	LEGISLATURE
K E Y C O N T E N T	<ul style="list-style-type: none"> Composed of ‘constitutional executive’ and ‘real executive.’ Constitutional executive: GG – a ‘figurehead’ for political democracy ‘Real executive’: Prime Minister and Cabinet, defined by Westminster convention Fused with legislative (Govt is formed in the HOR) 	<ul style="list-style-type: none"> Operates within a ‘court hierarchy’ (level of jurisdictions across states and territories.) Completely independent of the legislative and executive arm of government Operates under the ‘rule of law’ principle High Court deals with constitutional disputes and issues 	<ul style="list-style-type: none"> Bicameral legislature – composed of two law-making houses: The House of Representatives: people’s house and is home to the government of the day. The Senate: the state’s house and is half the size of the House of Representatives Fused with the executive arm of government Functions: legislate, represent, scrutinize the government and act as a responsible Parliament
E X A M P L E S	<ul style="list-style-type: none"> Section 61 of Constitution (executive power.) Governor-General ‘1975 Crisis’. Cabinet solidarity and secrecy. The Turnbull leadership spill. 	<ul style="list-style-type: none"> Section 71 of Constitution (Judicial power and the High Court.) Justice Marcus Einfeld (Upholding of the rule of law.) Citizenship crisis of 2017 The Williams decisions (Judicial review.) 	<ul style="list-style-type: none"> Section 53 of Constitution (co-equal lawmaking powers of Senate and House of Representatives.) Parliamentary Privileges Committee Matters of public importance 2016 Senate Electoral Amendment Act.



THE GOVERNOR-GENERAL

- The GG is the **political representative** of the Queen – vested with power under s 61 of the Commonwealth Constitution
- The GG's powers are two-fold:
 - **Reserve:** powers explicitly mentioned in the Constitution and only exercisable by the person who holds the position of GG
 - **Express:** powers of GG that are exercisable on behalf of the Parliament
- The GG's **actual power** is effectively diminished through the prevalence of the 'real executive,' who hold the majority of seats in the HOR
- In essence, the GG is a 'figurehead' for democratic operations in Australia
- Powers exercisable by the GG have been acquired by the 'real executive' (i.e. government itself), via **Westminster conventions**
- Westminster conventions govern that the GG **must act on behalf of the real executive and make decisions accordingly**
- Primarily, the GG's key roles concern either **ceremonial or non-ceremonial activities**
- GG accountability sits in a 'grey area,' as there are little Constitutional or statutory provisions which provide stringent measures to hold the GG responsible
- GG's are expected to act with dignity in their position of office, and must uphold the traditional Australian values

Key examples:

- '1975 Crisis'
The Whitlam Government's dismissal by then GG, Sir John Kerr, highlight the inconsistencies and grand extent of the powers exercisable by appointed GG's in Australia
- While Sir John Kerr was bound by Westminster convention to adhere to Whitlam's call for a half-Senate election, his refusal to do can be sign as an abuse of the GG's power → convention is not legally binding but has always been the **acceptable and necessitated practice** in Australia's political system



- ‘The Hollingworth Affair’ – Resulting in the resignation of then GG, Peter Hollingworth, this ‘affair’ of sorts indicates issues prevalent in the appointment process of GG’s. Hollingworth had been appointed to office despite incurring leadership failures in respect of child sexual abuse while employed as an Anglican *Archbishop*

FEDERALISM

- At the core of federalism lies the process of **division of powers** – that is allocated between at least two levels of government (generally Federal and State, but also local)
- Federalism serves the purpose of creating a unified system of government that can provide society with national defense, financial viability and legal consistency
- Swings in the ‘balance of power’ between States and the Federal Government have ebbed and flowed as a consequence of the shifting nature of federalism itself
- Federalism encompasses **three** broad categories:
 - **Cooperative federalism:** States and Commonwealth operate in harmony with one another, with decisions and power balanced accordingly
 - **Coordinate federalism:** Relative autonomous relationship between States and Commonwealth, with both exercising their powers with little to no fuss or controversy created by the other
 - **Coercive federalism:** States are affixed to and effectively played as ‘puppets’ by the Commonwealth. Financial decisions of the States are influenced by the Commonwealth through the lure of ‘tied grants.’
- **Vertical Fiscal Imbalance:** State financial dependence on the Commonwealth deriving from uniform tax laws, preventing the States for imposing income taxes to collect revenue. The VFI drives a wedge between States and the Commonwealth, and often allows the Commonwealth to enjoy the ability to influence State fiscal spending.



- **Horizontal Fiscal Equalisation:** ‘Closing the fiscal gap,’ courtesy of the GST reforms and COAG negotiations, the States have began to get a bigger slice of revenue previously owned and solely operated by the Commonwealth.

