Parliamentary Education Office, 2017

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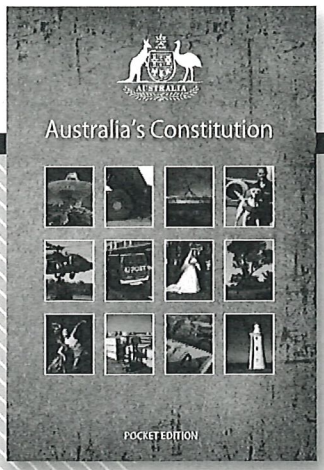
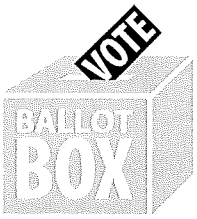
CLOSER LOOK



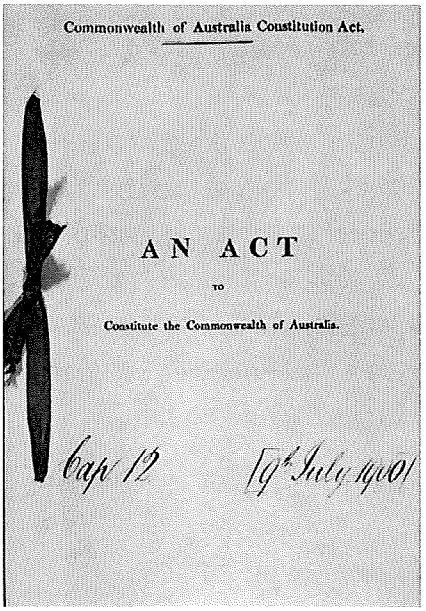
The Australian Constitution

A constitution is a set of rules by which a country or state is run

The Australian Constitution was drafted at a series of constitutional conventions held in the 1890s. It was passed by the British Parliament as part of the *Commonwealth of Australia Constitution Act 1900* and took effect on 1 January 1901. The Constitution is the legal framework for how Australia is governed and it can only be changed by referendum.



The Constitution states that federal elections must be called at least every three years. It also ensures senators and members of the House of Representatives are directly chosen by the people.


Commonwealth of Australia Constitution Act.

AN ACT

TO

Constitute the Commonwealth of Australia.

Parliament House Art Collection, Art Services Parliament House

Commonwealth of Australia Constitution Act, 1900: Original Public Record Copy (1900)

Australians were among the first people in the world to vote for a national constitution, which took effect on 1 January 1901

What is a constitution?

A constitution is a set of rules by which a country or state is run.

Some countries have unwritten constitutions which means there is no formal constitution written in one particular document. Their constitutional rules are derived from a number of sources. Britain sources its constitution from a number of important statutes, or laws, as well as principles decided in legal cases and conventions. New Zealand and Israel are two other countries that do not have formal written constitutions.

Other countries have formal written constitutions in which the structure of government is defined and the respective powers of the nation and the states are written in one single document. These systems may also include unwritten conventions and constitutional law which can inform how the constitution is interpreted. Australia, India and the United States are examples of countries with a written constitution.

Some constitutions may be amended without any special procedure. The documents that make up the New Zealand Constitution may be amended simply by a majority vote of its Parliament. In other countries a special procedure must be followed before their constitution can be changed. Australia has a constitution which requires a referendum in order to change it.

The Australian Constitution

The Australian Constitution is the set of rules by which Australia is governed. Australians voted for the national constitution in a series of referendums. The Australian Constitution establishes the composition of the Australian Parliament, and describes how Parliament works, what powers it has, how federal and state Parliaments share power, and the roles of the Executive Government and the High Court. It took effect on 1 January 1901.

In addition to the national Constitution, each Australian state has its own constitution. The Australian Capital Territory and Northern Territory have self-government Acts which were passed by the Australian Parliament.

How Australia formed its Constitution

Constitutional conventions

Before 1901 Australia did not exist as a nation. It was a collection of six British colonies which were partly self-governing but under the law-making power of the British Parliament.

During the 1890s representatives of the colonies came together at special meetings called constitutional conventions to draft a constitution which would unite the colonies as one nation and provide for a new level of national government.

Each Australian colony sent delegates to the conventions. By 1898 they had formed and agreed on a draft constitution which was taken back to their respective colonial parliaments to be approved.

Passing the Constitution

The final draft of the Constitution was approved by a vote of the people in referendums held in each colony between June 1899 and July 1900.

The Constitution had to be agreed to by the British Parliament before the colonies could federate (unite as a nation). An Australian delegation travelled to London to present the Constitution, which was part of the Commonwealth of Australia Constitution Bill, to the British Parliament.

After negotiating some changes, the British Parliament passed the bill in July 1900. Among these changes was the right to appeal decisions of the state Supreme Courts and the federal High Court in Britain's Privy Council (final law court of appeal for Commonwealth countries).

Queen Victoria approved the bill on 9 July 1900 by signing the *Royal Commission of Assent* and the bill became the *Commonwealth of Australia Constitution Act 1900.* Section 9 of this Act contained the Constitution which stated that on and after 1 January 1901, the colonies of New South Wales, Victoria, South Australia, Queensland and Tasmania would be united and known as the Commonwealth of Australia. The Constitution Act made provision for Western Australia to join the Commonwealth. Western Australia agreed to federate in a referendum held on 31 July 1900, two weeks after the Act was passed.

After Federation in 1901 Australia still had constitutional ties with Britain, particularly in matters of foreign policy and defence. Since then the British and Australian parliaments have passed a number of statutes which have progressively given the Commonwealth greater constitutional independence. For example, in 1942 federal Parliament passed the *Statute of Westminster Adoption Act 1942* which meant Australian laws could no longer be over-ruled by an act of British Parliament.

Key people who were involved in federation and in framing the Constitution.

Allport Library and Museum of Fine Arts, Tasmanian Archive and Heritage Office. Creator: J W Beattie

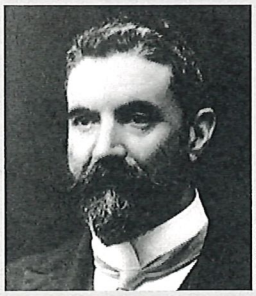
Andrew Inglis Clark was the key author of the original draft of the Australian Constitution and introduced proportional representation to Tasmania.

National Library of Australia, vn3582887

Sir Richard Baker wrote handbooks to assist delegates at the constitutional conventions and became the first President of the Senate.

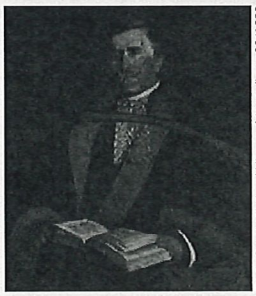
DPS AUSPIC

Edmund Barton was part of the constitutional delegation to London and became the first Prime Minister of Australia (Protectionist Party) 1901–1903.



DPS AUSPIC

Alfred Deakin was part of the constitutional delegation to London and became the second Prime Minister of Australia (Protectionist Party) 1903–1904.



Portia Geach, National Library of Australia, an2241658

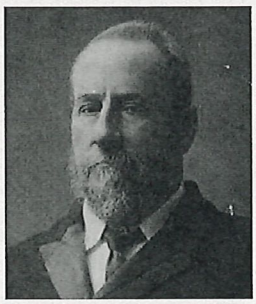
John Quick wrote handbooks to assist delegates at the constitutional conventions and became postmaster general.

National Library of Australia, an23435998

Robert Randolph Garran wrote handbooks to assist delegates at the constitutional conventions and became the first solicitor-general of Australia.

State Library of Queensland, Image no. 68307

Samuel Griffith became the first chief justice of the High Court of Australia.



National Library of Australia, an23379300

Charles Kingston was part of the constitutional delegation to London and became the first minister for trade and commerce.

In 1968 and 1975 federal Parliament passed acts that limited and then ended appeals from the High Court to the Privy Council. The *Australia Act 1986* removed all remaining legal links between the Australian and British governments.

Key features of the Constitution

The *Commonwealth of Australia Constitution Act 1900* (the Act) granted permission to the six Australian colonies, which were still subject to British law, to form their own Commonwealth government in accordance with the Constitution. The Act consists of a preamble and nine clauses, of which clause 9 is the original Australian Constitution. The Constitution consists of eight chapters and 128 sections.

DPS AUSPIC

Her Majesty Queen Elizabeth II

Marcus Bell, Studio Impressions

His Excellency General the Honourable Sir Peter Cosgrove AK MC (Retd).

Chapter 1 describes the composition and powers of our federal Parliament, which consists of the Queen and a bicameral legislature with:

- Single-member representation for each electorate for the House of Representatives (the lower house)
- Multi-member representation for each state for the Senate (the upper house).