Key examples:

- Commonwealth Constitutional powers – s52 (exclusive), s90 (financial power over customs, duties and excise), s96 (grants power – Commonwealth can provide States money on ‘terms they deem fit’)
- COAG = Council of Australian Governments
- GST – Goods and Services Tax, introduced by the Howard Government

Judicial decisions relevant to federalism:

- *Tasmania Dams Case*
- *Uniform Tax Case*
- *Workchoices case*
- *Ha and Hammond case*
- *Mabo case*
- *Koowarta case*
- *Engineers’ case*



THE REAL EXECUTIVE

- Unlike the GG, the ‘real executive’ is highly operational and vital to a healthy functioning Legislature
- Comprised of the PM, Cabinet and Ministry
- The party with the majority of seats (at least 50%+1) in the HOR becomes the **real executive** in action
- The legislative agenda is determined by the real executive
- Cabinet is the backbone of the real executive – they formulate policies, engage in political discussions and try to reflect the ‘national interest’
- Cabinet is governed by two principles:
 - **Solidarity**: Cabinet ministers must stand by and publicly agree with a political decision that has been supported by the majority
 - **Secrecy**: Cabinet discussions are kept under ‘lock and key’ for a period of 30 years and ministers must not leak any discussions which are classified as ‘confidential’
- The ‘Cabinet Handbook’ details the roles, responsibilities, powers and processes Cabinet is bound by and can be accessed via the *APH* website

Key examples:

- The current ‘real executive’ is the Liberal-Coalition government led by PM Scott Morrison (‘Scom’)
- There have been several PM scalps in recent years – the Gillard and Rudd double, Abbott being ousted by Turnbull and Turnbull then being ousted by...well in reality, Abbott, who lurked in the shadows of Peter Dutton’s leadership challenge
- Cabinet solidarity breach – in 2015, Barnaby Joyce broke the solidarity principle by calling out a decision by Cabinet to build a coal mine in Joyce’s electorate of New England



THE LAWMAKING PROCESS

- Lawmaking is a complex, and at times, longwinded process – involving the GG, Parliament and in some cases Judicial intervention
- Lawmaking can be boiled down to several questions which are answered through the process: Why introduce the proposed law? What will the proposed law achieve? How can the proposed law achieve royal assent?
- Per the syllabus, **three** key influences of lawmaking exist in Australia – Pressure Groups, individuals & Political Parties
- **Pressure Groups:** Organisations seeking to influence lawmaking in Australia through external means – they represent causes, grassroots issues, sectional or cross-sectional societal groups
- **Political Parties:** The backbone of Australian politics are **political parties** – these are organisations composed of individuals elected to the Legislature, who seek to represent the public and make an impact on the machinery of government itself
- **Individuals:** A person who seeks to represent their interests of others, either through running as an independent candidate at an election or through indirect means such as campaigning for a political cause

Key examples

Pressure groups – ACTU, Get Up!, Advance Australia

Political parties – The Liberal Party, Australian Labor Party, The Greens, United Australia Party, Family First

Individuals – Antony Green, Cathy McGowan, *Plaintiff M70*, Ronald Williams

EXECUTIVE ACCOUNTABILITY



- **Collective and individual ministerial responsibility** – the principles of CRM and IMR require ministers to adhere to a certain level of ‘ministerial conduct’ or face the threat of resignation or Parliamentary expulsion.

E.g. Former Health Minister was led to resign from her position after being criticised for purchasing an apartment on the Gold Coast, while on a tax-payer funded trip. Ley’s actions fell foul of the IMR protocols and also prompted then PM, Malcolm Turnbull, to create an independent commission to oversee government expenditure – increasing transparency and effectiveness within the political accountability domain.

- **Senate Estimates** – the chief mechanism for scrutinising government expenditure, ‘Estimates’ comprises of a committee of Parliamentarians representing a plethora of political parties. Certainly, Estimates is effective the committee is afforded access to every fiscal transaction made by government, allowing for a transparent review process to take place.

E.g. In 2017, Senate Estimates brought to light the ‘excessive’ salary earned by then Australia Post Ceo, John Stanhope. The scrutiny ultimately led to Stanhope’s departure.

- **Auditor-General and Administrative Appeals Tribunal** – these aspects of accountability relate to the **administrative branch** of government itself. In effect, they are designed to hold the public service to account and ensure government decisions are made with integrity, efficiency and consistency.
- **Judicial review** – the key judicial gateway providing accountability to the executive. In effect, courts have the power to assess executive decision making and where deemed appropriate, reverse it.

E.g. See: Ronald Williams HCA decision.