Chapter 2 describes the power of the most formal elements of Executive Government, including the Queen, Governor-General and the Federal Executive Council.

Chapter 3 provides for the creation of federal courts, including the High Court of Australia, which is the final court of appeal. The High Court can interpret the law and settle disputes about the Constitution.

Chapter 4 deals with financial and trade matters.

Chapters 5 and 6 outline the federal relationship between the Commonwealth, and the states and territories. Importantly chapter 5 states that if federal Parliament and a state parliament both pass laws on the same subject and these laws conflict, then the federal law overrides the state law. Section 122 in Chapter 6 gives the federal Parliament the power to override a territory law at any time. It also allows the Commonwealth to legislate for the representation of the territories in federal Parliament.

Chapter 7 describes where the capital of Australia should be and the power of the Governor-General to appoint deputies.

Chapter 8 describes how the wording of the Constitution can be changed by referendum.

Although many sections of the Constitution appear to be simple, there have been many different legal interpretations over the last century. Section 51 is particularly significant because it lists most of the areas in which the Australian Parliament can make laws. The Commonwealth makes laws on a range of issues (such as regulating marriage and divorce) but the Constitution allows other powers (such as providing roads and transport) to remain with the states.

The Constitution consists of eight chapters and 128 sections

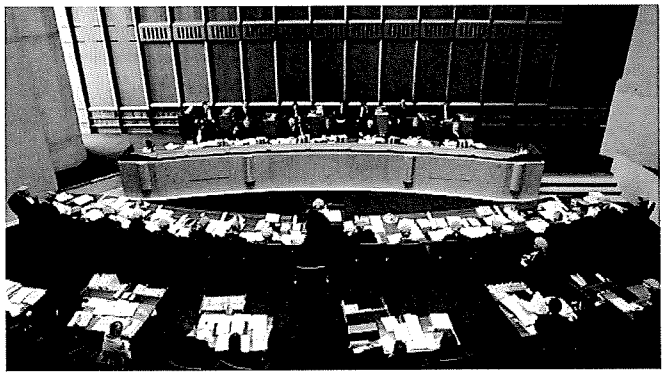
The Constitution and the High Court

People are allowed to test the meaning and application of the Australian Constitution. It is the principal function of the High Court of Australia to interpret the Constitution and to settle disputes about its meaning. The High Court, established in 1903, has the power to consider Commonwealth or state legislation and determine whether such legislation is within the powers granted in the Constitution to the relevant tier of government. The High Court can invalidate any legislation or parts of legislation that it finds to be unconstitutional.

Sometimes the High Court is asked to decide whether it is the Commonwealth Government or a state government which has the authority and responsibility to deal with a matter. At other times, because the Constitution provides specific limits to what the Commonwealth Government is empowered to do, the High Court may be asked to decide whether a law made by the Commonwealth Government is within that power.

Evolving interpretations of the Constitution by the High Court have resulted in stronger law-making powers for the Commonwealth, without any changes to the words of the Constitution. Important court cases have included the Engineers Case *(The Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129), the Tasmanian Dam Case *(Commonwealth v Tasmania* (1983) 158 CLR1) and Work Choices Case (*New South Wales v Commonwealth* (2006) 231 ALR 1).

The Australian Constitution does not include a Bill of Rights. However, some human rights are mentioned, including the right to compensation if the government acquires your property (s 51(xxxi)), guaranteed trial by jury for federal offences (s 80) and freedom of religion (s 116).



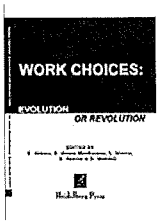
DPS AUSPIC

The High Court of Australia

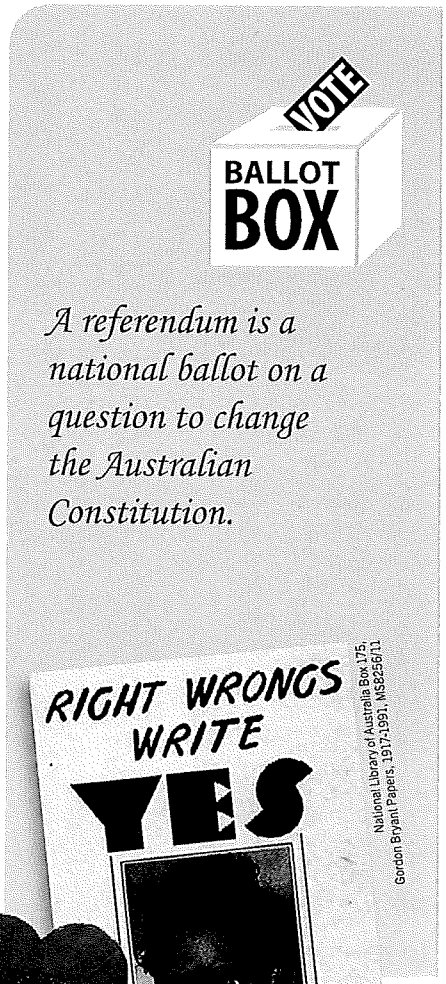
It is the principal function of the High Court of Australia to interpret the Constitution and to settle disputes about its meaning

Work Choices Case

The 'Work Choices' legislation, which came into effect in March 2006, made substantial changes to the regulation of employment conditions and industrial relations. The legislation used the 'corporations power' granted by s 51(xx) of the Constitution, rather than the conciliation and arbitration power in s 51(xxxv) that has historically been the foundation of Australia's industrial legislation, to make the changes.



The Commonwealth's use of the corporations power was challenged by the states and territories in the High Court, along with other aspects of the Work Choices reforms. However, the challenge was rejected by a majority of the Court and the legislation was upheld.



How the Constitution can be changed

The Australian Constitution can be changed by referendum according to the rules set out in section 128 of the Constitution. A proposed change must first be approved as a bill by the federal Parliament. It is then sent to the Governor-General in order for a writ to be issued so a referendum can occur.

A referendum is a national ballot on a question to change the Australian Constitution. In a referendum the Parliament asks each Australian on the electoral roll to vote. If a majority of people in a majority of states and a majority of people across the nation as a whole vote 'yes' (called a double majority), then the proposal to amend the Constitution is agreed to. Otherwise the Constitution remains unchanged.

Since 1906, when the first referendum was held, Australia has held 19 referendums in which 44 separate questions to change the Australian Constitution have been put to the people. Only eight changes have been agreed to.

Successful referendums have included:

- The 1946 referendum which allowed the Commonwealth to provide social service benefits to returned servicemen and women.
- The 1967 referendum (in which 90.77% of people voted 'yes') which gave the power to the Commonwealth to make special laws for Indigenous Australians.
- The 1977 referendum which gave the people of the territories the right to vote in referendums, changed the way casual senate vacancies were filled and forced federal judges to retire at 70 years of age.

Unsuccessful referendums have included:

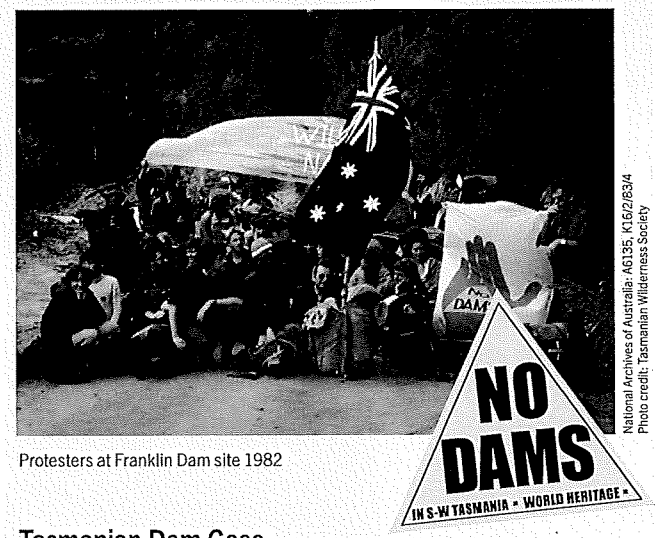
- The 1951 referendum which asked to make laws about communism and communists.
- The 1999 referendum which asked whether Australia should become a republic.

Indigenous Australians are no longer mentioned in the Constitution (due to the referendum in 1967). In recent years there have been discussions about recognising Indigenous Australians in a preamble to the Constitution and about changing the main part of the Constitution to include a section which outlaws racial discrimination.