JUDICIAL ACCOUNTABILITY

- Laws govern nations, so its critical that the courts are held to account in respect of their interpretation and application of statutory legislation, as well as deliverance of the common law
- **The Appeals process** – the primary accountability measure, court decisions can be review internally through the ‘higher’ courts giving their own interpretation in respect of the given case/s. The HCA is the highest jurisdiction in Australia and the last place where appeals can be heard.
E.g. Andrew Mallard appeal – overturned murder conviction.
- **Parliamentary scrutiny and legislation** – Statutory law is **supreme** to common law, so Parliament always has the capacity to abrogate the common law as it sees fit.
- **Censure and removal of Judges** – Like the GG removal process, this method is quite blurred, and contention surrounds its effectiveness. Judges appointed to the HCA, per s 72 of the Constitution, can be removed if its found that they have grossly misbehaved or are incapacitated to hold the respective bench position. Further, Judges are mandated to retire at 70 years of age, after the 1975 Referendum changed the retirement age from 75 to 70.
- **Public confidence in the courts** – this relates to how everyday citizens view the Judiciary. Engagement by the public in the judicial process is enhanced by the jury system as well as ‘open courts’ allowing most people to access the justice system as they deem fit.

GOVERNOR-GENERAL ACCOUNTABILITY

- How accountable is the GG????
On balance, the GG enjoys a vast amount of power to exercise, with very few accountability measures in place to check its use.



- **Removal process** – In practice, the only way the GG can be dismissed is by the Queen – acting on advice of the PM. Such a situation, by-where the GG is constitutionally dismissed, has never occurred in Australia.
- **The Hollingworth Affair** – Hollingworth ultimately succumbed to the court of public opinion, with close to **73%** voting in favour of his dismissal in the opinion polls. Hollingworth ultimately resigned before he could be formally dismissed.

A lack of accountability – Sir John Kerr

The '1975 Crisis' sours the extent to which the GG can be said to be held to account. Sir John Kerr, while exercising his power with practical correctness, effectively ignored the PM's direction in refusing to call a half-Senate election. This situation more so reflects the need for Australia's political system to redraw the powers of the GG and the extent to which they can bend the rules of Westminster conventions.

PARLIAMENTARY ACCOUNTABILITY

- Politicians are at the heart of lawmaking and **good governance** in Australia's political system, and therefore it is critical that they are held to account over their actions or inactions whilst representing the public
- **Elections for the House of Representatives and Senate** – this is the most direct mechanism of accountability. The very positions enjoyed by Parliamentarians are won or lost every **3 years for HOR** and **6 years for the Senate**. Voters make **informed judgements**, and therefore Parliamentarians must carryout their jobs with good faith to give themselves the greatest chance of getting re-elected.

E.g. Former HOR member for Townsville, Cathy O'Toole, lost her seat at the 2019 Federal election over her inaction in relation to the Adani Mine proposal. Townsville constituents are in dire need of employment, but O'Toole failed to decisively give her support in favour of Adani. As such, voters turned to Liberal candidate Phillip



Thompson as their preferred choice. Hence, O'Toole was held to account by failing to listen to the specific demands from her electorate.

- **Privileges committee** – Parliamentary privilege is afforded to all Parliamentarians, meaning MP's are exempt from having criminal or civil legal proceedings brought against them for comments made in chambers. The PC is designed to ensure MP's don't abuse the aforementioned privilege. The committee deliberates over allegations of privilege abuse and can call for certain punishments to be handed out to MP's where abuse is found in the positive – such as expulsion or temporary expulsion from chambers.

HUMAN RIGHTS

- Human rights are **liberties and freedoms** enjoyed by all individuals
- Civil rights are freedoms associated with all individuals irrespective of 'discriminatory factors' such as age, race, gender or sexual orientation.
- Political rights refer to the abilities provided in the Political Process, such as the right to vote.

USA RIGHTS PROTECTION

- The USA has a **constitutional** mechanism of rights protection – the **Constitutional Bill of Rights**
- Rights contained in the CBR include freedom of the press, right to assembly and right to bear arms



AUSTRALIA RIGHTS PROTECTION

- Australia adopts numerous methods to enforce and uphold human rights, however the Constitution is not an avenue for rights protection
- **Implied rights** – those not vested in the Constitution but inferred by its language, have grown throughout Australia – extending recently to same-sex marriage rights

RIGHTS – A PARTICULAR GROUP EXPERIENCE

How has an Australian statute impacted on the **experience of a particular group** in respect of their human rights?

- The Commonwealth Electoral Act (1918) has had an extreme impact on the experience of Indigenous Australians, relating to their political rights.
- When the Act was written, all Indigenous Australians were ineligible to vote, hence diminishing any strong engagement in the Political Process.
- However, as societies values shaped to be more ‘racially inclusive’, the act was amended in 1962, which allowed Indigenous Australians to vote in elections, an improvement on their experience within Australia’s political and legal system.
- Yet, unlike non-indigenous Australians, voting was not made compulsory until 1984, with a further amendment to the initial Act.
- Hence, the electoral Act and its subsequently extensions have impacted Indigenous Australians to enhance their experience in the political and legal system as more ‘positive’ in nature.