How the Constitution is interpreted has also changed and evolved, even without a referendum. These changes have all occurred under our existing Constitution and have been brought about by High Court decisions:

- The Commonwealth's increased power to collect income tax has meant it has a much greater share of revenue than the states. The Commonwealth partly redistributes this revenue in the form of grants to the states. The terms and conditions which are sometimes attached to these means the Commonwealth is able to gain control of areas of responsibility the states previously controlled, for example, tertiary education.
- The Commonwealth's power over 'external affairs' has meant Commonwealth law implementing international treaties can be applied to the states in areas (such as environmental protection) which were previously controlled by the states alone.

The Commonwealth's increased power to collect income tax has meant it has a much greater share of revenue than the states



National Archives of Australia: A6135, K16/2/83/4
Photo credit: Tasmanian Wilderness Society

Protesters at Franklin Dam site 1982

Tasmanian Dam Case

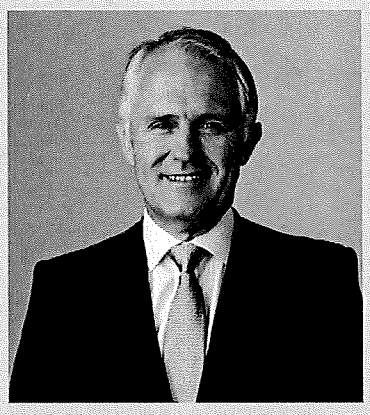
In the late 1970s and early 1980s the Commonwealth Government and the Tasmanian Government fought over whether a dam should be built on the Franklin River in Tasmania. The Tasmanian Wilderness Society campaigned against it and managed to get a World Heritage listing for the Franklin River.

The plan to build the dam was abandoned after a 1983 High Court ruling stated the Commonwealth's external affairs powers in section 51(xxix) of the Constitution gave it the right to honour its international treaty obligations with regard to World Heritage locations.

This overruled Tasmania's constitutional land use rights and prevented the flooding of the Franklin River.

Section 109 of the Constitution states that if the Commonwealth and a state Parliament both pass laws on the same subject, the Commonwealth law overrules the state law to the extent of any inconsistency.

The Constitution does not mention the Prime Minister or the Cabinet, both of which are central to the working of government and the Parliament.



The Hon Malcolm Turnbull MP, Prime Minister

Constitutional crisis

On 11 November 1975 the Governor-General, Sir John Kerr, dismissed Gough Whitlam as Prime Minister and appointed Malcolm Fraser as a caretaker Prime Minister. This occurred because a number of events resulted in the refusal by the Senate to pass the government's budget bills in October 1975.

Australian Information Service, National Library of Australia, an 24355082

Gough Whitlam speaks on the steps of Parliament House, Canberra, after his dismissal

Following the dismissal, a double dissolution election was held on 13 December 1975, at which the Whitlam Government was defeated.

This is commonly referred to as the 1975 Constitutional Crisis and it is one of the most significant domestic political events in Australia's history. For the first time, an unelected vice-regal representative, the Governor-General, had removed from office a prime minister who had a majority in the House of Representatives.

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Strengths/Weaknesses of Australia's Constitution

Strengths

- Major principles and constitutional provisions are fixed and can not be changed by the government without the consent of the Australian people in a referendum.
- The Commonwealth does not have all the power and can not make more power for itself.
- Non-political judges are able to interpret and administer the Constitution to ensure that its provisions are followed.

Weaknesses

- It is hard to change and therefore may be less responsive to changing circumstances.
- The final say about the Constitution resides with non-elected judges rather than democratically accountable politicians.

More information

PEO resources

Pocket Constitution
www.peo.gov.au/resources/Pocket-Constitution.html

Closer Look
www.peo.gov.au/learning/closer-look.html

Fact Sheets
www.peo.gov.au/learning/fact-sheets.html

Videos
www.peo.gov.au/multimedia/videos.html

Other resources

The Australian Constitution
www.aph.gov.au/About_Parliament/Senate/Powers_practice_n_procedures/Constitution

Commentaries on the Constitution of the Commonwealth of Australia
purl.library.usyd.edu.au/setis/id/fed0014

Senate Briefs
www.aph.gov.au/About_Parliament/Senate/Powers_practice_n_procedures/briefs

House of Representatives Infosheets
www.aph.gov.au/About_Parliament/House_of_Representatives/Powers_practice_and_procedure/00_-_Infosheets

Records of the Australasian Federal Conventions of the 1890s
www.aph.gov.au/About_Parliament/Senate/Powers_practice_n_procedures/Records_of_the_Australasian_Federal_Conventions_of_the_1890s